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Recent Developments: Sharrow v. State Farm Mutual Automobile Insurance Co.: Insurance Companies' Tortious Interference with Attorney Contingency Fee Contracts: A Broader Rule

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gree did not constitute marital property under § 8-201(e) of the Maryland Marital Property Act since it had "no exchange value on the open market." *Id.* at 591.

The court then turned its attention to the instant issue, noting first that various courts have considered the same issue with varying results. The court undertook a case by case analysis of the question. The court noted that while some courts have completely rejected the argument that a personal injury award or settlement is marital property, other courts have concluded that a personal injury case which is pending at the time of divorce cannot be marital property because of its speculative nature.

While the court was obviously swayed by this argument, and relied heavily on it, it is specious. The court has already allowed a nonvested pension right to be divided on a percentage basis, see *Deering v. Deering*, supra at 891, and there is no reason why the same argument could not be applied here.

The court then turned its attention to a series of New Jersey cases which have addressed the issue. In *DiTolvo v. DiTolvo*, 131 N.J. Super. 72, 328 A.2d 625 (1974), the court held that potential damages in a personal injury case which occurred during marriage was a chose in action and, as such, constituted marital property acquired by the spouse during marriage and was subject to equitable distribution upon dissolution of the marriage. *DiTolvo* was affirmed in *Landwehr v. Landwehr*, 200 N.J. Super. 56, 490 A.2d 342 (1985).

Reaching a contrary decision was *Amato v. Amato*, 180 N.J. Super. 210, 434 A.2d 639 (1981), another New Jersey intermediate appellate court case. *Amato* involved a spouse's unliquidated claim for damages stemming from a medical malpractice case. The court concluded that the damages were "peculiar to the injured person, to seek to be restored or made whole as he was before the injury." 434 A.2d at 642. Therefore, the court concluded that the monies "represent personal property of the injured spouse, not distributable under the New Jersey Marital Property Statute." Id. at 643. The court carved out an exception, however, for losses which diminish the size of the marital estate, i.e. lost wages and medical expenses, holding that such monies were "distributable when recovered." Id. at 644.

The Supreme Court of Washington, in *Brown v. Brown*, 100 Wash. 2d 729, 675 P. 2d 1207 (1984), gave a more concise explanation of the above rationale when it stated:

> The physical injury to the spouse, and the pain and suffering of the spouse therefrom is an injury to the spouse as an individual . . . but on the other hand, if the injury deprives the marital community of the earnings or services of the spouse, that is an injury to the marital community.

The court of appeals noted that Washington, unlike Maryland, is a community property state, but stated that the basic premise is the same: the focus is on the costs incurred by the couple and whether they reduced the size of the marital estate.

The court of appeals then turned its attention to the Maryland case law analyzing the Marital Property Statute, as well as the Report of the Governor's Commission on Domestic Relations Law (1978). After noting that the statute and case law call for the court to consider both the monetary and nonmonetary contributions when distributing property in a divorce, and that the property rights of the spouses' be adjusted fairly and equitably, the court noted that the commission report explicitly noted that the theory of equitable distribution is that each spouse has a duty "to contribute his or her best efforts to the marriage for the benefit of the family unit." 305 Md. at 587.

Given the above language, the court goes on to announce its holding in the instant case. In one paragraph the court states that since the claim was not "acquired" during the marriage, and arose by

> purely fortuitous circumstances . . . the claim is simply not the type of resource contemplated by the statutory definition of marital property even though, in part at least, payment of the claim would produce monies which would replenish marital assets previously diminished through payment of medical expenses and the loss of wages. *Id.* at 587

In announcing such a broad reaching decision the court of appeals has gone further than most courts which have come down on the same side of the issue. In Maryland, according to the court, not even lost wages or medical expenses which were originally paid out of the marital estate may be replenished by an award from a personal injury case.

Given the facts of the instant case, i.e. that the parties were separated at the time of the accident, and that the wife incurred none of the expenses of the accident, the court probably reached an equitable decision. However, the court could have accomplished this without dealing with the more complex issue presented here by ruling that under § 8-205 (8) of the Maryland Family Law Article that Gypsy had not contributed to this specific piece of marital property. In addition, § 8-205 (10) allows the court to consider "any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award."

The court has left us with what may be a classic example of bad facts making bad law. By expanding its decision as far as it did, the court may have reached a decision that will be difficult to reconcile given different facts. One can picture a scenario wherein a spouse is injured while living with his/her husband/wife and expends great sums of otherwise marital property during the recovery process. By delaying settlement in the personal injury case, the injured spouse could conceivably deplete marital funds and later receive a windfall. Given the previous case law in the area, this does not appear to be a result the court of appeals would desire.

