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.

REPLY BRIEF OF PETITIONER METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY

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TOPICAL INDEX

CITATIONS OF AUTHORITY

PRELIMINARY STATEMENT

This Reply Brief is accompanied by a Supplemental Appendix and references thereto shall be indicated by the letters "Supp. App." followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent states that no evidence of any negligence on the part of LACAVALLA, as regards the subject accident, was presented. The fact is that no opportunity was provided for the presentation of evidence of the negligence of any party to the proceedings before the trial court. The trial court granted two Motions For Summary Judgment filed by METROPOLITAN. One as regards the indemnity claim of CHICAGO and another as regards the priority of coverage available to satisfy the claims of the Plaintiffs. The Motions For Summary Judgment were determined as a matter of law by the trial court. Because of the posture of the case, there was no reason to present evidence of the negligence of any party. In fact, there is no evidence in the record establishing the negligence of the driver involved in the subject accident, TRUEMAN.

Respondent, CHICAGO, suggests that the trial court's Order determining the priority of coverage in the instant case determined that TRUEMAN was "only insured by METROPOLITAN." (Respondent's Answer Brief, Page 2) The trial court's Final Summary Judgment on Crossclaims for Declaratory Relief merely found that there were two classes of coverage as regards the claims asserted by the Plaintiffs. The trial court found that TRAVELERS and CHICAGO were in the first class of coverage, providing primary and excess coverage for the owner, respectively, and that METROPOLITAN was in the second class of coverage providing primary coverage for the driver. The Court did not find that

METROPOLITAN was the "only" insurer of the driver. The trial court's Order only outlined the classes of coverage and did not discuss the "additional insureds" covered by the respective policies. Obviously, TRAVELERS covered the driver, TRUEMAN, as an "additional insured" and METROPOLITAN has always contended that CHICAGO provided coverage to the driver, TRUEMAN, as an "additional insured," and neither the trial court nor the Fourth District Court of Appeal, in the instant case, has determined otherwise.

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?

CHICAGO concedes that if TRUEMAN was an insured of CHICAGO, CHICAGO would be precluded from its indemnity claim. (Respondent's Answer Brief, Page 5)

There is no question that TRUEMAN is an insured under CHICAGO's policy. CHICAGO acknowledges that its policy incorporates the provisions of the immediately underlying policy (specifically, the owner's primary policy with TRAVELERS), but argues that there is a "conflict" between the provisions of the TRAVELERS policy defining "insured" and the "other insurance" provisions of the CHICAGO policy. There is no "conflict" whatsoever.

The CHICAGO policy names ANTHONY D. LACAVALLA as the insured. It specifically describes the TRAVELERS policy involved in the instant case as the "underlying insurance." CHICAGO's policy provides no definition of the term "insured." It does provide, however, that the provisions of the TRAVELERS policy are incorporated into the CHICAGO 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, any 'other insurance' provisions and any other provisions therein which are inconsistent with the provisions of this policy." (Supp. App. 7)

Paragraph 7 of the CHICAGO policy refers to "named insureds and other insureds." (Supp. App. 7)

The underlying insurance provided by TRAVELERS, provides coverage to the driver, TRUEMAN, as an additional insured, since he was a permissive driver of the subject vehicle. (Supp. App. 12) The provision defining "insured" in the TRAVELERS policy is incorporated by reference into the CHICAGO policy. (Supp. App. 5) There is nothing inconsistent whatsoever between the provision defining insured and the "other insurance" provision of the CHICAGO policy.

CHICAGO obviously drafted its policy and, for whatever reason, chose to incorporate by reference the provisions of the underlying TRAVELERS policy as regards the definition of "insured," rather then setting forth a separate provision defining "insured" in the CHICAGO policy itself. By policy language of its own chosing, CHICAGO has elected to provide coverage to a permissive driver of an insured automobile as an insured under its policy. CHICAGO concedes that under those circumstances, it would not be entitled to claim indemnity.

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?

CHICAGO argues that if METROPOLITAN is correct and CHICAGO insures TRUEMAN under its policy, then METROPOLITAN and TRUEMAN would be in the same "class." CHICAGO confuses "insured" with "class."

In Hartford Accident and Indemnity Company vs. Kellman, 375 So. 2d 26 (Fla. App. 3rd DCA 1979), the active tortfeasor was "insured" under various policies of insurance, but those policies were ranked in different classes. Just because the provisions of the CHICAGO policy include the driver, TRUEMAN, as an additional insured, does not change the CHICAGO policy's class. CHICAGO's policy is an "owner's" policy and METROPOLITAN's policy is a "driver's" policy. Pursuant to Hartford, all insurance provided under a particular class, must be exhausted before coverage provided under another class is reached. METROPOLITAN would submit that the trial court was correct in requiring all coverages provided to the owner be exhausted prior to reaching coverage provided on behalf of the driver.

