017

IN THE SUPEME COURT,
STATE OF FLORIDA

CASE NO.: 88,908

U.S. CIRCUIT COURT OF APPEALS,
ELVENTH CIRCUIT CASE NO.: 95-5516

DISTRICT COURT CASE NO.: 94-07254-CIV-SM

DAVID FORGIONE, AS ASSIGNEE OF HARRY TOFEL AND LENA TOFEL,

Appellant,

vs.

DENNIS PIRTLE AGENCY INC., STATE FARM MUTIJAL AUTOMOBILE INSURANCE COMPANY, an ILLINOIS CORPORATION, HERMAN B. FINE, CERRATO-FINE AGENCY INC., and FIREMAN'S FUND INSIJKANCE COMPANY, a CALIFORNIA CORPORATION,

Appellees.

APPELLANT'S INITIAL BRIEF

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF FLORIDA

LAW OFFICE OF JOSEPH R. DAWSON, P.A.
Joseph R. Dawson, Esquire
320 Davie Boulevard
Fort Lauderdale, Florida 333 15
(954) 467-2100

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Whether the trial court erred in granting with prejudice Appellees' Motion to Dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the basis that a claim for negligence by an insured against an insurance agent, or other agent of an insurer, cannot validly be assigned to a third-party as damages claimed to have been occasioned by the negligence of an insurer or insurance agent is a personal tort, and therefore non-assignable.

STATEMENT OF THE CASE AND FACTS

Appellant is the Plaintiff below, and he has filed this cause of action against Appellees, Defendants below. Appellant brings this case as assignee of all rights and claims against Appellees that are available to Harry Tofel and Lena Tofel (the "Tofels") pursuant to an "Assignment of Interest in Claims and Legal Action." executed on August 25, 1994. R-l -2-9. Appellant alleges that he was involved in an automobile accident on or about December 23, 1990, with a vehicle owned by the Tofels. R-l-2-3. Appellant obtained a final judgment against the Tofels in the amount of $600,000.00, which led to the assignment of rights at issue in this case. R-l-2-11.

Appellant's Second Amended Complaint (R-l-32) alleges that an agent of Appellee, State Farm, sold a policy of automobile insurance to the Tofels, and that this policy was in force at the time of the accident with Appellant. Appellant alleges that the agent for State Farm breached its duty of care by failing to exercise reasonable skill and diligence to ensure that there would be no gap in the limit of the base amount of coverage in the policy sold by State Farm and the minimum umbrella coverage that the Tofels obtained in a separate transaction with Appellee, Fireman's Fund.

Appellant alleges in the Second Amended Complaint that these

insurance companies, through the actions of their agents, failed to exercise reasonable skill and diligence to ensure that there existed no gap in coverage between the liability limits of the underlying insurance coverage and the minimum coverage of the umbrella policy. Appellant contends that, as a result of the negligence of these defendants, he has suffered damages equal to the gap in coverage between the liability limits of the underlying policy and the minimum coverage of the umbrella policy.

The trial court granted Appellee's Motion to Dismiss with prejudice, made pursuant to Federal Rule of Civil Procedure 12(b)(6) on October 31, 1995, (R-l-37) holding that, under Florida law, a claim alleging negligence in the procurement and placement of insurance coverage is a personal tort, and therefore cannot be validly assigned.

Appellant timely appealed this decision to the United States Circuit Court of Appeals, 11th Circuit, who certfied the question to this Honorable Court as a case of first impression. Tt is from this ruling that this appeal emanates and which was thereafter timely filed. (R-l-33)

SUMMARY OF ARGUMENT

The trial court erred, and abused its discretion in granting Appellee's Motion to Dismiss the Second Amended Complaint with prejudice. It was error to conclude that an assignment to a third-party by a tortfeasor of its claim for negligence against the tortfeasor's insurance agent and insurer in the procurement of insurance coverage is invalid in Florida because it is a personal tort thereby precluding assignment. The trial court improperly extended the definition of a personal tort to include negligence actions against insurance companies or their agents.

