IN THE SUPREME COURT OF FLORIDA

CASE NO.: 66,263
FOURTH DISTRICT COURT
OF APPEAL NO. 83-2016

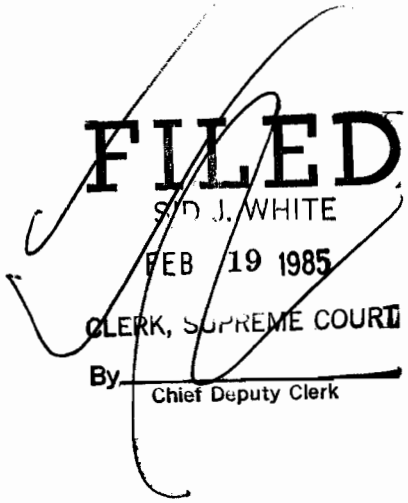
METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY, et al.,

Petitioners,

vs.

CHICAGO INSURANCE COMPANY,

Respondent.



BRIEF OF PETITIONER/METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY

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TOPICAL INDEX

CITATIONS OF AUTHORITY

PRELIMINARY STATEMENT

Petitioner, METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY, hereinafter referred to as METROPOLITAN, and Respondent, CHICAGO INSURANCE COMPANY, hereinafter referred to as CHICAGO, were Co-Defendants in the trial court below. CHICAGO was the Appellant and METROPOLITAN was the Appellee in the Fourth District Court of Appeal. The other two Defendants who were parties in the trial court but not parties to this Appeal are Travelers Insurance Company, Lacavalla Enterprises, Inc. and Glenn Trueman, and they shall be referred to herein as Travelers, Lacavalla and Trueman, respectively. Plaintiffs in the trial court, Nancy G. Moisan, Yvonne Moisan, Veronica Soucy and Roland Burgess, will be collectively referred to herein as Plaintiffs.

References to the Record on Appeal will be indicated by the letter "R" in parenthesis followed by the appropriate page number.

This Brief is accompanied by an Appendix pursuant to Rule 9.220 of the Florida Rules of Appellate Procedure and references to the Appendix shall be indicated by the letters "APP" in parenthesis followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

This case is before this Court upon a question certified by the Fourth District Court of Appeal as being a question of great public importance.

The instant case is an example of many recent decisions of trial courts and the courts of appeal in this state dealing with the order of responsibility for payment among multiple liability insurers of Defendants in a suit for personal injuries arising out of an automobile accident. What is unique about the instant case is that the Fourth District Court of Appeals has not only reversed the trial court's determination of the priority of applicable insurance coverage, but has ruled that one insurance company is entitled to indemnity from another insurance company.

The case below arose as a suit for damages as a result of personal injuries sustained in an automobile accident which occurred on November 29, 1981. Plaintiffs were the driver and two passengers in one of the vehicles. Trueman was the operator of a vehicle owned by Defendant, Lacavalla. There were three insurance carriers named as Defendants; Travelers, Chicago and Metropolitan. Travelers had a primary policy on behalf of the owner, Lacavalla. Chicago had an excess policy on behalf of the owner, Lacavalla. Metropolitan had a policy covering the driver, Trueman. Since it appeared that the value of the various claims being asserted would be significant, and in all probability would exceed the policy limits of Travelers' policy

covering the owner, a dispute arose between Chicago and Metropolitan as to the levels of coverage available to satisfy the various claims of Plaintiffs.

Travelers had a policy with limits of 10/20. Chicago's policy had total limits of 100/300, but they included the underlying limits, and as a result in this case, had applicable limits of 90/280. (App. 1)

Metropolitan's policy had limits of 100/300. It was obvious to all three insurance carriers from the outset of the litigation that the claims of the Plaintiffs being asserted would exceed the limits provided in the Travelers policy, and the claim of at least one Plaintiff would probably exceed the limits provided by two of the insurance carriers as regards their per person liability. Liability in the case was clear and it was essentially a question of the amounts to be recovered by the various Plaintiffs. Travelers always conceded that it provided the first layer of coverage, and made it known that its TWENTY THOUSAND DOLLARS ($20,000.00) was tendered for purposes of settlement negotiations. The issue between Chicago and Metropolitan was which carrier provided the second layer of coverage.

