IN THE SUPREME COURT OF MISSOURI
EN BANC

Case Number SC86363

UTILITY SERVICE AND MAINTENANCE, INC.
and
TIG INSURANCE COMPANY

Plaintiffs/Respondents

vs.

NORANDA ALUMINUM, INC. and
ZURICH INSURANCE COMPANY

Defendants/Appellants

Appeal from the Circuit Court of St. Louis County, Missouri
Division 26
Honorable Carolyn C. Whittington, Judge
Cause No. 98CC-004068

Transferred from Missouri Court of Appeals, Eastern District (No. ED82504)
Pursuant to Mo. R. Civ. P. 83.04

SUBSTITUTE REPLY OF APPELLANT ZURICH INSURANCE COMPANY TO SUBSTITUTE BRIEF OF RESPONDENTS

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I. REPLY TO RESPONDENTS' RESPONSE TO POINTS I AND II OF ZURICH'S SUBSTITUTE BRIEF

A. PLAINTIFFS/RESPONDENTS' FIRST AMENDED PETITION DID NOT PLEAD FACTS ALLEGING OR CONSTITUTING ANY STANDING OF PLAINTIFFS/RESPONDENTS TO SEEK A DECLARATORY JUDGMENT AGAINST ZURICH IN RELATION TO THE NORANDA-ZURICH POLICY

Zurich has shown that the Respondents' First Amended Petition (the "Petition") in this action impliedly and necessarily sought a declaration of Noranda's rights against Zurich under a Noranda-Zurich liability policy (the "Policy"), to which Policy neither Respondent was a party or third party beneficiary having standing to seek such a declaration. Such lack of standing, Zurich demonstrated in its Substitute Brief citing *St. Paul Fire & Marine Ins. Co v. Medical Protective Co*., 675 S.W.2d 665 (Mo. Ct. App. 1984), precluded the trial court from exercising subject matter jurisdiction over Zurich in regard to adjudication of such a declaration.

In their response at Respondents' Substitute Br. p. 81, Respondents have misinterpreted the holding of *St Paul*, arguing that they have circumvented the foregoing *St. Paul* authority by simply joining Noranda, the insured under the Policy, as a co-defendant with Zurich to their implied declaratory judgment claim on the Noranda-Zurich policy. This argument is not correct.

The standing of a declaratory judgment plaintiff is determined at the time of the filing of the petition for declaratory judgment, not at some later point in the case. *See Farmers Ins. Co, Inc. v. Miller*, 926 S.W.2d 104, 107 (Mo. Ct. App. 1996). As established under the holding of *American Economy Ins. Co. v. Ledbetter*, 903 S.W.2d 272, 275-76 (Mo. Ct. App. 1995), Respondents did not have standing under *St. Paul* to pursue a declaratory judgment of Zurich's obligation to insure Noranda under the Noranda-Zurich policy in this case because (1) Respondents were neither a party to nor a third party beneficiary of the Noranda-Zurich policy, (2) Respondents' First Amended Petition (LF 10-21) did not allege that Noranda or anyone acting on its behalf claimed that there was coverage under the Noranda-Zurich policy, or that Noranda had tendered the defense of the underlying Murphy suit to Zurich, (3) Respondents' First Amended Petition did not allege that Zurich had denied coverage under the Noranda-Zurich policy, and that Noranda or its legal representative disagreed with Zurich's interpretation of non-coverage, or (4) Respondents' First Amended Petition did not allege that Zurich had agreed to defend Noranda under a reservation of rights. *See id; Farmers Ins., 926 S.W.2d at 107.*

"Without such allegations, the [First Amended P]etition does not allege facts showing a justiciable controversy between [Noranda] and [Zurich]; hence, [Respondents have] failed to demonstrate standing." *Id*. at 276; *see Farmers Ins.*, 926 S.W.2d at 107; *St. Paul*, 675 S.W.2d at 667. "We cannot infer from the pleaded facts that any of these events (i.e. (1) through (4) above) occurred, and as a result, the [Respondents' First

Amended P]etition lacks an element to establish standing to initiate a declaratory judgment action." *Farmers Ins*., 926 S.W.2d at 107.

Thus, contrary to Respondents' argument, their simple joining of Noranda as a defendant to Respondents' implied declaratory judgment claim against Zurich is wholly immaterial and ineffective to avoid the effect of *St. Paul*. In the absence of any petition pleading the foregoing factual allegations to establish Respondents' standing to seek a declaration of Noranda's coverage under the Noranda-Zurich Policy for the claims of Murphy in the underlying action, Respondents have no such standing.

