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GULF V. BURNS

COALSON: Today, we have two key issues before the court. First, there is the question of whether the indemnity provision that forms the basis of this lawsuit meets the express negligence test. Two, is the assignment that Nash made of his cause of action in this case assignable or is it against public policy?

ENOCH: I thought the express negligence rule applied to when the contracting party tries to make the other party negligent for their own negligence, liable for their own negligence. Isn't that what the express negligence rule applies to?

COALSON: It applies to when a party seeking indemnity seeks to require the party giving the indemnity to indemnify them for the indemnitees's culpable conduct.

ENOCH: So if the agreement said just the opposite, that we are not liable to the extent your negligence contributes to this deal, and that's not an express negligence rule. So the only question is then, what portion of a party's negligence contributed to, or to the extent these damages were contributed to by the negligence? That's the only thing that's at issue under that kind of indemnity.

COALSON: I believe so. Basically I would like to start with the express negligence doctrine which formed one of the two holdings of the CA in this case. Because I think if you reach a ruling that the indemnity agreement question is unenforceable, you don't need to reach the issue about the assignability of the cause of action because there will be no cause of action.

HANKINSON: I'm still confused about the application of the express negligence doctrine in this case at all. If all that the insurance company is saying, is we will indemnify you for our own conduct that's bad, you're responsible for your own conduct. Why does the express negligence doctrine have anything to do with this case?

COALSON: Because the claims that Burns made against Nash in the underlying case involved allegations of Nash's own culpable conduct. In other words, he violated the DTPA. He made misrepresentations.

HANKINSON: And isn't it your position that under the indemnification clause of the contract, he doesn't get indemnified for that?

COALSON: Exactly. The agreement does not meet the express negligence doctrine.

HECHT: Well it's the opposite of it. It's not that they printed in in fine print. It's that

they said the opposite.

COALSON: Right. It doesn't indemnify Nash for the conduct that he was sued for in the underlying case.

HECHT: I take it, that is your position?

COALSON: That is our position. Anyway, the Corpus Christi CA - I've been trying to think of the best way to go about explaining the error here. And I think we need to ask ourselves what caused the CA to err? And I think the first thing that caused them to err is, they overlooked the fact that Nash had basically been found in this agreed judgment to have knowingly violated the DTPA. And that formed the basis of the underlying judgment. And as a result of that, he's judicially estopped from taking the position that he is an innocent pass-through of whatever representations he claims Gulf and Select made to him.

GONZALES: Is it your position then that somehow Mr. Nash caused, contributed or compounded the error?

COALSON: I don't think there's any question about that under the concept of judicial estoppel that has to be applied against him. If he had actual awareness of the falsity of what he was telling Mr. Burns, then he obviously knew that whatever Gulf and Select had told him or allegedly told him was false.

GONZALES: So we don't even have to decide or discuss express negligence doctrine, we just look at the contract and under the contract he would not be covered under the indemnity?

COALSON: I think that's true. I think the wording in the contract takes it out of the express negligence doctrine. But in any event, even if you can construe this contract in someway to say that there is some argument that it ought to include Nash's own culpable conduct, I think the express negligence doctrine still comes in.

ENOCH: It was unclear to me, but it looks as if, or the argument is made that Nash did bring a third-party action against the insurance company.

COALSON: He did.

ENOCH: And his claim is perhaps that, If I gave some misrepresentations to Burns it was as a result of the misrepresentations that the insurance company gave me.

COALSON: That's what he is claiming.

ENOCH: And you're claiming, Yes, but since he was found to have knowingly passed

along these misrepresentations, then we can't be liable even though we gave him those misrepresentations to pass along.

COALSON: I think that's true. I think if someone tells you something that you know to be false and you deliberately go out and pass along that information to another party, you are the sole cause of the harm that results.

ENOCH: And so as you interpret your contract, to the extent that he compounds the error, the insurance company does not indemnify for that?

COALSON: That would be true.