Chicago filed a Crossclaim for Indemnity against Truemann and Metropolitan. (App. 2-6) Chicago and Metropolitan both filed Crossclaims for Declaratory Relief, as regards the priority of insurance coverage available to satisfy the Plaintiffs' claims. (App 2-9) Metropolitan filed separate Motions for Summary Judgment as regards the Crossclaim for Indemnity and the Crossclaims for Declaratory Relief. (App. 10-12,62,63)

The Motions were heard by the trial court at separate hearings. As regards the Crossclaim for Indemnity, the trial court granted Metropolitan's Motion For Summary Judgment finding that Trueman was an insured pursuant to the provisions of the Chicago policy and that therefore Chicago was precluded from seeking indemnity against its own insured. (App. 13)

Therefter, at a subsequent hearing on Metropolitan's Motion For Summary Judgment as regards the Crossclaims for Declaratory Relief, the trial court followed Hartford Accident and Indemnity Company vs. Kellman, 375 So. 2d 26 (Fla. App. 3rd DCA 1979) and determined the priority of coverages available to satisfy the Plaintiffs' claims. Travelers had conceded that it was first in line as the owners' primary carrier. The trial court determined that there were two "classes" of coverage, with Travelers and Chicago providing coverage to the owner and Metropolitan providing coverage to the driver. The trial court determined that the coverage provided to the owner had to be exhausted before the coverage provided to the driver would be available to satisfy the claims asserted. (App. 14-15)

Chicago filed a Notice of Appeal as regards the trial court's determination of the Crossclaims for Declaratory Relief. (App. 16) Following the decision of Fourth District Court of Appeals in Travelers Insurance Company vs. Bruns, 443 So. 2d 959 (Fla. 1984) Chicago filed a motion with the Fourth

District to determine the appealability of the trial court's Summary Judgment and Metropolitan filed a Motion to Dismiss the Appeal. (App. 17-25)

The Fourth District Court of Appeal entered two separate orders dismissing the appeal, one on April 18, 1983, and another on April 29, 1983. (App. 26-27)

After the dismissal of the appeal of the trial court's determination of priority of coverage, Metropolitan requested Chicago to lead in settlement negotiations with the various Plaintiffs. Travelers had already indicated that it would pay its full policy limits of $20,000.00 as regards any settlement. Chicago's counsel corresponded to Metropolitan's counsel on June 28, 1983, and requested written permission from Metropolitan for Chicago to negotiate and settle the pending claims, if possible, while allowing Chicago to reserve its appellate rights as regards the order of the trial court determining the priority of coverage. (App.28-29) Metropolitan agreed to that request by correspondence dated July 8, 1983. (App.30)

Prior to trial, the two remaining Plaintiffs' claims were resolved. The Moisan claim was settled for the sum of Thirty Five Thousand Dollars ($35,000.00) and was satisfied within the coverage provided by Travelers and Chicago. The Soucy claim was settled for the sum of One Hundred Thirty Five Thousand Dollars ($135,000.00); Travelers tendered its policy limits of Ten Thousand

Dollars ($10,000.00), Chicago tendered its remaining policy limits of Ninety Thousand Dollars ($90,000.00), and Metropolitan paid the additional Thirty Five Thousand Dollars ($35,000.00) out of its coverage.

After the settlements were agreed to, Chicago filed and served a Motion For Entry of Judgment. (App.31 and 32) which came before the Court for hearing on August 23, 1983. At the request of Chicago and Travelers, the trial court entered a Final Judgment against those parties, but made it clear that such Judgment was not based upon the previous Summary Judgment entered in the cause, determining the priority of coverage. (App. 63).

Prior to the execution of the Final Judgment, a Stipulation and Order of Dismissal (App.35-36) was circulated at the hearing. It was executed by all parties and the Order of Dismissal was entered by the Court on the following day, August 24, 1983. The Order of Final Judgment against Travelers and Chicago was not entered by the trial court until August 31, 1983, seven days after the trial court had dismissed the action with prejudice.

Earlier in the proceedings, on September 16, 1983, Chicago had filed a Notice of Appeal of the Order of Final Judgment rendered August 31, 1983. (App. 37) Metropolitan filed a Motion to Dismiss that appeal. (App.38-42) The Fourth District Court of Appeal denied the Motion to Dismiss Appeal without prejudice to the issue being raised in the briefs to be filed with that Court. (App. 43)

On November 28, 1984, the Fourth District Court of Appeal entered a written opinion reversing the trial court's ruling

finding that Chicago, as the insurer of the owner of the subject vehicle, was entitled to indemnity from Metropolitan, the insurer of the driver of that vehicle. (App. 44-47) The Fourth District Court of Appeal rejected, and noted conflict with, the decision of the Third District Court of Appeal in Hartford vs. Kellman, supra, and indicated it would follow the decision of the First District Court of Appeal in Allstate Insurance Company vs. Fowler, 9 F.L.W. 1772 (FL 1st DCA August 15, 1984).