Equally ineffective to avoid the holding of *St. Pau*l is any purported trial stipulation by Noranda or Zurich that the Noranda-Zurich policy provides Noranda coverage for the type of claims that Murphy asserted against Noranda. This is because Respondents' lack of standing was determined at the time that their defective First Amended Petition was filed.

B. PLAINTIFFS/RESPONDENTS HAD NO STANDING TO SEEK A DECLARATORY JUDGMENT ACTION AGAINST ZURICH IN RELATION TO THE SUBSTATION PAINTING CONTRACT

Respondents then alternatively argue at pp. 80-81 of their Substitute Response Brief that, in their Petition, they did not join Zurich to an implied claim for declaration of Noranda's rights under the Noranda-Zurich Policy (for which they have no standing), but to an express claim for a declaration of the rights of the parties to the Substation Painting Contract, to which, Respondents allege, no party named in this action (including Zurich) was a "stranger." Zurich's alleged "non-stranger" status in relation to the Contract,

Respondents argue, therefore provides them standing to seek a declaration of rights against Zurich thereunder. This assertion is false. Respondents have no standing to seek a declaration of rights against Zurich under the Substation Painting Contract.

"[T]he provisions of our Declaratory Judgment Act do not extend standing to a party or *enlarge the jurisdiction of the court over subject matter or parties*." *St. Paul Fire & Marine Ins. Co., v. Medical Protective Co*., 675 S.W.2d 665, 667 (Mo. Ct. App. 1984) (emphasis added). "A 'justiciable controversy' is a necessary element in a declaratory judgment action." *American Economy Ins. Co. v. Ledbetter*, 903 S.W.2d 272, 274-75 (Mo. Ct. App. 1995. "The existence of a 'justiciable controversy' is essential before a court may exercise its jurisdiction in response to a petition for declaratory judgment." *Commonwealth Ins. Agency, Inc. v. Arnold*, 389 S.W.2d 803, 806 (Mo. 1965).

> [In declaratory judgment actions,] no justiciable controversy exists and no justiciable question is presented unless an actual controversy exists between persons whose interests are adverse in fact. . . . Plaintiff must present a state of facts from which he has ***present legal rights against those he names as defendants*** with respect to which he may be entitled to some consequential relief immediate or prospective. If it appears plaintiff can have no relief against defendant, defendant should not be forced into litigation which can have no possible final result in favor of plaintiff.

Witty v. State Farm Automobile Ins. Co., 854 S.W.2d 836, 839 (Mo. Ct. App. 1993) (emphasis added) (quoting *County Court of Washington County v. Murphy*, 658 S.W.2d 14, 16 (Mo. *banc* 1983)). Parties are "strangers" to a contract when they are neither parties thereto nor third party beneficiaries who can enforce the contract. *See Farmers Ins. Co., Inc. v. Miller*, 926 S.W.2d 104, 107 (Mo. Ct. App. 1996); *St. Paul Fire & Marine Ins. Co. v. Medical Protective Co.*, 675 S.W.2d 665, 667 (Mo. Ct. App. 1984).

Zurich was neither a party to the Contract nor a third party beneficiary entitled to enforce it. Thus, it was indisputably a "stranger" to the Contract. Moreover, Count I of Respondent's First Amended Petition expressly seeking a declaratory judgment that TIG and Utility did not owe a duty to defend Noranda under the Substation Painting Contract did not (and could not) set forth any allegations manifesting that Respondents possessed ***present legal rights*** against ***Zurich*** with respect to which Respondents ***were entitled to relief*** of any type, including declaratory relief. Thus, Count I stated no justiciable controversy against Zurich.

Because Count I stated no justiciable controversy between Respondents and Zurich in regard to the Contract, the trial court had no subject matter jurisdiction to adjudicate Count I against Zurich. Thus, Respondent's argument that the trial court properly exercised subject matter jurisdiction over the Count I declaratory judgment claim against Zurich in regard to the Contract is completely wrong.

Consequently, irrespective of whether Counts I and II of the First Amended Petition, taken together, implicitly sought a declaration of Noranda's coverage under the Noranda-Zurich Policy for Murphy's claims in the underlying action (which implied

claim against Zurich Respondents had no standing to assert), it remains undisputable that no subject matter jurisdiction existed in the trial court for adjudication against Zurich of the express Count I claim seeking a declaration of rights under the Substation Painting Contract.