ENOCH: If he takes the position, But they are responsible for part of this error, they gave me the misrepresentation and said this is how you sell the policy. Well I knew it was not true, but they said, You do this and so I do it, then does that raise a question under the contract as to whether or not because he contributed to it, the insurance company is liable for zero of those damages or just the part that he adds to?

COALSON: I think we have a real problem here under your opinion in the *Fisk Electric* case. The question becomes, what do you look at to determine whether there's a right of indemnity or not? You will recall in the *Fisk* case that they wanted to basically say, Well we're not really negligent, so the indemnity agreement is enforceable even though the parties admitted that under the express negligence doctrine it wouldn't be enforceable. In that case this court held that you look to the pleadings in the underlying case.

ENOCH: But *Fisk* raised the question of the express negligence doctrine, correct?

COALSON: Right.

ENOCH: And the only question was, because the party was found not liable, does that then absolve the indemnification requirement under the express negligence test for the party that would have otherwise had to indemnify them for the liability?

COALSON: The party in that case was basically taking the position that since we weren't negligent, the express negligence doctrine doesn't apply; therefore, you owe us some money for all the costs of defense that we incurred in the case. I think that's the gist of the *Fisk* case.

ENOCH: If the express negligence doctrine is not implicated in this case, there is no basis for reversing the CA's decision?

COALSON: I think there is a basis for reversing the CA. The CA completely ignored the fact that Nash had knowingly violated the DTPA.

OWEN: Is the fact that he knew that the misrepresentations he was passing along does that mean as a matter of law, that he was the sole cause, the sole contributor to, and that the insurance company did not compound the error? Can we say that as a matter of law?

COALSON: I would think you could say that as a matter of law. Because I think that would ultimately be the conclusion you have to reach. He has obviously independent duties to Burns...

OWEN: If Burns had sued Nash and the insurance company directly, could we say based on a jury's finding that Nash knowingly made these representations, that that precluded any causation as to the insurance company?

COALSON: I think it does.

OWEN: Why?

COALSON: Because I think that if you know that what you're telling someone else is untrue, you are the sole cause of the damages they sustain.

OWEN: Even if the insurance company said, Do this, pass it along, told you to pass it along?

COALSON: Of course that's not the testimony here. And Nash of course can't remember who he talked to. He can't remember exactly what they said. He just says basically, They assured me that these claims that were subsequently brought would be covered under this particular policy.

OWEN: I'm just asking you just the findings standing alone that Nash knowingly made the misrepresentations, does that necessarily mean he's the sole cause of the damage to Burns?

COALSON: I think under the definition of knowing under the DTPA, he has to be the sole cause of the damages. If someone knows that what they are saying is false and they proceed to tell the other person that information, they've essentially caused the whole problem.

OWEN: So we could say as a matter of law under the DTPA, that if Nash was liable because he knew that the misrepresentations were false, then Burns cannot recover as a matter of law against the insurance company as well?

COALSON: I think that's true.

GONZALES: If Burns had sued Nash and Gulf at the same time and suppose the evidence showed that Gulf said, Well we want to sell this policy, we know the coverage doesn't buy this kind of damage, but Nash we want you to go ahead and try to sell this policy. Are you telling me that because it was Nash communicating directly with Burns that in that lawsuit Burns could not sue Gulf

for fraud or collusion or some other basis?

COALSON: He might be able to sue them. In fact, I think he might be able to make the argument that they would be some sort of joint tort feasor. The problem is that I think any causation would have been superseded by the fact that the person that passed along the information or the advice or whatever you want to call it to Burns knew it was false and chose to pass it along anyway.

HANKINSON: The insurance company gets off the hook then as long as they have an agent who is willing to pass along the misrepresentation. They can't be jointly liable with the agent, and they can't be responsible for what the agent did.

COALSON: I think in this particular case where you have someone who knows what they've been told to be false, that it shouldn't pass through.