The Fourth District Court of Appeal certified the following the question as being one of great public importance:

> "Is the insurer of a party who is only vicariously liable to a third party for damages entitled to indemnity from an insurer of the active tort-feasor in a case where the active tort-feasor's limits have not been exhausted in payment to the injured party?"

Metropolitan has timely filed its Petition to this Court pursuant to Rule 9.030(a)(2)(A)(v) of the Florida Rules of Appellate Procedure. (App. 48)

POINT I

IS THE EXCESS INSURER OF THE OWNER OF A MOTOR VEHICLE, WHOSE POLICY BY ITS TERMS INSURES THE NEGLIGENT DRIVER OF THAT MOTOR VEHICLE, ENTITLED TO INDEMNITY FROM THE INSURER OF THE NEGLIGENT DRIVER?

The Fourth District Court of Appeal acknowledges that its decision in the instant case is in conflict with the Third District Court of Appeal's decision in Hartford vs. Kellman. A more significant conflict exists, however, between the decision of the Fourth District Court of Appeal and the long established principle that an insurer may not seek indemnity from its insured, established in Smith vs. Ryan, 142 So. 2d 139 (Fla. App. 2nd DCA 1962) and Ray vs. Earl, 277 So. 2d 73 (Fla. App. 2nd DCA 1973).

The Fourth District indicates that it is in disagreement with Hartford and prefers to follow Fowler. The decision of the Fourth District Court of Appeal in the instant case is different from Fowler, however, and this is indicated in the manner in which the Courts of Appeal have worded their respective certified questions.

Fowler appears to be concerned with the priority of coverage. The question certified was as follows:

> "Is the controlling law of Florida that if a party is only vacariously liable by way of the dangerous instrumentality doctrine, its insurer is entitled to follow that of the negligent driver regardless of policy language?"

The Fourth District Court of Appeal in the instant case, however, has determined the question as a matter of indemnity.

The question certified is:

> "Is the insurer of a party who is only vicariously liable to a third party for damages entitled to indemnity from an insurer of the active tort-feasor in a case where the active tort-feasor's limits have not been exhausted in payment to the injured party?"

In conjunction with its determination that Chicago is entitled to indemnity from Metropolitan, the Fourth District Court of Appeal has granted Chicago's Motion For Attorneys' Fees. (App. 49)

Another signficant difference between the Fourth District's opinion in the instant case and the First District's opinion in Fowler is that in Fowler, Travelers Insurance Company insured only Enterprise, the lessor of the subject motor vehicle and not the negligent operator, Morrison. In the instant case, the negligent operator, Trueman, is an insured under the Chicago policy. The Fourth District has indicated that Chicago is entitled to indemnity against Metropolitan, the primary insurer of the negligent driver, Trueman. The fact is that the only relationship between Metropolitan and Trueman is by way of a contract of insurance whereby Metropolitan indemnifies Trueman for his negligence. The only way Metropolitan could be obligated to indemnify Chicago, is if, in fact, the negligent driver, Trueman, is obligated to indemnify Chicago. Since that is precluded by the principle that an insurer may not seek indemnity from its own insured, the Fourth District's opinion finding that Metropolitan must indemnify Chicago is erroneous.

The particular Chicago policy in this case describes the Travelers policy covering Lacavalla to be the "immediate underlying policy." As regards liability coverage, the Travelers policy provides as follows:

> "We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible, because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. (App. 50)
>
> 'Covered person' as used in this Part means: . . .
>
> 2. Any person using your covered auto."

There is no question that Trueman is an insured under the Travelers policy.

The Chicago policy contains the following provision:

> "The provisions of the immediate underlying policy [Travelers] are incorporated as a part of this policy except for any obligation to investigate and defend and pay for costs and expenses incident to the same, the amount of the limits of liability, and 'other insurance' provision and any other provisions therein which are inconsistent with the provisions of this policy." (App. 51)

Therefore, Trueman is also an insured under Chicago's policy. An insurance company does not have a right to indemnify from an insured protected by its policy. Canal Insurance Company vs. Hartford Insurance Company, 415 So. 2d 1295 (Fla. App. 1st DCA 1982).

The Fourth District Court of Appeal ruled that by virtue of the excess language in the Chicago policy, Chicago had

"preserved any rights to favored status or indemnity that it may have with relation to the tort-feasor's policy with Metropolitan." (App. 47) Metropolitan was not negligent as regards this accident, its only obligation was to indemnify Trueman. Metropolitan has no contractual or common law obligation to indemnify Chicago. The only "indemnity" to which Chicago could be entitled would be from the negligent driver, Trueman. Only if Trueman were obligated to indemnify Chicago, would Metropolitan be obligated to likewise indemnify Trueman. As indicated above, since Chicago is precluded from seeking indemnity from Trueman, it is likewise precluded from seeking indemnity from Trueman's insurer.

