STATE OF MICHIGAN

COURT OF APPEALS

ALDEN K. KIRSCHNER and NAOMI F. KIRSCHNER,

Plaintiffs-Appellees,

v

PROCESS DESIGN ASSOCIATES, INC.,

Defendant,

and

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA,

Garnishee-Defendant-Appellant.

UNPUBLISHED

Nos. 182861, 183858
Alpena Circuit Court
LC No. 88-08420

Before: Gribbs, P.J., and Saad and J. P. Adair,* JJ.

GRIBBS, P.J., dissenting.

I respectfully dissent. An insurance carrier such as GAI "owes certain responsibilities not only to the insured but also to the opposing party and to the court." *Cozzens v Bazzami Bldg Co*, 456 F Supp 192, 202 (ED Mich 1978). GAI failed to live up to its responsibilities in this case and I would find that the trial court's judgment and order in this case was appropriate. The insurer here did more than merely fail to notify plaintiff about a potential lack of coverage. The facts of this case show that the insurer made an active effort to prevent plaintiff from discovering the lack of coverage.

GAI appointed an attorney to represent Process Design. It is evident from the record that the GAI-appointed attorney was well aware of the policy limitations, that he was in constant contact with the insurer, and that he was acting on GAI's behalf. As the majority notes, plaintiff asked in its interrogatories for information about Process Design's insurance policy. However, the majority fails to

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* Circuit judge, sitting on the Court of Appeals by assignment.

note that plaintiff *also* asked in its interrogatories for the "limits of liability" under the policy. The answer to the interrogatory, which lists the name of the GAI-appointed attorney as Process Design's counsel, advised plaintiff of the $1,000,000.00 policy coverage but failed to include any information about the limits of liability, raising the fair inference by that omission that there were no limits. Moreover, shortly after the interrogatories were answered, GAI advised plaintiff by letter that they would advise plaintiff about "all coverage and liability issues" once they were resolved. There is record evidence that GAI determined long before trial that there was no coverage in this case. But GAI never informed plaintiff or the trial court of that conclusion.

Estoppel may arise when (1) a party, by its silence, intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on this belief, and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts. *Schmude Oil v Omar Operating*, 184 Mich App 574, 581-582; 458 NW2d 659 (1990). In addition, the "suppression of the truth" can amount to fraud, and it is just as prejudicial as "the assertion of a falsehood." *Lorenzo v Noel*, 206 Mich App 682, 684; 522 NW2d 724 (1994). In this case, on the basis of the deception by GAI's appointed counsel, plaintiff made settlement decisions concerning other defendants in other areas of the lawsuit. Plaintiff decided to aggressively pursue the claim of design negligence in their action against Process Design, and concluded that a restraining order was not necessary to protect Process Design's assets because of the purported insurance coverage.

GAI attempts to excuse its failure to disclose the policy limitations by suggesting that the policy coverage was broad enough to apply to some of plaintiff's allegations. However, the record shows that GAI specifically informed Process Design repeatedly that "all allegations made against Process Design to date would fall within the exclusionary language" of the policy. This conclusion was never conveyed to plaintiff or the trial court.

Nearly three years before the trial began, Process Design was ordered to produce documents. Nonetheless, on the date of trial, the GAI attorney had still failed to produce a copy of the insurance policy, despite plaintiff's repeated efforts and requests. As trial began, the GAI attorney actively directed the case during bench discussions in a successful effort to limit the jury's consideration to only the areas of design and engineering—two areas expressly excluded by the policy. Even then, the GAI attorney did not advise the trial court of the coverage limitations or that it was no longer appropriate for GAI to provide a defense. As a result, plaintiff and the trial court engaged in an expensive and unnecessary trial proceeding that lasted nearly two weeks.

There is record evidence that GAI was in frequent communication with its appointed attorney, that it was aware several months prior to trial that plaintiff hadn't discovered the policy exemptions, and that it knew plaintiff was seeking production of the insurance policy. GAI knew that Process Design did not have coverage for plaintiff's design and engineering claims, and knew that Process Design was planning to file for bankruptcy if found liable. There is also evidence that GAI was aware of and concerned about the possibility of estoppel because of their defense strategy in this case.

I believe there is ample evidence in this case to support the trial court's conclusion that GAI acted improperly in failing to disclose the policy exemptions to either plaintiff or the trial court. I would affirm.

/s/ Roman S. Gribbs