HANKINSON: But if the type of agency exist that would allow vicarious liability, why isn't the insurance company at least responsible vicariously for what its agent does?

GONZALES: Why would we want to discourage that kind of behavior by an insurance company?

COALSON: In terms of vicarious liability, I don't think you have vicarious liability here because again he knows what he's doing is wrong. And I think that in order to be vicariously liable, the agent has to - or in order to have the insurance company to be liable, I think you would have to be able to show that the agent was innocent in his conduct.

OWEN: Vicarious liability apart, let's focus on the indemnity agreement. Let's suppose that Burns had sued Nash and the insurance company jointly under the DTPA, and the jury had found that both Nash and the insurance company made knowing misrepresentations under the DTPA and they were jointly and severally liable, then Nash seeks indemnity against the insurance company. What would happen under the indemnity agreement?

COALSON: I think it would be the same result.

OWEN: Why is that?

COALSON: I think that if he was the only conduit to which Burns got these misrepresentations...

OWEN: But the jury found that both were liable, that both the insurance company and Nash knowingly participated in the representation, and that it was the producing cause of the damage. You've got jury findings against the insurance company and against Nash. Now Nash sues for indemnity. How does the indemnity clause work under that circumstance?

COALSON: I think it comes right back to the fact that he is the sole cause...

OWEN: Well the jury didn't find sole cause. The jury found comparative if you will causation.

COALSON: But I think that it's sole cause as a matter of law.

O'NEILL: But doesn't that go against the plain wording of the indemnity agreement. It says, Except to the extent agent has caused, contributed to, or compounded. So that implies a certain element of comparative as opposed to legal sole cause. And it seems like it should be governed by the terms of the agreement.

COALSON: I think again if you know that you make a false representation to someone, you know it's false, I don't see how you can be anything but the sole cause of the damages that result.

HANKINSON: Was the insurance company a party to this lawsuit at the time the judgment was taken?

COALSON: As I understand it, they were joined as a third-party defendant by Nash. But for reasons I don't know, Nash never served them.

HANKINSON: Had they made an appearance?

COALSON: No. They were never served. And apparently Nash and Burns elected to proceed forward without making them a party and, therefore, not having the ability to jump in this thing and defend themselves against this judgment that ultimately resulted.

ENOCH: But in this case you can still defend yourself on the fact that you didn't have any part of the negligence in this case?

COALSON: I don't think we would be estopped. I think we would have a perfect right to make that argument.

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RESPONDENT

LEACH: The discussion that's gone on to this point during the argument is exactly to prove the thing that I kept coming back to when in the appellate court and in the briefing in this case, the issue of express negligence kept coming up. Because our position never was under this indemnity agreement that Mr. Nash or Burns as Mr. Nash's assignee was going to be able to collect for anything for which Mr. Nash was responsible in the terms of his own negligence. That wasn't the argument that we were trying to make.

HECHT: That's your position still here isn't it?

LEACH: That's correct. Our position is, that Nash still has a right under the indemnity agreement to go against the insurance company to prove, if he can, whatever part of his liability grew out of their negligence. And I think that's exactly what the indemnity agreement says.

O'NEILL: We're not _____ that negligence.

LEACH: For which they were responsible. I think the indemnity agreement says, For whatever part the insurance company is responsible for any liability, that you become responsible for it. If we caused it, if it was our responsibility that it occurred, then you are entitled to indemnity for that.

HECHT: But how can you sort it out if (A) tells (B) a lie, and (B) knows it's a lie and he tells (C). And (C) says, Well I want A's and B's share. It looks like A and B are both on the hook for everything.

LEACH: I would agree that under this indemnity agreement that we're talking about in this case, that if it was found that Mr. Nash was the sole responsible party for passing along this misinformation, that he would not be entitled to whatever liability he suffered because of his own actions.

HECHT: But what if his principals knew it was a lie and he knew it was a lie?