– William Cassara

Sharrow v. State Farm Mutual Automobile Insurance Co.: INSURANCE COMPANIES' TORTIOUS INTERFERENCE WITH ATTORNEY CONTINGENCY FEE CONTRACTS: A BROADER RULE

In *Sharrow v. State Farm Mutual Automobile Insurance Co.*, 306 Md. 754, 511 A.2d 492 (1986) the Maryland Court of Appeals, reversing the court of special appeals, held, in a case of first impression, that an attorney stated a cause of action against an insurer for tortious interference with contract by alleging that the insurer had capitalized on his client's need for money by involving the client in settlement negotiations.

The client, Donald Zorbach, was involved in an automobile accident with another automobile insured by State Farm and suffered personal injuries. Zorbach retained Ronald M. Sharrow as his attorney where, pursuant to a written agreement, Sharrow was to receive a specified percentage upon settlement or a slightly greater percentage if suit was filed. During his representation by Sharrow, Zorbach ran into serious financial difficulties and requested that Sharrow advance him money. Sharrow declined stating that it is unethical for an attorney to advance money to his client and also stated that it would be unwise to approach State Farm with a similar request. Against his attorney's advice and without his knowledge, Zorbach contacted State Farm and requested an advance on

his claim. State Farm refused and instead negotiated a settlement of Zorbach's claim for $2,500. Zorbach was directed to go to State Farm's office to execute certain documents to finalize the settlement. Zorbach went to the office and signed a release as directed. Zorbach was also requested to execute a document discharging Sharrow as his attorney and stating that he had advised Sharrow of his intention to settle directly with State Farm.

Sharrow filed a three count complaint against State Farm and two of its employees, alleging that they tortiously interfered with his contingent fee contract by negotiating and settling the claim directly with Zorbach. The trial court dismissed the complaint for failure to state a claim and Sharrow appealed. Sharrow contended that he adequately stated a cause of action which averred that State Farm, knowing of Sharrow's representation of Zorbach, sensed Zorbach's desperate need for money when he contacted the insurer for an "advance" on his pending claim; that the insurer "seized the opportunity to exploit Zorbach's financial plight and induced a settlement"; and that "the egregious nature of State Farm's conduct was compounded by its requirement that Zorbach execute documents it prepared which falsely stated that he had terminated Sharrow as his attorney and had advised Sharrow that he intended to deal directly with State Farm." Sharrow reasserted the same allegations against a claims adjuster at State Farm who was assigned to Zorbach's claim. Sharrow asserted that the claims adjuster further interfered with Sharrow's contract rights by stating to Zorbach that since it was Zorbach, not Sharrow, that settled the claim, Sharrow should not receive a fee for legal services. Sharrow stated that the claims adjuster's actions were undertaken by her solely to deprive Sharrow of the benefit of his contract. Sharrow contended that State Farm's conduct was coercive and malicious and that Zorbach's termination of the contract was induced by State Farm's "opprobrious conduct and misrepresentations."

The court of special appeals in *Sharrow v. State Farm Mutual Automobile Insurance Co.*, 63 Md. App. 412, 492 A.2d 977 (1985), citing *Wilmington Trust Co. v. Clark*, 289 Md. 313, 329, 424 A.2d 744 (1981), recognized the general proposition that a third party who, without legal justification, intentionally interferes with the rights of a party to a contract, or induces a breach thereof, is liable in tort to the injured contracting party. However, the Maryland appellate courts had not had occasion to consider whether that tort applied to professional service agreements between attorney and client and, if so, what type of conduct would suffice to create liability. Although a different rule had been adopted in a minority of states, the Court of Special Appeals of Maryland saw no reason why attorney-client agreements should be regarded differently in the eyes of the law than other contracts which are protected against tortious interference by third parties. The problem was not whether attorney-client agreements should be included within the aegis of the tort, but in determining whether particular conduct by a third party is actionable.

Upon analysis of the out-of-state cases supporting the view that attorney-client agreements do come within the aegis of the tort, the intermediate appellate court noted that liability was predicated "upon fraudulent or unconscionable conduct that actually induced the claimant to dismiss his or her attorney and settle directly with the insurer." 63 Md. App. at 421.

The court looked to Comment a of the Restatement (Second) of Torts § 766 (1977) which emphasizes that for the acts or statements to be actionable in tortious interference with contract, they must be "improper"; and under § 767 a chief factor in determining whether an act is improper is the nature of the conduct, *e.g.*, "physical violence, fraudulent misrepresentation, and threats of illegal conduct which are ordinarily wrongful means" and thus actionable. The Restatement analysis is not whether the person is justified in causing the harm, but whether he is justified in the manner in which he does it.