C. RESPONDENTS ARE BARRED FROM ASSERTING A DIRECT CLAIM FOR REIMBURSEMENT AGAINST ZURICH BEFORE THEY HAVE OBTAINED A FINAL JUDGMENT AGAINST NORANDA, ZURICH'S INSURED

Finally, notwithstanding the authority of *State ex rel. Anderson v. Dinwiddie*, 224 S.W.2d 985 (Mo. *banc* 1949) that otherwise precludes Respondents from asserting a direct claim for reimbursement against Zurich before they have obtained a final judgment against its insured, Respondents argue that they could sue Zurich directly anyway because Zurich "solicited and demanded payment on behalf of its insured[,] . . . took an active role in requesting and requiring that TIG settle the Murphy case[,] . . . actively participated in the mediation of the Murphy case[,] and represented certain matters to TIG which were later discovered to be untrue (the "Quoted Allegations")." Resp. Br. p. 82.

First of all, Respondents do not cite a single legal authority for the sweeping proposition that such an exception exists to the *Anderson* rule. This is because there is no legal authority supporting this proposition.

Secondly, there is not a shred of evidence in the record even suggesting that any of the foregoing Quoted Allegations are true. The record of this case is entirely devoid of

the slightest evidence, by testimony or exhibit, even suggesting that Zurich ever solicited or demanded payment of behalf of Noranda, ever took an "active" role in requesting and requiring that TIG settle the Murphy case, ever "actively" participated in the mediation of the Murphy case, and ever made any false statements or representations to TIG.

The undisputed record is that the TIG representative at the mediation, Ralph Mason, did not want or seek the advice of even its own Retained Noranda Counsel on any case issues or Noranda defenses before or while attempting to settle the underlying action as to defendants Noranda and Long. The TIG representative had sole control of whether or not to settle the underlying action, engaged in private, one on one negotiations with counsel for Murphy in the underlying action, and decided on his own to settle the case. (T. 99:17 - 100:20, 118-12 - 119:11).

As a result, under R.S.Mo. §379.200 and *Anderson*, the trial court was without subject matter jurisdiction to enter a judgment for liability damages against Zurich before Respondents obtained a judgment against Zurich's insured, Noranda.

II. REPLY TO RESPONDENTS' RESPONSE TO POINT III OF ZURICH'S SUBSTITUE BRIEF

A. TIG Possessed Full Knowledge of the Existence Or Non-Existence Of All Facts Material To Its Defense/Indemnification Obligation At Least 1 ½ Years Before Making the Settlement Payment to Murphy, And Was Still Uncertain When It Made The Payment Regarding The Legal Effect Of Those Material Facts and The Existence Of Such Obligation; Thus, TIG Was A Volunteer In Regard To Such Payment Without Right To Reimbursement; No Equities Exist In The Case Facts That Warrant Abandonment Of This Rule

In its defense to Zurich's claim that TIG is not entitled to reimbursement because TIG was a volunteer in regard to its settlement payment to Murphy in the underlying action, TIG discourses at length on the factual history of the contract relationship between Utility and Noranda. None of that lengthy discourse, however, is material at all to illumination or resolution of the volunteer payment issue. The one undisputed material fact that ***is*** dispositive of the volunteer payment issue in favor of Zurich (and Noranda) is the following:

By ***May 16, 1997*** (the date that TIG received a copy of Contract Exhibit C from Noranda), over 1 ½ years before it paid Murphy the settlement payment in the underlying action, TIG knew of the specific existence or non-existence of all of the material facts bearing upon its determination as to whether it was obligated to defend and indemnify Noranda in the underlying action. On that date, TIG possessed both of the Contract's

purported indemnity provisions, Terms and Conditions ¶ 19 and Contract Exhibit C. TIG also knew:

(a) precisely where Paragraph 19 was located in the Contract, the manner in which it was manifested therein, and its specific terms;

(b) the precise language of purported Contract Exhibit C and its supposed location in the Contract documents;

(c) the claim of its insured, Utility, that Contract Exhibit C had never been made a part of the Utility/Noranda Contract, and all of the facts that Utility asserted as supporting this claim, including the fact that Utility had never seen or been provided the exhibit or otherwise assented to its terms;