Such a conclusion is neither illogical nor unfair. Chicago, as an excess insurer, was under no statutory obligation to include Trueman as an insured under the provisions of its policy. Travelers was obligated and did, in fact, provide coverage for Trueman, as the permissive user of the automobile being insured. Like Travelers in the Fowler case, Chicago could have drafted its policy to insure only Lacavalla, but it chose not to do so, and, instead, incorporated by reference the terms of the Travelers' insurance policy in the instant case, determining who is an insured. Chicago specifically drafted its policy to provide coverage for the negligent permissive user of the vehicle for which it was providing excess liability insurance, and, under those circumstances, it is precluded from seeking indemnity from its insured, the negligent driver, or from the primary insurer of the negligent driver, Metropolitan.

The trial court's order granting Metropolitan's Motion For Summary Judgment as regards Chicago's Crossclaim for Indemnity was correct and the decision of the Fourth District Court of Appeal reversing the trial court's order, providing that Chicago is entitled to indemnity from Metropolitan, and granting Chicago's Motion For Attorneys' Fees is erroneous and should be quashed.

POINT II

IN AN AUTOMOBILE NEGLIGENCE CASE, MUST THE INSURER OF THE NEGLIGENT DRIVER EXHAUST ITS COVERAGE IN THE SATISFACTION OF CLAIMS PRIOR TO THE EXCESS INSURER OF THE OWNER BEING REQUIRED TO MAKE PAYMENT UNDER ITS POLICY?

The trial court in the instant case was faced with an issue as to the priority of coverages to be provided by multiple overlapping insurance policies. The Plaintiffs sued three insurance companies, in addition to the owner and driver of the subject vehicle. Without a determination as to the priority of coverage available, it became difficult, if not impossible, to settle the pending claims and avoid a trial on the merits. All insurance carriers were desirous of having the matter of priority of coverage determined by the trial court, in order to facilitate settlement negotiations with the Plaintiff. As is often the case in situations of multiple overlapping coverage, the insurance carriers found it difficult to consider settling with the Plaintiffs without knowing exactly how much money each carrier would have to contribute to any settlement that might be obtained. There were three insurance policies. Who was first? Who was second? Who was third? It was even possible that two of the insurance policies shared second place. Travelers made the task of determining the priority of coverage somewhat simpler. It conceded that its policy was first in line. It was then left to the trial court to determine which policy would come into

play next, Metropolitan's or Chicago's, or whether those two policies would apply pro rata after the exhaustion of the benefits provided in the Travelers' policy.

The trial court appropriately followed the only appellate decision then available which addressed itself to the question of priority of coverage. Hartford Accident and Indemnity Company vs. Kellman, 375 So. 2d 26 (Fla. App. 3rd DCA 1979). In Hartford, all the excess insurance carriers wanted all the primary insurance exhausted before they were required to pay. The Third District Court of Appeal rejected that argument, however, and specifically held that each class of responsibility had to be considered separately and no provision in any insurance policy would be sufficient to change that policy's class. There is no question that where there is double or overlapping coverage the owner's insurer is primarily liable for damages to a third party injured as a result of negligence of the driver of the insured vehicle. State Farm Mutual Insurance Company vs. Universal Underwriters Insurance Company, 365 So. 2d 778 (Fla. App. 1st DCA 1978). The trial court followed this principle, then applied Hartford, supra, and determined that the Travelers and Chicago policies had to be exhausted before the Metropolitan policy, since both those policies covered the owner and Metropolitan covered the driver. The trial court specifically did not consider the "other insurance" clauses of the respective policies, since, under Hartford, no clause would be sufficient to change that policy's class.

The Third District Court of Appeal's decision in Hartford has not met with overwhelming approval in appellate decisions rendered following the determination by the trial court in the instant case. The Second District, the First District and now the Fourth District Court of Appeal, in the instant case, have rejected Hartford. Allstate Insurance Company vs. Fowler, 9 F.L.W. 1772 (FL 1st DCA August 15, 1984) and Sentry Insurance Company vs. Aetna Insurance Company, 450 So. 2d 1233 (Fla. 2nd DCA 1984).