The Court of Special Appeals of Maryland left no doubt that a client has the good faith right to settle his cause of action without his attorney's knowledge or consent notwithstanding the existence of a contingency fee contract. The court looked to *State Farm Mutual Automobile Insurance Co. v. White*, 248 Md. 324, 236 A.2d 269 (1967), which held an insurer liable where it had the opportunity to settle a claim on behalf of its insured within the policy limits but did not do so. In *White* the court applied a good faith test in determining the liability of the insured. For an insurer to measure up to the good faith test, its action in refusing to settle must consist of an informed judgment based on honesty and diligence. *Id.* at 333. Just as a claimant has a right to settle his claim with an insurer, *White* indicates that an insurer has a right, and where reasonable and possible, a duty to settle a claim made against its insured.

The court of special appeals in *Sharrow* attempted to define the restraint imposed on the insurer's duty by stating that:

> If, to achieve its own ends, an insurer deliberately induces the claimant to repudiate his retainer agreement by means of threats, misrepresentations, or other coercive or unconscionable conduct, its 'right to settle' cannot save it from liability to the lawyer who has suffered economic detriment from the repudiation. 63 Md. App. at 424.

Therefore, if a claimant indicated to an insurer his willingness to settle without the intervention of his attorney and the insured responds in good faith to settle the claim, as its duty may well require, without engaging in coercive or unconscionable conduct, there would be no improper interference with the attorney's contract. Using that analysis, the court of special appeals agreed with the lower court in finding that Sharrow failed to state a claim upon which relief could be granted. Assuming the allegations of the complaint to be true, that decision was made in light of the fact that false statements existed in the settlement agreement. The court summarily dismissed the effect of the false statement—the certificate that Zorbach had discharged Sharrow—by noting the fact that the statement became true the instant it was signed. The other false statement that, "I have advised Ronald Sharrow of my intention to settle my claim directly . . ." was dismissed because there was no allegation that it had anything to do with inducing Zorbach to settle his claim. The allegation that a claims adjuster told Zorbach he would not have to pay Sharrow was determined to have no basis of liability. The court indicated that because the statement came after Zorbach signed the agreement, it had nothing to do with inducing him to settle with State Farm.

The court of appeals in *Sharrow* agreed with the court of special appeals' analysis of the applicability of tortious interference with contract to attorney-client contracts, the right of claimants to settle their claims, and the duty of insurers to settle claims against its insured, but did not agree with the standard used to assess the conduct of an interfering third party. The court of special appeals' standard for actionable conduct was, that an act must be either egregious, opprobrious, fraudulent, coercive, or unconscionable and manifested by threats, misrepresentations or other acts or statements made to induce the client to repudiate his contract and settle with the insurer. 306 Md. at 767. The court of appeals held that standard to be too restrictive. The court enunciated a broader rule which defines as actionable any purposeful conduct, however subtle, by which an insurer improperly and intentionally induces or persuades a client to discharge his counsel and settle directly. 306 Md. at

767. After this rule, the conduct of the insurer need no longer be opprobrious or unconscionable in nature, but only intentional with an underlying improper purpose of inducing a client to settle directly with the insurer.

The court reversed the court of special appeals but admitted that it did so only because Sharrow barely alleged a claim for tortious interference with contract. Sharrow, on the basis of the broader rule, although lacking specificity, alleged the elements necessary to sustain the tort claim. Based on the facts and the court's analysis, it is highly unlikely that Sharrow had what was needed to prove the commission of tortious interference with contract. The court, however, supplied practitioners, who may find themselves victims of an interference with contract, with the ammunition necessary to actually prove the tort.

The court emphasized that the determinative factor in such cases is whether there was purposeful conduct by the insurer, or whether such conduct was by the client. If the facts of Sharrow's case showed that State Farm rather than Zorbach actually initiated the settlement negotiations, the purposeful conduct of State Farm would indeed be more substantial and the tort claim more likely to succeed at trial. Also absent from Sharrow's complaint was an allegation that State Farm's purpose in negotiating directly with Zorbach was for its own benefit. The presence of such an allegation would enhance the success of a claim alleging the commission of the tort and certainly assist in proving the same.

The *Sharrow* case sends a message to insurance companies to tread lightly whenever they may be in a position of dealing with a claimant directly. The insurer's duty toward its insured, heretofore rather ambiguous, does not extend to intentional conduct, however subtle, whereby the insurer leads a claimant to discharge his attorney and settle his claim.

–Kevin S. Anderson

Knill v. Knill: HUSBAND MAY NOT BE EQUITABLY ESTOPPED TO DENY CHILD SUPPORT

The Doctrine of Equitable Estoppel may not be applied to estop a husband from denying support to an illegitimate child born to his wife by another man during the marriage, unless the husband's voluntary conduct in treating the child as his own gives rise to reliance by the child upon such conduct and such conduct results in the child suffering financial loss. *Knill v. Knill*, 306 Md. 527, 510 A.2d 546 (1986).