(d) the claim of Noranda that Contract Exhibit C was a part of the Contract, and all of the facts that Noranda asserted as supporting its claim, including the fact that Utility had initialed the Contract document package signifying its receipt of Contract Exhibit C;

(e) that, because of the contradictory assertions by its insured and Noranda regarding Contract Exhibit C (and, apparently, some unspoken concern in TIG's mind over the legal efficacy of Paragraph 19, even though it unconditionally and expressly accepted the tender of defense and indemnification based upon that contract provision), TIG ***remained uncertain*** as to whether it had an obligation to defend and indemnify Noranda in the Underlying Action despite its knowledge of the existence or non-existence of all facts relating to that determination; and

(f) that this ***uncertainty*** could only be removed by an adjudication of the ***legal consequences or effects*** flowing from those known facts.

TIG states that, rather than acting in a prompt manner to secure a declaratory judgment to remove the uncertainty and inform itself of the legal effects of these known material facts, it chose to "rely" instead upon the legal judgment of its and Utility's ***opponent*** in the dispute, ***Noranda***, that Utility owed Noranda defense and indemnification under their Contract for Murphy's claims against Noranda. There is ***no*** rational argument that TIG can make that it ***reasonably relied*** upon the representation of its ***adversary*** as to the legal consequences or effects of the material facts known to all of the parties when it made the settlement payment to Murphy.

In the factual context presented by this case, courts must ***consider the relationship*** between TIG, the payor, and Noranda, the payee (or party on whose behalf money was paid) in determining whether TIG had reason to believe that it would be reimbursed by Noranda when it made the settlement payment to Murphy. *Estate of Bends*, 589 S.W.2d 330, 332 (Mo. Ct. App. 1979).

For example, in *Ticor Title Ins. Co. v. Mundelius*, 887 S.W.2d 726 (Mo. Ct. App. 1994), a title company that acted as escrow agent for a home sale filed an action against the purchaser to recover $2,000 that it had paid the seller to facilitate closing after an error was discovered at closing in the settlement statement's listing of the property sale price. The settlement statement had listed the property price as $2,000 less than the price upon which the seller and purchaser had previously agreed. When the sale closed, Ticor paid the seller the $2,000 difference to avoid delaying the closing. It then sought reimbursement from the purchaser, but the purchaser failed to respond to its requests, and Ticor filed suit.

The *Ticor* court held that, in determining whether Ticor should be reimbursed, it must look to the relationship between Ticor and the purchaser to determine if it was reasonable for Ticor to expect such reimbursement. *Id*. at 728. The court ruled that, since Ticor was acting in its capacity as the purchaser's escrow agent for the real estate purchase, it was reasonable for Ticor to believe that the purchaser would reimburse it for costs paid by Ticor that were associated with the purchase, including the $2,000 shortage payment. *Id*.

The *Ticor* court also held that, since the $2,000 shortage payment was made by Ticor in the performance of its ***duty*** as defendant's ***escrow agent***, it was not ***voluntary*** in nature and, therefore, did not nullify any right of Ticor to reimbursement, as a voluntary payment with full knowledge of all material facts would have. *Id*. (citing *American Motorists Ins. Co. v. Shrock*, 447 S.W.2d 809, 812 (Mo. Ct. App. 1969)). Additionally, the *Ticor* court found that, since Ticor had not paid the money under any ***uncertainty*** that the money was due, the payment did not fall within the principle enunciated in *Farmers New World Life Ins. Co. v. Jolley*, 747 S.W.2d 704, 707 (Mo. Ct. App. 1988) that an insurance company cannot obtain restitution of funds disbursed by it knowing there was uncertainty as to whether such payment was actually due. *Id*.

In contrast to the foregoing authority, in the instant case, TIG paid the settlement payment to Murphy (a) when it was uncertain as to whether it was obligated to make the payment, (b) when it had sought no legal determination of its duty or obligation to Noranda or Utility to make such a payment notwithstanding its knowledge of all material facts and its remaining uncertainty, and (c) when, based upon its adverse relationship to

Noranda and Zurich, it had no reasonable expectation that it would be reimbursed if it made such a payment. Thus, TIG is not entitled to reimbursement.