POINT III

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

CHICAGO complains that METROPOLITAN has raised a jurisdictional issue "knowing that the Fourth District Court of Appeal has ignored its argument previously." (Respondent's Answer Brief, Page 15)

METROPOLITAN would respectfully submit that the Fourth District Court of Appeal is not the final arbiter of its own jurisdiction.

The fact remains that an order of dismissal, with prejudice, was entered by the trial court upon stipulation of the parties to the law suit on August 24, 1983, and all judicial labor by the trial court ended at that time. CHICAGO requested the trial court to enter a subsequent "Order of Final Judgment," but never requested the trial court to set aside the previous Order of Dismissal.

POINT IV

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

CHICAGO cites Brown vs. Financial Indemnity Company, 366 So. 2d 1273 (Fla. 4th DCA 1979) for the proposition that attorneys' fees are recoverable in the successful prosecution of an indemnification action in addition to fees incurred in defending the underlying law suit. The decision is not that clear and Brown does not necessarily stand for that proposition. In that case, Financial Indemnity originally sued Brown in the County Court to recover on an indemnification agreement. Brown obtained a judgment on the pleadings. On appeal before the Circuit Court, the judgment on the pleadings in favor of Brown was reversed and Financial Indemnity was granted attorneys' fees for the appeal. Brown filed a Petition For Certiorari to the Fourth District claiming that the contract of indemnity relied upon by Financial Indemnity did not specifically provide for attorneys' fees on appeal. The Fourth District denied the writ determining that fees were appropriate pursuant to the agreement of indemnity. The particular indemnity contract at issue in Brown is not set forth in the opinion, but it would appear that the contract itself provided for attorneys' fees to be awarded to the successful litigant.

Respondent has no claim for attorneys' fees under §627.428 (1), Florida Statutes. CHICAGO is not an insured under METROPOLITAN's policy and is therefore a third party claimant as regards that policy. Pursuant to Roberts vs. Carter, 350 So.2d 78 (Fla. 1977), as clarified by Industrial Fire & Casualty Insurance Company vs.

Prygocki, 422 So. 2d 314 (Fla. 1982), CHICAGO is precluded from seeking attorneys' fees from METROPOLITAN under §627.428 (1) Florida Statutes.

POINT V

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 TORTFEASOR, IN A CASE WHERE THE ACTIVE TORTFEASOR'S LIMITS HAVE NOT BEEN EXHAUSTED IN PAYMENT TO THE INJURED PARTY?

Respondent has added the above issue in its Answer Brief. Petitioner has put the issue in question form, but has used the wording suggested by Respondent.

In the instant case, Plaintiffs sued TRUEMAN, as driver, LACAVALLA, as owner, and three insurance companies, TRAVELERS, METROPOLITAN and CHICAGO. TRAVELERS provided primary coverage on behalf of the owner, LACAVALLA, and by the expressed terms of its policy provided coverage to the permissive user of the vehicle, TRUEMAN. METROPOLITAN carried insurance on behalf of TRUEMAN through a policy issued to his parents. TRUEMAN was a resident relative of his parents' household and entitled to liability coverage under the provisions of the METROPOLITAN policy. CHICAGO carried excess insurance on behalf of the owner, LACAVALLA. The CHICAGO policy contained no definition of "insured" and by its terms incorporated by reference the provisions of the specifically designated underlying policy issued by TRAVELERS, and, therefore, TRUEMAN was an insured under the CHICAGO policy. TRAVELERS had the primary duty to defend TRUEMAN and LACAVALLA and did so. CHICAGO and METROPOLITAN participated in the case because they were named as parties by the Plaintiffs. METROPOLITAN and CHICAGO were also concerned about the litigation and in all probability would have participated as "non parties," since it appeared that the value of Plaintiffs'

claims would exceed the policy limits provided in the TRAVELERS' policy, and perhaps the policy limit of the policy (CHICAGO or METROPOLITAN) determined by the Court to be next in line to satisfy the claims of the Plaintiffs after the exhaustion of the TRAVELERS' policy limits.

The trial court determined that the order of coverage available for the satisfaction of Plaintiffs' claims was 1) TRAVELERS 2) CHICAGO and 3) METROPOLITAN. The Fourth District Court of Appeal has determined that the trial court was in error and that the correct order of coverage should be 1) TRAVELERS 2) METROPOLITAN and 3) CHICAGO. In doing so, the Fourth District disagreed with the Third District's opinion in Hartford, supra, and determined to follow the First District's opinion in Fowler, supra. Unlike Fowler, the Fourth District Court of Appeal in the instant case determined the issue not as a matter of priority of coverage, but as a matter of indemnity, and ruled that CHICAGO was entitled to indemnity from METROPOLITAN and also the recovery of attorneys' fees.