The Third District's sister Court of Appeal may have rejected and unflatteringly disapproved of Hartford, but the fact is that Hartford presents a reasonable and practical solution to the everincreasing problem of overlapping insurance coverage in personal injury actions in this state. The Fourth District's approach to the problem in the instant case is particularly troublesome. Unlike Fowler, which determined the issue as a matter of priority of coverage, the Fourth District has determined the matter as an issue of indemnity. Consistent with its opinion, the Fourth District has granted Chicago's Motion to Assess Attorneys' Fees against Metropolitan. All three insurance companys were brought into the law suit by the Plaintiff. All defended on the liability claim and Chicago and Metropolitan filed Crossclaims in that action to establish the priority of coverage. Both the Travelers and Chicago policies insured Lacavalla, the owner, and Trueman, the driver. If the Fourth District Court of Appeal is right and an insurer

who carries a policy on the owner and driver, is entitled to indemnity from an insurer who provides a policy only for the driver, then Travelers, which is primarily obligated to defend the claim and provide primary coverage, would be in no different position than Chicago as regards a right to be indemnified by Metropolitan. If that were the case, then the law in this state that provides that the owner's insurer is primarily liable, would make no sense. The owner's carrier would defend and provide coverage for a claim only to demand to be reimbursed for its payment, including attorneys' fees, from an insurer for the driver. Under such circumstances, the insurer for the driver would most likely elect to undertake the defense itself.

Metropolitan would submit that Hartford was a sensible decision and should be approved by this Court to the extent that it determined that no "other insurance" clause contained in a policy would be effective to remove that policy from its "class" of responsibility. Metropolitan would further submit that the law of this state is and should continue to be as set forth in State Farm vs. Universal, supra, that in cases of double or overlapping coverage the owner's insurer is primarily liable for damages to a third party injured as a result of negligence of the driver of the insured vehicle.

The trial court was correct in its determination of the priority of coverages applicable in the instant case. The decision of the Fourth District Court of Appeal should be quashed and the decision of the trial court reinstated.

POINT III

DID THE FOURTH DISTRICT COURT OF APPEAL HAVE APPELLATE JURISDICTION TO ENTERTAIN CHICAGO'S APPEAL?

Metropolitan submits that the Fourth District Court of Appeal was without jurisdiction to entertain the Appeal prosecuted by Chicago of the trial court's orders concerning indemnity and priority of coverage. This issue was briefed and argued, but not discussed in the decision of the Fourth District Court of Appeal in the instant case.

Chicago's first attempted appeal of the trial court's order concerning priority of coverage, was dismissed by the Fourth District as premature. The Fourth District entered two separate orders dated April 18, 1983, and April 29, 1983, respectively, dismissing Chicago's appeal without prejudice to Chicago to raise the issue of coverage after trial and final disposition in the cause. (App. 26 -27)

Following the dismissal of Chicago's first appeal, all three insurance carriers who were Defendants in the case, were concerned that attempts be made to settle Plaintiffs' claims.

Although Chicago disagreed with the trial court's ruling that it provided the secondary level of coverage, Travelers had already indicated that it would pay its full policy limits of Twenty Thousand Dollars ($20,000.00) as regards any settlement, and it was appropriate that Chicago should lead in negotiating settlements with the various Plaintiffs. Counsel for Metropolitan

requested that they do so. In response, Chicago's counsel corresponded to Metropolitan's counsel on June 28, 1983, and requested written permission from Metropolitan for Chicago to negotiate and settle the pending claims, if possible, while allowing Chicago to reserve their appellate rights as regards the Order of the trial court determining the priority of coverage. (App. 28, 29) Metropolitan's counsel agreed to that request by correspondence dated July 8, 1983. (App. 30)

Prior to trial, the two remaining Plaintiffs' claims were resolved. The Moisan claim was settled for the sum of Thirty Five Thousand Dollars ($35,000.00) and was satisfied within the coverage provided by Travelers and Chicago. The Soucy claim was settled for the sum of One Hundred Thirty Five Thousand Dollars ($135,000.00); Travelers tendered its policy limits of Ten Thousand Dollars ($10,000.00), Chicago tendered its remaining policy limits of Ninety Thousand Dollars ($90,000.00), and Metropolitan paid the additional Thirty Five Thousand Dollars ($35,000.00) out of its coverage.

