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Torts--Limitation of Actions--Estoppel

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fore, if the opinion of the Court had been more closely aligned with the somewhat more narrow opinion of Justice Goldberg (an opinion which, incidentally, should surely be less distasteful to Justices White and Harlan), the hypothetical statute which, as mentioned above, invaded a seeming first amendment privacy might well be found to invade the liberty concept of the fifth amendment as broadened by the ninth amendment.

For its failure to locate the right to marital privacy within the penumbra of a specific amendment, the Court's holding may prove to be too unwieldly to be useful in future litigation. But, while this omission causes an incomplete utilization of the ninth amendment, the Court's holding that the right to marital privacy lies somewhere on the periphery of the Bill of Rights will perhaps prove to be quite strong in itself, for marital privacy encompasses a multitude of fundamental privacies that have heretofore gone unrecognized. Marital privacy, however, has become a unique right, one separate from a greater right—"the right to be let alone."[20] It seems that the Court's opinion may have laid the groundwork for the future interpretation that the right to be let alone was the right which was actually invaded in Connecticut.

George C. Piper

TORTS—LIMITATION OF ACTIONS—ESTOPPEL.— Appellants were involved in an automobile collision with appellee's insured. An insurance adjuster, appellee's agent, visited appellants three times within the next four months. The claims of the parties are in conflict, but according to appellants, the adjuster told them that appellee would take care of everything, that he wanted them to get well, and that they should call him when they determined the amount of their expenses. Appellee never paid appellants' expenses. More than one year after the collision, the appellants brought suit, and the appellee relied on the Kentucky one-year statute of limitations.[1] Appellants maintained that appellee should be estopped to plead the limitation, in that appellee had obstructed the prosecution of the action within the one-year period.[2] The trial court dismissed appellants' claim. *Held*: Affirmed. Appellants are presumed to know that their action will be barred after one year. They had no right to rely on the

[20] Olmstead v. United States, 277 U.S. 438, 478 (1928).

[1] Ky. Rev. Stat. 413.140 (1) [hereinafter cited as KRS].

[2] Although there is a statute covering this matter, KRS 413.190 (2), it is vaguely worded and is always construed in light of the common law.

representations of the adjuster, who is their "adversary."[3] *Cuppy v. General Accident Fire & Life Assurance Corporation*, 378 S.W.2d 629 (Ky. 1964).[3a]

The result reached in this case is in keeping with previous Kentucky decisions, but it is apparently in opposition to that of all other states.[4] The first Kentucky case directly in point is *Jackson v. Jackson*.[5] Plaintiff alleged that the adjuster for defendant's insurer told her that her claim would be settled, that once she had filed a claim with his company a civil action was unnecessary, and that he could not settle her claim until she was dismissed by her doctors. The court relied on *Hopperton v. Louisville & N.R. Co.*[6] and *Bryant v. Bryant*[7] in affirming the dismissal of plaintiff's claim. In *Bryant*, there was an express repudiation of the promise to pay, six months before the action was barred. In *Hopperton*, the misrepresentations were of law only, not of fact. Neither case involved misrepresentations by an insurance adjuster.

The next case in point after *Jackson* is *Pospisil v. Miller*.[8] There, the adjuster allegedly told plaintiff that his company had "assumed and recognized its liability to the plaintiff,"[9] that she would be fully compensated without having to consult an attorney, and that a settlement would be made when she recovered and when the amount of her medical expenses had been ascertained. Her claim was dismissed, the court citing *Jackson* and *Hopperton*. The next case is *Burke v. Blair*.[10] It is similar in facts and results and relies mainly upon *Pospisil*.

The principle case is the latest one in Kentucky. It relies directly upon *Pospisil* and *Burke*, and indirectly, of course, upon the line of cases discussed above. The law remains that, absent a firm offer to settle the claim for a specified amount, a fiducial or trust relationship between the parties, a promise of payment for an agreement not to sue (attackable by way of the statute of frauds, if not in writing), or a concealment of facts which prevented the institution of a suit, misrepresentations of fact inducing the plaintiff not to file suit within the prescribed period will not estop the defendant from

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[3] Appellants also entered on a contract theory, but failed because of the statute of frauds KRS 371.010.

[3a] 24 A.L.R.2d 1413, § 13.

[4] 53 C.J.S. *Limitation of Actions* § 25.

[5] 313 S.W.2d 868 (Ky. 1958).

[6] 17 Ky. L. Rep. 1322, 34 S.W. 895 (1896).

[7] 246 S.W.2d 457 (Ky. 1952).

[8] 343 S.W.2d 392 (Ky. 1961); see Note, 41 Texas L. Rev. 147 (1962).

[9] 343 S.W.2d at 393.

[10] 349 S.W.2d 836 (Ky. 1961).

claiming the statute of limitations as a bar to the action.[11] The following test, outlined in *Corpus Juris Secundum*, is frequently invoked: "The fraud must be of a character to prevent inquiry, or to elude investigation, or otherwise to mislead the party having the cause of action, . . . and the plaintiff is under a duty to exercise reasonable care and diligence."[12] However, Kentucky courts construe such rules so strictly against the plaintiff, that the aforementioned four categories exhaust the cases in which estoppel is granted.

All other states apparently take the opposite position, though cases directly in point are difficult to find. In Massachusetts, the defendant was estopped from pleading the statute of limitations after he assured the injured plaintiff's father that his company would pay all damages and persuaded him not to secure a lawyer.[13] In Pennsylvania, the following test is used: "If through fraud or concealment the defendant causes the plaintiff to relax his vigilence or deviate from his right of inquiry, the defendant is estopped from invoking the bar of limitation of action."[14]

In California, where the defendant's conduct is such as to mislead the plaintiff, or where he lulls the plaintiff into a false security, he may be estopped.[15]

It would seem that the Kentucky court should modify its position. The doctrine of estoppel is equitable in nature, and it should therefore be applied with a specially keen eye on justice. Granted that every man must be presumed to know the law, granted that the prudent man would regard an insurance adjuster as his legal adversary, it is when such stringent rules as these reach unjust and unreasonable results that any proper reply to them should be freely received by the court.

It is sometimes argued that a liberal use of estoppel will encourage plaintiffs in making fraudulent claims. In this situation however, the alternative is to encourage disreputable insurance companies in misleading the unwary injured plaintiff and to give the insurer every legal advantage when he is already in possession of the more powerful economic lever.

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[11] *Id.* at 838.

[12] 53 C.J.S. *Limitation of Actions* § 25.

[13] MacKeen v. Kasinskas, 333 Mass. 695, 132 N.E.2d 732 (1956); see also, McLearn v. Hill, 276 Mass. 519, 177 N.E. 617, 77 A.L.R. 1039 (1931).

[14] Nesbitt v. Erie Coach, 416 Pa. 89, 204 A.2d 473 (1964).

[15] United States Cas. Co. v. Industrial Accident Comm., 122 Cal. App. 2d 427, 265 P.2d 35 (1954).