B. RESPONDENTS' CITATIONS TO WAIVER/ESTOPPEL CASES AT PAGES 86-89 OF ITS SUBSTITUTE RESPONSE BRIEF ARE COMPLETELY INAPPOSITE

Respondents also extensively cite to Missouri case authority for the proposition that the doctrines of waiver and estoppel cannot be asserted to extend coverage provided by a policy or to create coverage where none exists. The authority is completely inapposite to the facts of this case. When TIG paid the settlement payment to Murphy, as set forth above, it was a ***volunteer***, in that it made the payment with full knowledge of the existence or non-existence of all material facts relating to its obligation *vel non* to do so, and while still uncertain as to the legal consequences of those known facts. As a ***volunteer***, then, TIG made the settlement payment wholly separate and apart from, and outside of, any purported policy-based obligation to do so.

Thus, this is not a case of Noranda or Zurich asserting, ***before*** any insurance payment has been made, that waiver has "created *coverage*" or "extended *coverage*" under an existing policy of insurance, and that, therefore, there is a policy-based obligation of TIG to pay. TIG ***voluntarily*** made the payment while uncertain whether or not it was obligated to do so. TIG did not make the settlement payment in deference to or in satisfaction of any "new" or "extended" policy coverage deemed to have been created by its waiver, because no "new" or "extended" coverage arising from any purported waiver had yet been sought or declared. TIG paid simply as a volunteer.

As illustrated in the "voluntary payment under uncertainty" cases cited by Zurich at pp. 39-42 of its Substitute Brief and as set forth above, the waiver/estoppel authority cited by Respondents does not trump or displace, and is not inconsistent with, the "voluntary payment while uncertain" authority, as the voluntary payment doctrine is based upon a completely different factual predicate and analytical framework. If an insurer pays as a volunteer when it does not know if it has any obligation to pay under a policy, and before any adjudication of its obligation to pay, it has intentionally relinquished or abandoned its policy rights altogether.

CONCLUSION

By May 16, 1997, 1 ½ years before it made the settlement payment to Murphy, TIG indisputably knew the existence or non-existence of all material facts bearing upon its obligation *vel non* to defend and indemnify Noranda against the claims of Murphy in the underlying suit. However, TIG was still uncertain of whether such an obligation existed, because it did not know how a court would adjudicate the competing claims and facts asserted by Noranda and Utility.

What TIG should have done once it possessed all of the material facts, if it was still uncertain regarding their legal import, was promptly seek a judicial resolution establishing their effect. In the alternative, TIG should have initially assumed defense and indemnification of Noranda under a reservation of rights. Then, if TIG later determined after prompt investigation that coverage did not exist based upon the facts known to it, it could have promptly informed Utility and Noranda that it was denying

coverage and withdrawing from Noranda's representation, thereby providing Noranda a reasonable opportunity to undertake its own defense.

Instead, TIG (a) unconditionally accepted tender of Noranda's defense and indemnification without any reservation or rights, (b) failed to promptly investigate coverage or liability issues, (c) failed to seek a prompt judicial resolution of the legal effect of the material facts bearing upon coverage that were known to it, (d) continued to control the defense of Noranda up until the eve of trial, (e) suggested that its insured or its adversary, rather than TIG, should investigate and inform TIG as to TIG's obligations rather than TIG, (f) controlled the settlement of the underlying action, and (g) paid the settlement to Murphy. These facts unquestionably do not create any predicate for reimbursement of the settlement payment to TIG.

WHEREFORE because TIG was a voluntary payor as set forth above, this Court should reverse the decision of the trial court in this case awarding judgment in favor of TIG and Utility and against Noranda and Zurich, and enter judgment in favor of Noranda and Zurich on Plaintiffs/Respondents' claims for declaratory judgment and indemnity. In the alternative, this Court should dismiss the claims against Zurich for lack of subject matter jurisdiction.

Dated: February 21, 2005

Respectfully submitted,

By _____

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RULE 84.06(c) CERTIFICATION

The undersigned certifies that the foregoing substitute brief complies with MO.R.CIV.P. 84.06(b) and contains 3,761 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies the undersigned attorney has caused service of one (1) Rule 84.06(a) copy and one (1) Rule 84.06(g) disk of **SUBSTITUTE REPLY OF APPELLANT ZURICH INSURANCE COMPANY TO SUBSTITUTE BRIEF OF RESPONDENTS** to be made by first-class mail, postage prepaid, to the address of the following attorneys representing parties to this action, on this ___ day of February, 2005:

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