Chicago never consulted with Metropolitan as to what pleadings it might desire to have filed in conjunction with the settlements. After the settlements were agreed to, Chicago served a Motion For Entry of Judgment (App. 31-32) which came before the Court for hearing on August 23, 1983. At that hearing, Chicago's counsel first requested the trial court to enter a Final Judgment against Travelers, Chicago and Metropolitan. Metropolitan's counsel objected. Metropolitan contributed to a settlement of one

of Plaintiff's claims. Metropolitan had never agreed to have a Final Judgment entered against it that would be a formal recorded lien subjecting the assets of Metropolitan to the possibility of execution. The trial court agreed that there was a "substantial difference" in settling a case and having a Judgment of record entered against a party. (App. 52) It was then suggested that the Final Judgment be just entered against Chicago and Travelers. Counsel for Chicago wanted the "stipulated" Final Judgment to indicate that it was pursuant to the Court's previous Final Judgment. There was nothing in the record, however, to support the position that the settlement was entered into "pursuant" to the previous Summary Judgment and the trial court refused to so find. (App. 53) The trial court indicated that any Stipulation regarding the form of the Judgment should have been agreed to prior to the completion of the settlement:

> THE COURT: "This is infuriating to me that you all did not iron all of this out before you settled." (App. 54)

After much discussion at the hearing, counsel for Chicago indicated that, in any event, it would like a Final Judgment entered against it and Travelers.

> THE COURT: "If they want a judgment entered against them, I don't understand how you can complain about that.
>
> MR. ESLER: I probably can't, if they want a judgment against them, as long as it doesn't affect my clients.
>
> THE COURT: All right. . . .

THE COURT: Okay. I think the final judgment -- Whoever wants a final judgment entered against them, be my guest. Those who object to it, I think based on what has transpired in this case, the judgment cannot be entered against them. So who does that leave wanting a judgment?

MR. GODFREY: Chicago and Travelers.

THE COURT: Okay. So I'll enter a judgment against those two people, and then you do with it whatever you want, but I am not putting in there it was based on the Summary Judgment." (App. 54-55)

The Court made it clear that the judgment that would be entered was not based upon the previous Summary Judgment entered in the cause.

THE COURT: "The settlement may have been based upon that, but the judgment is not, so that has to be deleted." (App. 55)

One of the counsel for Chicago then indicated to the trial court that he would prepare a Final Judgment against Chicago and Travelers and submit same to the Court at a later date.

The Stipulation and Order of Dismissal (App. 35) was then discussed. All counsel, including counsel for Metropolitan, indicated that they would execute the Stipulation. (App. 56-57) Counsel for Travelers was not present at the hearing, but the trial court was advised that he would stop by the next day to sign the Stipulation. Counsel for Chicago advised the Court that it would be proper to enter the Order of Dismissal based upon the Stipulation, after it was signed by counsel for all parties

in the case. (App. 57) The Order of Dismissal was entered by the trial court on the following day, August 24, 1983.

The Order of Final Judgment entered against Travelers and Chicago at their request, was not entered by the trial court until August 31, 1983, seven days after the trial court had dismissed the action, with prejudice.

Chicago's previous appeal of the Summary Judgment regarding the issue of coverage was premature and the appeal was dismissed. It was clear from the separate Orders of Dismissal that the Fourth District would allow the coverage issue to be raised after trial and final disposition in the trial court. There was no trial, however. By it's decision in the instant case, it appears the Fourth District intended to allow the coverage dispute to be raised on a plenary appeal after settlement of the Plaintiffs' claims by the various insurance carriers. But even if that was the intent, the fact is that all judicial labor by the trial court, as regards the coverage dispute between Chicago and Metropolitan, ended on August 24, 1983, when the trial court entered its Final Order of Dismissal with prejudice. The trial court had no continuing jurisdiction to enter any further orders and the subsequently entered order of Final Judgment was a nullity. However, Chicago appealed the trial court's "Order of Final Judgment" against Travelers and Chicago entered August 31, 1983, which had nothing whatsoever to do with the coverage dispute. An appeal as regards the trial court's previous Final Summary Judgment would have to have been brought from the Order of Dismissal. (App. 35 - 36)

Moreover, prior to the filing of the appeal, Chicago had waived and abandoned its right to appeal any proceedings which occurred in the trial court below by virtue of its Stipulation with Metropolitan and other parties in this cause, which resulted in the trial court's Order of Dismissal entered August 24, 1983. (App. 35-36)

Chicago was obviously concerned with obtaining a negotiated settlement of the claims, if possible, and reserving its right to later appeal the coverage determination; that is reflected in its correspondence of June 28, 1983. (App. There is no question that Metropolitan had no objection to Chicago negotiating the claims and reserving its right of appeal as set forth in Metropolitan's correspondence of July 8, 1983. (App. 28-29) The Stipulation and Order of Dismissal, however, occurred <u>after</u> that exchange of correspondence on August 24, 1983. (App. 35-36) The Stipulation of the parties was as follows:

> "An amicable settlement of all matters and things in dispute between the parties hereto having been made it is
>
> STIPULATED AND AGREED by and between the parties hereto that the above cause may be dismissed with prejudice, each party to bear its own costs; all liens and subrogated interests are to be paid by the Plaintiff out of the proceeds of the settlement herein."