Even assuming that CHICAGO had drafted its policy so as not to include the permissive driver (TRUEMAN) of the insured automobile as an insured, and assuming further that it was established in the proceedings below that LACAVALLA was in no way negligent, CHICAGO should still not be entitled to indemnity and the recovery of its attorneys' fees from METROPOLITAN under the circumstances of this case where the appellate court has reversed the priority of coverage established by the trial court.

This was not a case where the insureds were left swinging in the wind by an insurance company which denied coverage and

a defense requiring another insurance company to undertake the defense. METROPOLITAN and CHICAGO were both excess carriers in the instant case. The trial court and the Fourth District Court of Appeal simply differed in the determination of which excess coverage would apply after the probable exhaustion of the underlying primary coverage.

The amount of the policy limits provided in the underlying primary policy in such a situation is irrelevant to the issue of whether one excess carrier should be entitled to indemnity from another. The duty to defend of the primary carrier is unlimited and is unrelated to the amount of the policy limits. In the instant case, CHICAGO was never called upon to provide a defense to its insured through any action or inaction of METROPOLITAN. CHICAGO, like METROPOLITAN, was brought into the case by the Plaintiffs.

TRAVELERS, CHICAGO and METROPOLITAN all agreed to the settlements with the various Plaintiffs. The trial court determined that CHICAGO would pay after TRAVELERS and before METROPOLITAN. The ruling of the trial court can in no way create a right of indemnity between the two excess insurers. If the trial court was wrong, as indicated by the Fourth District Court of Appeal, then it is a matter priority of coverage and not indemnity. If the decision of the Fourth District Court of Appeal is determined to be correct, then METROPOLITAN should simply be required to reimburse CHICAGO for the excess sums paid by CHICAGO in settlement of the Plaintiffs' claims over and above what CHICAGO would have been required to pay had their policy been determined to be excess over METROPOLITAN's.

In any event, even if the claim of CHICAGO were conceptually one of indemnity, there would be no automatic right to attorneys' fees since no recoverable attorneys' fees were incurred by CHICAGO.

It is the law in this State that one litigant is not entitled to recover its attorneys' fees from another litigant, absent a statute or contract between the parties providing for same. The few exceptions to this general rule recognize that in some instances attorneys' fees are part of the actual damages sustained by a litigant. Where one party is obligated to indemnify another party, attorneys' fees incurred by the indemnitee in the underlying law suit which should have been defended by the indemnitor, become part of the damages of the indemnity action itself, in the same way that the judgment entered against the indemnitee in the underlying suit is a part of the indemnitee's damages for which the indemnitor is responsible.

In the instant case, even if the Fourth District were correct that CHICAGO is entitled to indemnity from METROPOLITAN, CHICAGO has simply sustained no damages in the nature of attorneys' fees. CHICAGO was not obligated to incur any attorneys' fees in any "underlying suit," because of a failure of METROPOLITAN to defend such underlying suit. CHICAGO incurred fees in the instant case because it was sued as a party by Plaintiffs. The only other fees incurred by CHICAGO were those involved in the crossclaims between CHICAGO and METROPOLITAN and those are not the sort of attorneys' fees that are recoverable in an action for indemnity.

If the decision of the Fourth District Court of Appeal in the instant case regarding indemnity and the attendant right to recovery of attorneys' fees is approved, it has the potential of causing absolute havoc in cases involving multiple levels of insurance coverage. Even in those cases where the various insurance companies are not named as parties because of the statutory bar, the various insurance companies providing coverage will take an active role in any personal injury litigation where it appears likely that the damages sustained by the Plaintiff will exceed the limits provided in one or more of the insurance policies. The Fourth District Court of Appeal has basically ruled that in every dispute between insurance carriers as to the priority of coverage available to satisfy a Plaintiff's claim, the successful insurance carrier will be entitled to the recovery of attorneys' fees. Such a threat would obviously work to discourage what might otherwise be valid disputes over priority of coverage and there is no contravailing public policy which would favor the recovery of attorneys' fees under such circumstances Petitioner would submit that priority of coverage issues in cases involving multiple levels of liability insurance should be handled like all other litigation in this State and attorneys' fees should not be recoverable unless provided by statute or contract between the parties.

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 U.S. mail to: PALLOTTO, WEIR & HAYSON, 4600 Sheridan Street, Sutie 401, Hollywood, Florida 33021, DANIEL S. SCHWARTZ, ESQUIRE 25 S.E. 2nd Avenue, Suite 240, Miami, Florida 33131, RICHARD BERMAN, ESQUIRE One Financial Plaza, Suite 1318, Fort Lauderdale, Florida 33394 and CHRISTOPHER FERTIG, ESQUIRE 3104 South Andrews Avenue, Fort Lauderdale, Florida 33131 this 3rd day of April, 1985.

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