MONTANA SUPREME COURT

INSURANCE: Supervisory control of Irigoin denied on admissibility of adjuster's preliminary and retracted liability assessment as to advance payments . . . order.

Larry Burckhard requests supervisory control, contending that Judge Irigoin is proceeding under a mistake of law and asking the Court to address the following to "ensure that the jury is properly instructed."

1. Does Montana public policy codified in § 26-1-701 et seq. (voluntary payments shall not be construed as admission of liability) extend to communications & negotiations concerning liability in response to demand for payment of lost wages & medical expenses, which precede the voluntary payments(s)?

2. Does Rule 408 prohibit admission in litigation against the insured, to prove liability for claims or the amount of claims, of evidence concerning an adjuster's statement apportioning liability to the insured, as a statement made in compromise negotiations, prior to voluntary payments?

3. Does Rule 411 prohibit admission in the liability dispute against the insured, of evidence concerning an adjuster's statement apportioning liability to the insured, as evidence of insurance?

4. Is evidence concerning the adjuster's liability apportionment irrelevant and/or prejudicial, as prohibited by Rules 402 & 403?

5. Is an insurer's pre-litigation statement concerning liability apportionment an admission of liability, as defined in Rule 801, against the insured?

As a rule, evidentiary issues can be adequately addressed in a post-judgment appeal, and we are thus disinclined to address them by supervisory control. Rarely does litigation proceed without an evidentiary error of some sort. Not all evidentiary errors rise to the level of "gross injustice" for which appeal is not adequate remedy. "Supervisory control is an extraordinary remedy, to be exercised only in extraordinary circumstances." Forsyth (Mont. 1985). The errors alleged here do not meet that threshold. "Extraordinary" relief under Appel. Rule 17 is not appropriate. Petition denied.

Gray, Leaphart, Morris, Warner.

Rice, Nelson, and Cotter dissented: Supervisory control is appropriate. Nancy Gilbertson, Bella Lester, and Walter Lester claim that Burckhard negligently operated his vehicle and caused their injuries. Shortly after the accident, and pursuant to the request of their counsel, an adjuster for Burckhard's insurer State Farm made advance payments for medical expenses and lost wages. In the course of communicating to Plaintiffs' counsel about these payments, the adjuster made various statements about his preliminary assessment of liability:

Based on the information in our file at this time, there appears to be some negligence on the part of Bella Lester and Walter Lester, as well as negligence on the part of Mr. Burckhard. This certainly is not a case of clear liability. Our investigation to date indicates liability at 60% for Mr. Burckhard, 20% for Bella Lester and 20% for Walter Lester.

Then in a letter accompanying the advance payments, which were calculated in accordance with the percentages, the adjuster explained:

Please note that where an issue exists as to the liability of the parties involved, we are making payment to you under the voluntary payment statute, section 26-1-701. As provided in that statute, these payments are not admissible as evidence in any civil proceeding. Further, these payments should not be construed as an admission of liability on the part of Larry J. Burckhard. We will offset these advance payments against any final settlements or judgments.

After further investigation State Farm concluded that Burckhard was not liable for Plaintiffs' injuries and the adjuster retracted his initial liability assessments. However, despite the preliminary nature of the statements regarding liability, the context – making voluntary advance payments – and his specific disclaimer about improperly construing the payments, and although Burckhard had no prior knowledge that his insurer was making these statements and has maintained throughout that he is not liable, Judge Irigoin has ruled that the adjuster was acting as his agent and thus his statements are attributable to Burckhard and admissible. Thus the adjuster may be called by Plaintiffs and required to testify regarding his preliminary assessment that Burckhard was 60% liable. His retraction may also be admitted. The ruling violates § 26-1-701 et seq., which prohibits voluntary partial payments from being construed as an admission of fault or liability in any later action. Also, Rule 408 prohibits admission of statements made in compromise negotiations for proving liability. And Rule 411 prohibits evidence of insurance to prove liability. These rules will all be violated by the adjuster's testimony. The ruling thus constitutes clear error and cannot be considered harmless. A jury's knowledge of Burckhard's insurance, an adjuster's specific calculation of liability, however preliminary, and the insurer's advance payments will prejudice Burckhard or at minimum interject inappropriate issues into the trial. It will set a lamentable precedent until overruled. The error is glaring and needs no further factual or case development to confirm it. Irigoin is proceeding under a mistake of law which will result in prejudicial error and on appeal will require reversal. Requiring adjusters to testify about their initial liability assessments in furtherance of advance payments could well disrupt every such negotiation now pending.

Burckhard v. Irigoin, 05-409, 9/7/05. Randall Nelson (Nelson & Dahle), Billings, for Burckhard; Laura Christoffersen (Knierim, Fewer & Christoffersen), Culbertson, for Bella & Walter Lester and Nancy Gilbertson (Gilbertson has settled); Janet Christoffersen (Christoffersen Law Office), Sidney, for Bella Lester (against Walter).