The Stipulation was executed by all parties to the cause, including Metropolitan and Chicago. Pursuant to the Stipulation, the cause was dismissed by the trial court with prejudice.

Although Chicago subsequently requested the trial court to enter a Final Judgment against it, and the court did so, that Final Judgment did not mention Metropolitan and had nothing to do with the coverage dispute between Chicago and Metropolitan. It should also be noted that that Final Judgment was only against Chicago and not its insured. Cf., Lumbermans Mutual Casualty Co. vs. Foremost Insurance Co., 425 So. 2d 1158 (Fla. 3rd DCA 1983).

Although there was clearly a prior agreement between Chicago and Metropolitan that Chicago could proceed with settlement negotiations while preserving its appellate rights, it is also clear that Chicago subsequently waived its appellate rights by later entering into a stipulation to the effect that all matters in dispute between the parties had been settled, and having that stipulation approved by the trial court. See Nail vs. Browning 76 So. 2d 679 (Fla. 1917).

It is obvious that Metropolitan agreed that Chicago could take the lead in perfecting settlements with the Plaintiffs while preserving its right to appeal the prior ruling of the trial court as regards priority of coverage. Metropolitan has stood by that agreement and has never taken the position that Chicago has waived its right to appeal by virtue of the settlements. Metropolitan has never agreed, nor has it even been requested to agree, to any procedural irregularities. Metropolitan was requested by Chicago and other parties to this lawsuit to execute a Stipulation for Dismissal, and it did so. The issue before

this Court is whether the Fourth District had jurisdiction to entertain the appeal below upon the record presented which was the result of procedures orchestrated by Chicago. Any issue as to an agreement of the parties as to the preservation of appellate rights is irrelevant to that determination, since neither the parties to the litigation nor even the trial court have the authority to confer jurisdiction upon an appellate court by agreement. Salinger vs. Salinger, 100 So. 2d 393 (Fla. 1958), and Lalow vs. Codoma, 88 So. 2d 752 (Fla. 1956).

Pursuant to Rinek vs. The State of Florida, Department of Transportation, 442 So. 2d 996 (Fla. App. 3rd DCA 1983), the appeal to the Fourth District should have been filed from the Stipulation and Order of Dismissal within thirty (30) days of the entry of that Order.

Chicago may well have had an intent in entering into the Stipulation for Dismissal different from that indicated by the plain wording of the document, but the fact remains, that prior to the trial court's Final Order of Final Judgment sought to be appealed herein, the case had already been dismissed with prejudice. At the very least, it would have been incumbent upon Chicago to move to set aside the dismissal of the case prior to requesting the court to enter the subject Final Judgment. Why Chicago circulated for signature an agreement which indicated that "an amicable settlement of all matters and things in dispute between the parties" had been made, is unclear, but that it what was done and Metropolitan would submit that the effect of the

Order of Dismissal entered pursuant to the Stipulation was to preclude an appeal by Chicago of a Final Summary Judgment rendered by the Court resolving a prior dispute between Chicago and Metropolitan.

The assumption of jurisdiction by the Fourth District Court of Appeal in the instant case was erroneous and proceedings before that Court below should be quashed.

POINT IV

DID THE FOURTH DISTRICT COURT OF APPEAL ERR IN GRANTING CHICAGO'S MOTION FOR ATTORNEYS' FEE?

The Plaintiffs brought this action against Metropolitan and Chicago, as well as other parties. Within that litigation Metropolitan and Chicago crossclaimed for a determination of Chicago's right to indemnity and in the priority of coverages available to satisfy the claims of the Plaintiffs. Neither Chicago nor Metropolitan claimed that it provided no coverage, the only argument was which company's excess coverage was available first after the exhaustion of the primary coverage provided by Travelers.

In conjunction with its appeal, Chicago filed a Motion For Attorneys' Fees requesting fees based upon §627.428 Florida Statutes and common law indemnity. Chicago requested fees incurred both in the trial and appellate courts. The Fourth District granted that motion and provided that the trial court would assess the fees upon remand. (App. 58-61) Metropolitan would submit that even if the Fourth District were correct in ruling that Chicago is entitled to indemnity from Metropolitan, the Order of the Fourth District Court of Appeal granting Chicago's Motion For Attorneys' Fees was in error.

Chicago clearly has no claim for attorneys' fees based upon §627.428 Florida Statutes. It is not within the class of persons protected by that Statute. Chicago is certainly not an insured of Metropolitan and would only have rights "by assignment" back against Metropolitan through a claim of Trueman. Trueman is

Chicago's insured and Chicago is therefore precluded from seeking indemnity from him through his insurance carrier, Metropolitan.

