IN THE SUPREME COURT
STATE OF FLORIDA

DAVID FORGIONE, as Assignee of HARRY TOFEL and LENA TOFEL,

Appellants,

vs.

DENNIS PIRTLE AGENCY, INC., STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, HERMAN B. FINE, CERRATO-FINE AGENCY, INC., a New York corporation, AMERICAN STATES INSURANCE COMPANY, an Indiana corporation, FIREMAN'S FUND INSURANCE COMPANY, a California corporation,,

Appellees.
_____/

CASE NO.: 88,908
U.S. 1 lth CIR. CASE NO.: 95-5516
DC DKT. NO.: 94-07254 CIV-SM



**APPELLEE'S, FIREMAN'S FUND INSURANCE COMPANY, ANSWER BRIEF**

McNARY and BEFERA, P.A.
Scott R. McNary, Esq.
Grove Forest Plaza, Suite 203
2937 S.W. 27th Avenue
Miami, FL 33133
(305) 442-1718

## TABLE OF CONTENTS

## TABLE OF CITATIONS

**STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES**

Pursuant to Florida Rules of Appellate Procedure and Federal Rules of Appellate Procedure 28(i) and recognizing that Appellant's allegations against FIREMAN'S FUND INSURANCE COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY were nearly identical, FIREMAN'S hereby adopts STATE FARM's Answer Brief.

## STATEMENT OF THE CASE AND FACTS

This action is the misbegotten offspring of an automobile accident which occurred December 23, 1990. The plaintiff and appellant in this case, DAVID FORGTONE ("FORGIONE") collided with another vehicle owned by HARRY and LENA TOFEL ("the TOFELS"). (R 1-32-3)[1] FORGIONE obtained a consent judgment against the TOFELS worth $600,000.00. Unable to completely satisfy the judgment because of a gap in the available insurance coverages, FORGTONE secured from the TOFEL's an assignment to sue their insurance agents and insurance companies. (R l-32-7, 8)

By the Second Amended Complaint, FORGTONE alleged the TOFELS held applicable insurance policies with Appellees, STATE FARM MUTUAL INSURANCE COMPANY ("STATE FARM") and FIREMAN'S FUND INSURANCE COMPANY ("FIREMAN'S") and that the agents for each failed to secure appropriate coverage for the TOFELS. (R l-32-4,7) FORGIONE alleged the insurance agents, HERMAN B. FINE, CERRATO-FINE AGENCY, INC.,

[1] Record references are made in accordance with the United States Eleventh Circuit Court of Appeals' procedure. The references are to volume number, document number, and page number.

and DENNIS PIRTLE AGENCY, INC. ("FINE, CERRATO, and PIRTLE," respectively) permitted a gap in coverage to exist. FORGIONE claimed STATE FARM and FIREMAN'S were vicariously liable because their agents failed to exercise reasonable skill, care, and diligence in the placing of appropriate insurance for the TOFELS. (R l-32-4,7,8) This liability was not based upon contract or statute.

The Federal District Court's Order granting the Motion to Dismiss to all defendants stated the assignment was prohibited by Florida law. By its Order, the district court determined the relationship between an insurer, its agent and the prospective insured was similar to that between an attorney and client. Such relationships are of a personal nature. (R l-30-13) Since the assignability of legal malpractice actions is prohibited due to their personal nature, so too was the TOFELS's assignment to FORGIONE.

Additionally, FORGIONE seeks the opportunity to file a Third Amended Complaint based upon a breach of contract. In its Order, the district court did not acknowledge any possible claim by FORGIONE against STATE FARM OR FIREMAN's arising from a breach of contract. Otherwise, the district court would not have dismissed FORGIONE's Second Amended Complaint with

prejudice. Furthermore, this issue is not before this Court. Rather, the following certified question from the United States Eleventh Circuit Court of Appeals is:

> "Can a claim for negligence by an insured against an insurance agent for failure to obtain proper insurance coverage be assigned to a third party?"

## SUMMARY OF THE ARGUMENT

The district court properly granted the Motion to Dismiss FORGIONE's Second Amended Complaint with Prejudice on the basis that the alleged cause of action rested on an impermissible assignment of rights. The TOFELS's assignment to FORGIONE on their claim for negligence against their insurance agents and insurers regarding the procurement of insurance coverage was invalid. This was a pure negligence claim arising from a breach of trust and confidence between the TOFELS and their insurance agents, FINE, CERRATO-FINE, and PIRTLE. Due to the personal nature of the claim, the district court determined Florida law precluded its assignment.

