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ABSTRACTS

Appeal and Error—New Trial Ordered as to Appealing Defendant Only

P brought an action against *D1* and *D2,* in the Circuit Court of Monongalia County to recover damages for personal injuries and property damage resulting from an automobile collision. *P* obtained a judgment on a jury verdict for $10,000 against the *Ds. D1* appealed on the ground that the trial court was in error in giving instructions that urged the jurors who were in the minority to re-examine their views and also on the ground that the element of proximate cause was not included in the binding instructions to the jury. *Held,* reversed and a new trial ordered. The court stated that the judgment against *D2* would remain undistrubed because no injustice would result from a reversal of the judgment only in part. *Levine v. Headlee,* 134 S.E.2d 892 (W. Va. 1964).

This recent West Virginia case has shown that the question of injustice to the defendant who did not appeal is the basic factor in determining if the reversal for a new trial will affect only the defendant who did appeal. For example, the court held in *Armstead v. Holbert,* 122 S.E.2d 43 (W. Va. 1961) that where rights and issues against several defendants are interdependent and injustice might result from reversal as to less than all parties, the court in reversing for one or more defendants will reverse for all defendants.

The majority rule in the United States, which allows the court to grant a new trial or reversal on appeal by only one defendant without the grant of a new trial or reversal as to defendants not appealing, is not a rigid rule without qualifications. All of these qualifications or exceptions are based on the fundamental idea of according substantial justice to a codefendant as to whom, through no error was committed, the judgment, if left intact, might work injustice. Annot., 143 A.L.R. 7, 30 (1943).

It would seem that the reasoning of the principal case is in accord with that of past cases in West Virginia and also with the majority of jurisdictions in the United States.

Gift Taxes—Construction of Split-Gift Code and Regulations Provisions

Commissioner, respondent, argued that petitioner should be accessed gift taxes in the sum of $10,117.13 because the petitioner's wife had not signed gift tax returns for the years 1956 and 1957 in the place provided to show her consent that her husband's gifts were made one-half by her. Tax Court sustained the Commissioner. *Held,* reversed, the wife's consent was sufficiently "signified" on the returns and that no signature of the wife was required to give this consent. *Jones v. Commissioner* 327 F.2d 98 (4th Cir. 1964).

At issue was the interpretation of the INT. REV. CODE OF 1954, § 2513, and the regulations dealing with the split-gift provisions in petitioner's gift tax return. Treas. Reg. § 25.2513-2 (1958) provided that where only one spouse files a gift tax return within the time provided, the consent of both spouses shall be "signified" on the return. In the principal case the wife of the petitioner had signed her consent to a split-gift provision in earlier returns of the petitioner and had never filed separate returns of the gifts. This, coupled with the fact that petitioner "signified" his wife's consent in the returns for 1956 and 1957 by answering "yes" to the question that he gave his consent to have the gifts considered as having been made one-half by him and one-half by his spouse and by answering "no" to the question whether his spouse would file a gift tax return, indicated to the court that the consent of the wife had been "signified" to the petitioner's assertion of a split-gift. The court has thus held that one spouse may "signify" a consent for the other spouse in a gift tax return.

Silence is quite frequently taken for consent in tax cases as was shown in *Hennen,* 35 T.C. 747 (1961). There the court held a wife liable on a joint income tax return even though she had not signed it. Also, the court held that the true intention of the taxpayer was the deciding factor in determining if it were a joint return.

Insurance—Insurer's Responsibility to Defend

P, assured, brought this action to recover from *D,* liability insurer, the expense of defending a tort action against assured. The Superior Court ordered judgment for *P* and *D* appealed. *Held,* affirmed. Because liability insurer could have included provisions concerning cost of defense in various situations in covenant to defend under reserva-

tion of right to disclaim liability, uncertainty would be resolved against insurer, and insurer would be required to pay the legal expense of assured's successful defense of tort action after assured declined to accept insurer's defense under reservation. *Magoun v. Liberty Mut. Ins. Co.*, 195 N.E.2d 514 (Mass. 1964).

An assured does not have to consent to a nonwaiver agreement which provides that the insurer will defend a suit against the assured but disclaims liability and retains its right to later assert the non-coverage. Once insurer makes it known that it wants to repudiate its liability, it cannot insist on handling the defense, and insured may have the insurer removed if it does insist on taking part in the litigation. Annot., 49 A.L.R.2d 694, 700 (1956). It would then seem that, because of the conflicting interests between insurer and assured, assured did have the right to refuse the legal help of insurer. The problem is to determine who should pay the expenses for the independent legal help acquired by assured.

The insurer did make a covenant to defend assured and an insurer must defend the assured at least in good faith and without negligence. *Murach v. Massachusetts Bonding & Ins. Co.*, 339 Mass. 184, 158 N.E.2d 338 (1959). Because insurer did have the duty to defend assured, the reasoning that insurer should pay the independent legal expenses seems just in that insurer could have limited its covenant to defend by expressing various situations when the covenant would have no effect. The case of *Stichman v. Michigan Mut. Liab. Co.*, 220 F. Supp. 848 (S.D.N.Y. 1963) is in accord with the principal case; the court held that if a liability insurer refused to defend a claim against assured, insurer was liable for assured's attorney fees and expenses of defense regardless of whether the cause of action was within policy coverage. See *Goforth v. Allstate Ins. Co.*, 220 F. Supp. 616 (W.D.N.C. 1963). No West Virginia cases were found on this point.

Negligence—Governmental Immunity from Tort Liability—Estoppel—Effects of Liability Insurance

P brought this action against *D*, county, for injuries sustained when she fell on a bridge which was controlled or maintained by *D* though it was not authorized to do so. Trial court granted summary judgment in favor of *D*. *P* appealed to the Supreme Court of

Appeals. *Held,* affirmed, *D* was immune from tort liability because it could not be estopped from asserting its governmental immunity from suit by reason of a legally unauthorized act by its officers or agents. Also, the fact that *D* County had liability insurance was not sufficient to take away this immunity from tort liability. *Cunningham v. County Court,* 134 S.E.2d 725 (W. Va. 1964).

Except for a few jurisdictions, it is the general rule that counties are not subject to liability for torts committed by it in carrying out its governmental functions unless statutory provisions provide otherwise. Annot., 114 A.L.R. 420 (1938). West Virginia is in accord with this view as was shown in *Ward v. County Court,* 141 W. Va. 730, 93 S.E.2d 44 (1956).

The general rule is that a county may not be estopped from asserting its governmental immunity when functioning in its governmental capacity. Annot., 1 A.L.R.2d 338 (1948). The parties in the principal case apparently agreed that the maintenance of the bridge was a governmental function. This general view is the same as that of past West Virginia cases.

In the principal case, *P* contended that *D* had liability insurance and this took away *D's* governmental immunity. The prevailing view is that a governmental unit retains its immunity from tort liability irrespective of liability insurance coverage. Annot., 68 A.L.R.2d 1439 (1959). Hence, the principal case is in accord with the majority view on this point.

P did not seriously contend that the statute, W. VA. CODE ch. 17, art. 10, § 17 (Michie 1961), which imposes liability on county courts for injuries sustained through defects in roads or bridges controlled by the county court, applied in the principal case. The court in the principal case agreed that the statute had no effect because the defendant had no legal right, duty or authority to maintain, repair and control the bridge.

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