As regards Chicago's claim that it is entitled to fees under common law indemnity, Metropolitan would submit that there are no legally recoverable fees. Metropolitan concedes that the general rule is that the indemnitee is entitled to recover attorneys' fees as part of his damages incurred in litigation concerning the matter in which he is indemnified. In the instant case, Chicago assumably incurred fees in defense of the liability action before the trial court, and, in pursuing its claim for indemnity in the trial court and before the Fourth District Court of Appeal. First, attorneys' fees incurred in establishing the right to indemnification are not allowed. American and Foreign Insurance Company vs. Avis Rent-A-Car, 401 So. 2d 855 (Fla. 1st DCA 1981) Therefore, Chicago's fees incurred in prosecuting its Crossclaim for Indemnity and in prosecuting the appeal before the Fourth District Court of Appeal would not be recoverable. Second, Chicago would not be entitled to recover attorneys' fees incurred in defense of the Plaintiffs' claims at the trial court level. Unlike American and Foreign Insurance Company vs. Avis Rent-A-Car, supra, this was not a situation where one insurance company refused to undertake its primary duty to defend and another insurance company providing excess coverage was caused to undertake that duty under its policy. Metropolitan

and Chicago were both in secondary positions as regards coverage in the instant case. Travelers had the primary duty to defend and did so. Metropolitan and Chicago were joined as Defendants in the cause by Plaintiffs. They defended the case to protect their own interests, since it appeared that the claims of the Plaintiffs would exceed the coverage provided by Travelers and the coverage of the carrier that the Court determined provided the second layer of coverage. Because of the nature of the claims, both carriers would have continued to defend the case through trial regardless of the determination by the Court on the priority of coverage issue.

Chicago no more has a valid claim for attorneys' fees against Metropolitan in this case than it or Metropolitan would have against Travelers, who owed the primary duty to defend. In this case, no insurance carrier improperly refused the duty to defend which caused another insurance carrier to undertake that obligation. Chicago was not caused to incur any attorneys' fees by any action of Metropolitan. Although attorneys' fees are recoverable as part of a Plaintiff's "damages" in a claim for indemnity, it cannot be said in this case that Metropolitan "damaged" Chicago in any respect as regards incurring attorneys' fees in the defense of the Plaintiffs' claims before the trial court.

The Fourth District Court of Appeal has ruled in the instant case that Metropolitan must pay Chicago's attorneys' fees incurred

in this case, even though both are "excess" insurers, neither had a primary duty to defend, and Chicago was brought into the law suit by Plaintiffs, not Metropolitan. If the decision of the Fourth District Court of Appeal in the instant case is approved, then in any case where excess and primary insurers are joined as parties, or simply provide separate defenses in a case, excess carriers would be entitled to recover attorneys' fees from other insurance carriers whose coverage is determined to be available before theirs to satisfy the pending claims. This would be the case even though such fees were voluntarily incurred, or incurred because the carrier was joined in the litigation by the Plaintiff.

Furthermore, the award of attorneys' fees in clearly premature. In the instant case, as in Fowler, supra, there has been no determination that Chicago's insured is totally without fault as regards the subject accident.

Even if the decision of the Fourth District Court of Appeal, as regards indemnity is correct, the order of the Fourth District Court of Appeal granting attorneys' fees in this cause is erroneous and should be quashed.

CONCLUSION

For the reasons and authorities set forth above, the question certified by the Fourth District Court of Appeal as being a question of great public importance should be answered in the negative and the decision of the Fourth District Court of Appeal should be quashed.

Further, the order of the Fourth District granting Chicago's Motion For Attorneys' Fees should be quashed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to: PALLOTTO, WEIR & HAYSON, 4600 Sheridan Street, Suite 401, Hollywood, Florida 33021, DANIEL S. SCHWARTZ, ESQUIRE Ingraham Building, Suite 240, 25 S.E. 2nd Avenue, Miami, Florida 33131, RICHARD BERMAN, ESQUIRE One Financial Plaza, Suite 1318, Fort Lauderdale, Florida 33394 and CHRISTOPHER R. FERTIG, ESQUIRE 3104 South Andrews Avenue, Fort Lauderdale, Florida 33301 this 15th day of February, 1985.

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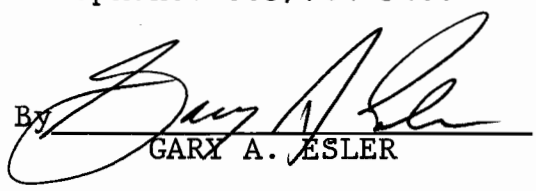
By 
GARY A. ESLER