North Dakota Law Review

Volume 19 | Number 4 Article 3

1943

Insurance - Waiver and Estoppel

Telmar E. Rolstad

Goplen, Arnold O.
Bismarck
Grimm, Wayne
Washburn
Grimson, Lynn G.
Rugby
Hager, Harold M.
Fargo
Hanley, Jr., James M.
Mandan
Heller, Gordon H.
Fargo
Houck, E. A.
Mandan
Hoverson, C. T.
Fargo
Huseby, Lyle Eugene
Grand Forks
Kellogg, Theodore
Dickinson
Kilgore, James L.
Bismarck
Knezevich, W. R.
Bismarck
Kretschmar, B. E.
Venturia
Kuhfeld, Albert M.
Beach
Langsteth, G. E.
Bismarck
Lanier, Jr., P. W.
Fargo
Leo, James E.
Grand Forks
Lindell, Gustav A.
Washburn
McGrath, Wm. P.
Fargo
Monson, Leigh J.
Fargo
Mowery, Harry O.
Fargo
Murray, William S.
Bismarck
Nelson, Carlton G.
Grand Forks
Neste, Roy A.
Park River
Ottis, John Gordon
Fargo
Palda, Robert W.
Minot
Palmer, Everett E.
Williston
Powers, Joseph M.
Fargo
Purcell, R. Alvin
Grand Forks
Reichert, W. Ray
Dickinson
Rex, S. Theodore
Grand Forks
Ritchie, Thomas N.
Valley City
Sanders, Marvin O.
Ray
Silverman, Sam S.
Grand Forks
Smith, Bernard J.
Bismarck
Smith, Leland J.
Fargo
Snowfield, Ellis G
Langdon
Stewart, Ferguson C.
Grand Forks
Swanke, C. Francis
Kulm
Swenson, R. W.
Devils Lake
Swinland, William A.
Lakota
Toussaint, Leo R.
LaMoure
Vandal, J. Arthur
Rolla
Wartner, Jr., Aloys
Harvey
Weiss, Roland B.
Carson

INSURANCE — WAIVER AND ESTOPPEL

The insured had taken out a conventional automobile liability policy which restricted the authority of the agent to waive or change any part of the policy or to estop the company from asserting any right under the terms of the policy which was accepted by the insured. The policy was "notice" to the insured of all its terms. The insurer's agent had knowledge that one automobile covered by the policy was owned by the insured's wife, notwithstanding a declaration in the policy that the named insured was the sole owner of all automobiles therein listed. Held, that the

insurer was not estopped from denying liability under the policy. Trinity Universal Insurance Co. v. Woody et al., 47 F. Supp. 327 (D. N. J. 1942).

The distinctions between waiver and estoppel are set out very ably by Mr. Richards in his works on Insurance where he says, "The words waiver and estoppel are often used interchangeably by the courts. There is, however, a real distinction. Waiver is the voluntary relinquishment of a known right. It involves the idea of assent, and assent is an act of understanding. This presupposes that the person to be affected has knowledge of his rights, but does not wish to assert them. Intention to relinquish must appear, but acts and conduct inconsistent with intention to terminate the conract are sufficient. The rule is applicable that no one shall be permitted to deny that he intended the natural consequences of his acts and conduct. Estoppel rests upon the misleading conduct of one party to the prejudice of the other. Estoppel involves the acts and conduct of both parties and inquiry always is as to whether or not the fault of one party has induced the other in reliance thereon to alter his position to his detriment." Richards, Law of Insurance (4th Ed.) para, 106; Bernhard v. Rochester German Insurance Co., 79 Conn. 392, 65 Atl. 134, 8 Ann. Cas. 298; Vance, On Insurance (2d. Ed.) p. 459.

"An insurance company is not estopped from setting up the breach of warranty of an existing fact contained in a policy even though the company, through its agent, knew of the true fact at the time the policy was issued." Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, 46 L. Ed. 213, 22 S. Ct. 133 (1901). This rule is contra to the decisions of nearly every state in the Union which has had the occasion to pass upon the question.

"The restrictions inserted in the contract upon the power of the agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premiums with full knowledge of the actual situation. To take the benefit of a contract with full knowledge of all the facts, and attempt afterwards to defeat it, when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other party." Wood v. American Fire Insurance Co., 149 N. Y. 382, 44 N. E. 80, 52 A. St. Rep. 733 (1896). This rule is followed by North Dakota. Leisen v. St. Paul Fire Marine Insurance Co., 20 N. D. 216, 127 N. W. 837, 30 L. R. A. (NS) (1910). The overwhelming weight of authority supports the view taken by these courts. The cases supporting this contention are found on page 327 of Volume 20 of the North Dakota Reports.

"The issue of a policy by an insurance company, with a full knowledge or notice of all the facts affecting its validity, is tantamount to an assertion that the policy is valid at the time of its delivery, and is a waiver of the known ground of invalidity."

Dwelling House Insurance Co. v. Brodie, 52 Ark. 11, 11 S. W. 1016, 4 L. R. A. 458 (1889).

"The information given to the agent operated as notice to the company, and it having accepted the premium and assumed the risk, it must be held that the company has waived the condition, or if not, it is estopped from urging its breach as a defense. To permit such a defense would be highly unjust and iniquitous. It would shock the sense of right and fair dealing to permit money to be obtained under such assurances, and to permit the company to say, we are not bound, and did not intend, on our part, to be bound for any loss that might occur; we misled and deceived you into paying the premium, and although we did not intend to be bound, and knew we were not, still we will keep the premium, and you must suffer the loss. This is the substance of the defense and such a defense cannot be allowed to prevail." St. Paul Fire & Marine Insurance Co. v. Wells, 89 Ill. 82 (1876).

This writer is of the opinion that the court would have been justified in decreeing that the insurer was estopped from denying liability under the policy. In the case under discussion the federal court was bound to apply the law of the state where the contract was consummate and which happened to be New Jersey. It is highly probable that if the same court were trying an identical case and applying North Dakota law that the result would be contra to the New Jersey decision and in accord with the rule laid down in North Dakota and a majority of the state courts.

TELMAR E. ROLSTAD
Law Student
University of North Dakota.

OUR SUPREME COURT HOLDS

In Osage National Bank, a National Banking Corporation, Pltf. and Respt., vs. Oakes Special School District, a Public Corporation, Deft. and Applt.

That where the Legislature, under the State Constitution, had the power to authorize a school district to increase its debt limit upon securing the assent of a majority of the voters voting at an election held within the district, it could by retrospective legislation validate an indebtedness of a district which at the time it was incurred, was within the limit the Legislature had power to authorize and to which limit the electors of the district had assented at an election, which, though previously unauthorized, was such a proceeding that it would have constituted a valid election had it had prior legislative sanction.

That Chapter 278, Laws of North Dakota 1923 is, for the reasons stated in the opinion, held to validate certain warrants issued by the defendant.

Appeal from the District Court of Dickey County, Hon. W. H. Hutchinson, Judge. AFFIRMED. Opinion of the Court by Burke, J.

In State of North Dakota, Respt., vs. W. F. McClelland, Deft. and Applt.

That the right to a new trial is purely statutory and a trial court has no jurisdiction to entertain or grant a motion for a new trial noticed for