Charles and Cledythe Knill had been married ten years. As a result of their marriage, two children were born. After the birth of their children, Charles underwent surgery for a full vasectomy. However, one and a half years after the operation, Mrs. Knill bore a third child, Stephen. Both parties acknowledged that Stephen was not Charles' son. According to Cledythe, the natural father was a former co-worker. Charles apparently forgave Cledythe for her infidelity and the marriage continued for twelve years with Stephen being reared and supported as a member of the Knill family. During this twelve year period, Stephen had no knowledge of his illegitimacy. Charles was named as Stephen's father on his birth certificate. Additionally, Stephen was treated as "one of the family" and was thereby so known in the community where the family resided. In the aftermath of a family dispute, Cledythe revealed to Stephen that Charles was not his natural father. Charles nevertheless continued to support Stephen for two years until Cledythe sued for divorce. Among her prayers for relief, Cledythe requested child support for Stephen. The Circuit Court for Frederick County held that even though Charles was not Stephen's natural father, he was estopped from asserting the illegitimacy of the child in order to avoid child support.

On appeal, Charles argued that since he was not Stephen's natural father he could not be ordered to support Stephen. Maryland law places the responsibility of child support squarely on the shoulders of natural parents. MD. FAM. LAW CODE ANN. § 15-703(b)(1) (1984). *See also, Bledsoe v. Bledsoe*, 794 Md. 183, 448 A.2d 353 (1982). Charles asserted that he stood *in loco parentis* during the twelve years that he voluntarily supported him. Since this relationship had been temporary in nature, he owed no legal duty to continue to support Stephen. On the other hand, Cledythe contended that the doctrine of equitable estoppel should be applied to prevent an inequitable and unconscionable result.

For the first time in Maryland, the court of appeals had the opportunity to address the applicability of equitable estoppel to a child support proceeding. For the doctrine's to apply that a party claiming the benefit of estoppel must have been misled to his injury and changed his position for the worse, having believed and relied on the representations of the party sought to be estopped. *Dahl v. Brunswick Corp.*, 277 Md. 471, 356 A.2d 221 (1976). *See also*, 3 J. Pomeroy, *Equity Jurisprudence* § 804 (5th Ed. 1941).

In *Knill*, by a 4-3 decision, the court held that a husband cannot be equitably estopped to deny a duty to support. In reaching its decision Judge Cole for the majority reviewed decisions from other jurisdictions which had previously addressed the issue. While a few jurisdictions had held that equitable estoppel is to be applied in order to force child support, as in *Clevenger v. Clevenger*, 189 Cal. App.2d 658, 11 Cal. Rptr. 707 (1961) and the Supreme Court of New Jersey in *Miller v. Miller*, 97 N.J. 154, 478 A.2d 351 (1984), the majority for the court followed the holdings of the majority of jurisdictions which do not apply the doctrine to estop a husband from denying paternity and a support obligation. *See e.g., Remkiewicz v. Remkiewicz*, 180 Conn. 114, 479 A.2d 833 (1980); *Weise v. Weise*, 699 P.2d 700 (Utah 1985).

The court in *Knill* stated that in order for the doctrine of equitable estoppel to apply, the related elements of representation, reliance and detriment must be present. The Court indicated that the application of the three-element test requires that the voluntary conduct or representation of the party to be estopped must give rise to the estopped party's reliance and, in turn, result in detriment to the estopped party. In applying the elements of equitable estoppel to the facts in *Knill*, the court found the elements of representation and reliance to be present. The facts showed that Charles represented to Stephen that he was his father and these representations were accepted and acted upon by the child. *Id.* at 537, 510 A.2d at 551. The facts also showed Stephen relied upon the representations and treated Charles as his father, giving his love and affection to him in ignorance of the true facts. *Id.* In regard to the element of detriment, the court stated,

> [T]he evidence in this case, however fails to demonstrate any financial detriment incurred by Stephen as a result of Charles's course of conduct during their twelve year relationship . . . if any detriment was incurred by Stephen, it was emotional and attributable to his mother . . . it was she who ripped the 'cloak of legitimacy' off the boy when she revealed to him that Charles was not his father.

Knill, at 537, 510 A.2d at 551. The court concluded that since the elements of equitable estoppel were not satisfied, Charles could not be held legally responsible for child support.

For the dissent, Chief Judge Murphy, opined, "I think the majority is dead wrong." *Id.* at 539, 510 A.2d at 552. Murphy