FORGIONE's claims against FIREMAN'S and STATE FARM were based upon FIREMAN'S and STATE FARM's alleged vicarious liability for the negligence of the TOFELS's insurance agents, FINE, CERRATO, and PIRTLE. This liability was not based upon contract or statute. Due to the personal nature of the claim, the district court determined Florida law precluded its assignment; and it did not acknowledge any possible claim by FORGIONE against FIREMAN'S or STATE FARM arising from a breach of contract. Accordingly, the TOFELS's assignment to FORGIONE was invalid.

## ARGUMENT AND CITATIONS OF AUTHORITY

THAT THE TRIAL COURT CORRECTLY DETERMINED THAT FLORIDA LAW PRECLUDES THE ASSIGNMENT OF AN INSURED'S NEGLIGENCE CLAIM AGAINST AN INSURANCE AGENT.

### I.

Florida law holds that the assignability of causes of action is the rule rather than the exception. Selfridge v. Allstate Insurance Co., 219 So.2d 127, 129 (Fla. 4th DCA 1969). However, Florida courts refuse the assignment of causes of action based on torts of a personal nature. McNulty v. Nationwide Mut. Ins. Co., 221 So.2d 208, 211 (Fla. 3d DCA 1969), rev. denied 229 So.2d 585 (Fla. 1969). See also, Ginsberg v. Lennar Florida Holdings, Inc., 645 So.2d 490, 496 n. 4 (Fla. 3d DCA 1994) (assuming that torts for conversion and theft occurred, such causes of action were personal to the assignor and therefore the assignee could not pursue those causes of action); Notarian v. Plantation AMC Jeep, Inc., 567 So.2d 1034, 1036 (Fla. 4th DCA 1990) (employee's wrongful discharge action not a tort claim and therefore assignable, but claim for intentional infliction of emotional distress was a personal injury claim and was not assignable); Florida Patient's Compensation Fund v. St. Paul Fire & Marine Ins. Co., 535 So.2d 335 (Fla. 4th

DCA 1990) approved, 559 So.2d 195 (Fla. 1990) (holding that personal injury and malpractice claims are not assignable); and Washington v. Fireman's Fund Insurance Co., 459 So.2d 1148 (Fla, 4th DCA 1984) (as a matter of public policy, the assignment of legal malpractice actions prohibited due to the personal nature of legal services).

In the instant case, the district court reasoned that the relationship between an insurer, agent, and prospective insured was similar to that between an attorney and client. Such relationships are of a personal nature. Consequently, just as the assignability of a legal malpractice action is prohibited, so too was the TOFELS's assignment to FORGIONE on any negligence claim against their insurers and agents for failing to obtain appropriate insurance coverage. In recognizing the similarity of the relationships, the trial court relied upon the Washington holding and the cases cited therein.

In Washington at 1149, the court noted that a majority of jurisdictions prohibited the assignment of legal malpractice claims due to the personal nature of legal services. Within its decision, the court cited Goodlev v. Wank & Wank, Inc., 62 Cal.App.3d 389, 133 Cal.Rptr.83 (1976). The Goodlev court reasoned that the assignment of legal malpractice actions was against public policy stating

in pertinent part:

> The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights... The almost certain end result of merchandizing [sic] such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession...

62 Cal.App.3d 397-398, 133 Cal.Rptr. 83.

As acknowledged by the parties, the assignment of legal malpractice claims would open the door to havoc. The losing party in a lawsuit, in which collecting a judgment was difficult, could assign to the winning party the right to assert a claim against the losing party's attorney for legal malpractice. This reasoning is applicable to the instant case.

FORGIONE attempted to secure the assignment of the TOFELS's insurance malpractice claim. To allow this assignment would create the problems identified and feared by the Goodlev court. If permitted, would anything prevent FORGIONE from assigning his assignment? To paraphrase Goodley, the assignment of such claims could relegate the insurance malpractice action to the market place and the highest bidder. This claim arose from a breach of trust and

confidence between the TOFELS and their agents who represented FIREMAN'S and STATE FARM. The relationship between the agents and the TOFELS was of a personal nature; the same as that between an attorney and client. The district court correctly dismissed the Second Amended Complaint.

II.

The attempt to lessen the significance of the relationship between the insurer and agent to the insured fails. An insurer or agent provides a personal service to the prospective insured. In return, the prospective insured places his trust in the insurer and/or agent to satisfy his needs. Here, the TOFELS relied upon their agents, FINE, CERRATO, and PIRTLE to meet their insurance needs.