LEACH: And I understand what the court is saying. And this is where we get into difficulty in terms of the judgment. The TC judgment that was entered in terms of Mr. Nash says that he knowingly did it because of the false information that was provided to him.

GONZALES: Not because of it, based upon.

LEACH: Based upon the false information provided to him. I think Mr. Nash's position all along, if you go back and you look at the evidence in this case has been: This is what they told me, I passed it along.

OWEN: Let's assume that you _____ on that and that some responsibility is assigned to Nash. How do you sort out this indemnity agreement? Assuming that there is some responsibility on his part and some responsibility on the insurance company's part.

LEACH: I think what Mr. Nash is entitled is to go to a jury and to present the evidence of what the circumstances were and allow a finder of fact tp determine whether or not what the insurance company did was indeed a partial cause for Mr. Nash's liability. If a jury looks at this and looks at the facts in this case and says, Look, Mr. Nash you got yourself into this, it's all your own

fault, he's obviously not going to recover. But I think he should have the right under this contract to be able to go to a jury and make that argument. We have never in this case taken the position that the insurance company is going to be liable for everything for which Mr. Nash was liable.

HECHT: But how can you sort it out? The principal tells the agent a lie, and the agent knows it's a lie, and tells the same lie to a third-party. There's no way to sort that out.

LEACH: I understand. And the only way that comes about is if you look at the underlying judgment, and by looking at the underlying judgment you say as a matter of law Mr. Nash is now estopped from saying that he didn't know at the time that it was a lie.

OWEN: If you assume that, what happens?

LEACH: Then I think there is - obviously he's going to have a problem of ever being able to prove.

O'NEILL: But don't we have to assume that? Isn't that the basis upon which treble damages were awarded for knowing misrepresentation?

LEACH: For the treble damages, yes.

O'NEILL: But that's what you're seeking indemnity on.

LEACH: No, we're not seeking indemnity for the treble damages. We are seeking indemnity for the portion of the liability that Mr. Nash became liable for attributable to the insurance company. The treble damages, he would not be entitled.

ABBOTT: And why is that?

LEACH: If indeed, he knowingly passed along a lie, that would be the basis for the treble damages.

ABBOTT: But the treble damages are awarded only if the jury finds that the conduct was done knowingly. So what that means is the actual damages are also predicated upon knowing conduct.

LEACH: Not necessarily. I don't think that that's necessarily true.

OWEN: What if we disagree with you. Let's just assume that we were to decide as a matter of law Nash knew, for purposes of he actually knew, for purposes of the enhanced damages what happens under this indemnity agreement?

LEACH: I still believe that Nash should be entitled under that set of circumstances to go to the court and to go to the finder of fact to make a determination of how much responsibility the insurance company bears. Otherwise, you are going to have the circumstance that's been discussed and that is simply the insurance company is not - if the agent is found to be liable under the DTPA, the insurance if they have this kind of indemnity agreement just walks away from it.

ABBOTT: Why wouldn't the better answer be to go ahead and instead of having a sham trial like this bring the insurance companies in in the original matter and present it all to a jury?

LEACH: I can't argue that that would not be a more efficient way to...

ABBOTT: Why did you not do it that way?

LEACH: One, at the time this judgment was taken, we were not representing Mr. Burns. So I can't answer the question.

ABBOTT: But you were actively involved with Mr. Burns at the time were you not?

LEACH: No, not at that time. We had originally been involved with Mr. Burns. Mr. Burns then substituted counsel during this period of time. Later after that, he asked us to become involved again.

OWEN: Who was counsel for Mr. Burns at time the judgment was entered?

LEACH: Preston Hendrickson was counsel.

OWEN: Somebody at your firm was present at the hearing were they not?

LEACH: No.

BAKER: Based on your argument, do I understand you to interpret that last clause of the indemnity agreement that it reads: He's only indemnified to the extent that they caused any damages and he's separately liable for his own negligence.

LEACH: That's correct.

BAKER: Can you also interpret that by saying, If Mr. Nash contributed to that or compounded the error, that then that lets the company off 100%?

LEACH: I don't believe that's the way it should be interpreted. I think the way that it should be interpreted should be, he is liable to the extent that he did contribute to it.

BAKER: But if the facts are that both Mr. Nash and the insurance company were aware of the falsity of the information, then they are both jointly and severally liable, is that right?

LEACH: That certainly would be a possibility.

BAKER: But the CA held that language was ambiguous in the indemnity agreement, is that correct?

LEACH: That is correct.

OWEN: It's one thing for Mr. Nash to try to enforce this indemnity agreement. Will you talk for a minute about what's wrong with a rule that where as here there's been an assignment, we erect some safeguards. For example. We might say something: there has to be a trial at which the insurance company is joined and there has to be a full and fair opportunity to litigate. And then once there's been a determination of the damages, then there may be assignment. What's wrong with that kind of protection?

LEACH: I don't know that there is anything wrong with that kind of protection. In this particular situation what I think is different is this assignment took place, and the argument that's been made at least before the CA and here is that this was a collusive situation, that as a matter of law, it should be held to have been a collusive situation because there wasn't a full adversarial trail.

I'm basically a defense lawyer. When the *Gandy* case came out obviously around our office we thought that was a great idea because of the way things had gone in the past. But I do think that there is a distinct difference to be made in a case in which you have an agreement and an assignment prior to any trial of the case where the person who comes in then has absolutely no chance that they are going to have any personal liability. They basically come in and rollover and come up with all these big damages. And of course, that being an insurance case, then all they have to do is run over and say, Well if there's coverage I'm entitled to all of these damages. That's not true in this case under two grounds: 1) because the only evidence before the CA on the issue of this assignment of whether or not there was an agreement prior to or after the assignment was Mr. Nash' testimony that there was no agreement.

OWEN: But _____ you that, why shouldn't we also erect other safeguards to prevent...

LEACH: As a matter of public policy, I don't know that that's not a good idea. If there is to be something that says: If you're going to have a situation that involves an indemnity, that the insurance companies must be a party to the original suit, therefore all this could be sorted out at one time, that may well be good and it would probably be a good idea. The problem is in this particular case that at least is not my understanding of the law, and Mr. Nash then of course is in the position

of those safeguards. That was not something that was in place that he was aware of or should have been aware of and therefore he should now be precluded from being able to pursue his remedy against the insurance company.

ENOCH: Whether Nash is here or not, couldn't Burns bring this action against the insurance company?

LEACH: Yes, he could have.

ENOCH: And if Nash was simply passing through whatever the insurance company him to pass through Nash could bring it for whatever portion of the liability that the insurance company is for?

LEACH: I agree. I'm not arguing the fact that wouldn't it have been better had all these people been there at one time to sort all this out.

ENOCH: Is there not another point other than the assignment occurred after the judgment, the fact that everybody is taking a position that's consistent with where they were to begin with in this case?

LEACH: At the present time, that would be where we are, yes.

O'NEILL: I thought I heard you say a minute ago that he admitted he knowingly passed information on but not necessarily that he knowingly misrepresented. Did I hear you correctly?

LEACH: Where that comes from is, if you read the transcript of the hearing that was held and if you read the judgment, the judgment specifically says, that he knowingly misrepresented because of the erroneous information that he was given.

O'NEILL: But isn't that some evidence of collusion, because it sounds like you are trying to have it both ways. You are trying to beef up the damages on the DTPA end, and then when it comes to the indemnity claim, you're trying to say. We didn't really mean he knowingly for that reason.

LEACH: Of course, that would be true if we were now trying to come in and say under the indemnity agreement you have to pay us for the treble damages. That would be true. But that would be no evidence of collusion if you're not going to try to get them to pay the treble damages for Mr. Nash's knowing misrepresentation. That wouldn't be any evidence of collusion. The reason as I understand it under the *Gandy* case and what was going on prior to the *Gandy* case was, because obviously they would go in and they would go after those damages knowing that it being an insurance situation...