When a broker agrees to obtain insurance for a client, the broker becomes the client's agent . Bennett v. Berk, 400 So.2d 484, 485 (Fla. 3d DCA 1981); First National Ins. Agency v. Leesburg Transfer & Storage. Inc., 139 So.2d 476, 479 (Fla. 2d DCA 1962). Essentially, the relationship between the prospective insured and agent becomes that of principal and agent. Again, this is the same relationship existing between an attorney and client.

As evidenced by Appleman, Insurance Law & Practice Section 8841 (Rev. Ed. 1981), an insurance broker is the agent of the insured in negotiating for a

policy, and owes a duty to his principal to exercise reasonable skill, care, and diligence in effecting insurance. The agreement to act on behalf of the principal causes the agent to become a fiduciary with a duty to act primarily for the benefit of another (the insured/principal) in matters connected with his undertaking. The Restatement (Second) of Agency §1, 13. This was the relationship which existed in the instant matter and therefore any assignment of an alleged negligence claim against the agent/insurer by the insured was invalid.

## III.

FORGIONE misapplies the decision in Aaron v. Allstate Ins. Co., 559 So.2d 275 (Fla. 4th DCA 1990). In Aaron, the tortfeasor assigned her rights to a claim against her insurer for an improper or inadequate defense. The complaint alleged several causes of action against the insurer in causing the entry of an excess judgment. The insurer moved to dismiss asserting that Florida law prohibited the assignment of a legal malpractice claim. The court permitted the assignment stating the complaint alleged breach of contract, bad faith, negligence and fraud in causing the entry of the excess judgment. Those causes of action not based on a personal tort such as malpractice, may be assignable. Aaron at 277. The Aaron court relied upon the earlier holding of Selfridge v. Allstate Insurance

Co., 219 So.2d 127 (Fla. 4th DCA 1969) in making its decision

In Selfridge, the issue was whether an insured's cause of action against his liability insurer for the alleged negligent failure to settle within policy limits was assignable. The Selfridge court recognized Florida's adherence to the common law proscription against the assignability of personal injury claims. In permitting the assignment, the court concluded that the cause of action was not based on a personal tort. Selfridge at 129.

FORGIONE asserts that since Florida law permits the assignment of causes of action for the recovery of excess judgments when an insurer allegedly acts in bad faith, that the subject assignment should be permitted. To the contrary, the assignment of causes of action for the recovery of excess judgments due to the alleged bad faith of an insurer are of a contractual nature, McNulty, 221 So.2d at 210. The McNulty court stated:

> It follows that the cause of action for an "excess," where one arises from bad faith, is bottomed on the contract, and that the nature of an action thereon is excontractu rather than in tort. The fact that the proofs offered to establish an insurer's bad faith in this connection may include or consist of showing; an act of negligence will not take the cause of action out of the contract category.

Id. (Emphasis added).

The McNulty holding is in keeping with the Selfridge decision. Selfridge permitted the assignment of a cause of action against an insurer for its alleged negligent failure to settle within policy limits. This is nothing more than a cause of action for bad faith arising from a contractual duty, rather than in tort. Whether the claim is couched in terms of negligence or bad faith, the cause of action arises from an alleged breach of an insurance contract which is assignable pursuant to Florida law.

## IV.

Essentially, FORGIONE's claims against FIREMAN'S and STATE FARM are identical. These claims were based upon FIREMAN'S and STATE FARM's alleged vicarious liability for the negligence of the TOFELS's insurance agents, FINE, CERRATO, and PIRTLE; not upon contract or statute. FORGIONE seeks the opportunity to file a Third Amended Complaint sounding in breach of contract. This issue is not before the Court and does not involve Florida law.

## CONCLUSION

Based upon the foregoing, the district court properly granted FIREMAN'S and STATE FARM's Motions to Dismiss FORGIONE's Second Amended Complaint with Prejudice. Accordingly, FIREMAN'S respectfully requests the Court answer the certified question in the negative.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this day of December , 1996 to: JOSEPH R. DAWSON, ESQ., Law Offices of Joseph R. Dawson, P.A., 320 Davie Boulevard, Fort Lauderdale, FL 33315, (305) 467-2100; THOMAS A. CONRAD, ESQ., Heller & Conrad, P.A., 2500 Hollywood Boulevard, Suite 402, Hollywood, FL 33020; and HAYES G. WOOD, ESQ., Wood & Quintairos, 7990 Red Road, Miami, FL 33143.

McNARY and BEFERA, P.A.
Attorneys for FIREMAN'S FUND
Grove Forest Plaza, Suite 203
2937 S.W. 27th Avenue
Miami, FL 33133
(305) 442-l 718

BY: _____
SCOTT R. McNARY, ESQ.
Fla. Bar No.: 201197

forgione\appeal\answer.brf