O'NEILL: Well but you seem to be implying then that if you don't go after those damages that somehow the admission that you knowingly did this doesn't apply. You've admitted that you knowingly misrepresented. And you're saying just because you're not seeking the knowing damages, that somehow that doesn't mean...

LEACH: What I am saying is that under his indemnity agreement with the company, he should still have the opportunity to determine whether or not something that the company did was responsible in addition to whatever he may or may not have done. Whatever portion that is.

GONZALES: But you would have that opportunity by suing the insurance company directly?

LEACH: You could have that opportunity.

GONZALES: Is your client barred from doing that?

LEACH: Yes.

HECHT: *Gandy* says that the judgment that is taken after a trial that's not fully adversarial is neither binding nor even evidentiary of damages.

LEACH: And I understand that. And if this case were to go to trial, we would be starting from ground zero to prove whatever damages Mr. Nash suffered because of what the insurance company did.

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REBUTTAL

COALSON: We've hit on something real interesting here and that is, what are their damages? They sued to collect under the judgment. But yet, under *Gandy* there is no judgment against the insurance company. And it seems to me that they have nothing to recover here.

I think that's where the second part of my argument kicks in. And that is, this is not a good situation here because they are seeking to get indemnity for a judgment which no longer has any effect. So what are we going to go down to the TC and do? Can he prove his damages now as the assignor? It's already been litigated. It's collateral estoppel. It's res judicata. Except they don't have a valid judgment. At least against us.

BAKER: With all due respect this is a summary judgment case and that was never raised as a ground by Gulf was it?

COALSON: We did raise the lack of damages that the damages were a result of collusion. And in fact, I think the TC in her letter explaining her decision specifically said, I find that the

judgment is not to be used as evidence and has no enforceability. So it was clearly part of the proceedings in the TC.

BAKER: Well but the nature of your summary judgment was to say, We shouldn't even have to go that far because the express negligence doctrine bars indemnity here; and, secondly, the assignment was void because of public policy. Was there also a summary judgment ground by the way under the "plain language" of the indemnity agreement itself. Since he knowingly did all of this he can't recover under the contract. Did you raise that?

COALSON: That was one of the things that was raised.

BAKER: What did the summary judgment order itself say?

COALSON: It's just a general order that just grants summary judgment on all grounds, or not on all grounds. Of course, in the CA they specifically made the argument they just made, which is, well even though we don't have a valid judgment we will go back down to the TC and find something to claim as damages. But I don't see what at this late date 19 years after the representations were made what it is that they are going to be trying to prove. What kind of damages they could possibly have since he was representing himself pro se in those proceedings. If the judgment is no good, and he doesn't have any attorney's fees, he has no damages. And of course, in his pleadings in the TC, Burns as the assignee of Nash pled for recovery of the full $250,000 under the judgment.

ENOCH: Now why is the judgment no good?

COALSON: Because it's taken by an agreed judgment. And under *Gandy* ...

ENOCH: It's not binding on the insurance company?

COALSON: It's not binding and it's no evidence of damages.

ABBOTT: Does it absolve Nash of any liability, the assignment?

COALSON: There was a covenant not to execute that came along with it. And so that would have been what would have actually absolved him of liability. I think in summary, I believe that this case still represents a case where the CA erred. First of all, I don't think the indemnity agreement is enforceable. I think the CA contending that the contract was ambiguous automatically made it unenforceable. Because under indemnity law when an indemnity contract is ambiguous it's unenforceable. You don't send it back down to the TC and get a finding on what the parties meant.

BAKER: Wouldn't it be to your advantage to say, Well the way we construed this is since he contributed to or compounded it, that's the total exception here, and we don't owe him

anything, so we want enforce this agreement exactly as it's written. Rather than say, And it's not any good.

COALSON: And that arguments been made in our position before this court.

BAKER: It's your contract isn't it?

COALSON: Yes.