Moreover, it was error, and a abuse of discretion, to dismiss the case with prejudice as the trial court tacitly acknowledged a possible claim by Appellant against Appellee arising out of a breach of contract, which clearly is an assignable right.

ARGUMENT AND CITATIONS OF AUTHORITY

THAT THE TRIAL COURT ERRED IN EXTENDING THE DEFINITION OF A "PERSONAL TORT" TO CLAIMS AGAINST INSURANCE AGENTS AND COMPANIES THEREBY PROHIBITING ASSIGNMENT OF CLAIMS AGAINST THEM FOR NEGLIGENCE.

The trial court erred, and abused its discretion in granting Appellee's Motion to Dismiss with prejudice. In determining that the assignment by the Tofels to Appellant of the right to sue for the damages which occurred due to the placement of insurance coverage with a "gap" was invalid under Florida law, the trial court applied a flawed logic, and overreached when attempting to apply existing legal theory to a perceived case of first impression.

PART ONE

CLAIMS AGAINST INSURANCE AGENTS ARE NOT PERSONAL TORTS AND THEREFORE ARE ASSIGNABLE TO THIRD-PARTIES

It is conceded that in Florida, purely personal tort claims cannot be validly assigned. Having retreated from the common law rule prohibiting assignments of causes of action, assignability of a cause became the rule rather then the exception. See, Selfridge v. Allstate Insurance Company, 2 19 So. 2d 127 (Fla. 4th DCA 1969). However, causes of action arising out of a "personal tort" are not assignable. See, e.g., McNulty v. Nationwide Mutual Insurance Comnany, 22 1 So.

2d 208 (Fla. 3rd DCA 1969). For example, medical malpractice claims have been deemed to be too personal to be validly assigned. Florida Patient's Compensation Fund v. St. Paul Fire & Marine Insurance Company, 535 So, 2d 335 (Fla. 4th DCA 1990). Claims for intentional infliction of emotion distress were considered to be personal torts, and thus, not assignable. Notarian v. Plantation AMC Jeep. Inc., 567 So. 2d 1034 (Fla. 4th DCA 1990).

The concept of defining a "personal tort" was extended to legal malpractice actions in Florida, as in most other states. See, Washington v. Fireman's Fund Insurance Company, 459 So. 2d 1148 (Fla. 4th DCA 1984). The trial court seized this body of law to support its extension of the concept of "personal torts" to that of the nature of a negligence claim against an insurance agent or insurer. It is this extension that Appellant feels is contrary to the essential requirements of law.

It is interesting to note that the Washington court emphasized, in extending the definition of a "personal tort" to a claim of legal malpractice in Florida, that it was doing so because of the "personal nature of legal services which involve highly confidential relationships." Id., at 1149 (emphasis added). Clearly this is a significant distinguishable characteristic which contrasts the unique relationship between a client and lawyer, from an insurance agent and customer. While each is clearly employed to perform tasks for the person who has retained him or her, only

the lawyer has an obligation to keep disclosures confidential, and to otherwise adhere to the cannons of ethics which are not shared by insurance agents or insurance carriers. It is because of these standards which are applicable to attorneys uniquely, that there exists a strong public policy against permitting assignment of a legal malpractice claim. It would be unfair to expect an attorney to maintain such confidences when he or she could be sued by someone other than the client for the manner in which a legal matter was handled and yet, be restrained from disclosing client confidences regarding that matter.

It is submitted that there exists a separate, and equally compelling public policy rationale in disallowing assignments of claims for legal malpractice. This rationale is embodied in the well-reasoned decision of Joos v. Drillock, 338 N.W. 2d 736 (Mich Ct. App. 1983). In that case, a tortfeasor who received a judgment in excess of her policy limits assigned to plaintiff the right to sue the tortfeasor's lawyer for legal malpractice for the difference between the coverage afforded and the judgment attained, In Joos, that court acknowledged the unassignability of a legal malpractice claim. The rationale acknowledged that it would throw open the doors to havoc if the losing party in a lawsuit was permitted to assign to the victor the right to claim against the losing party's attorney for legal malpractice should the losing party prove uncollectible. This would open the floodgates to secondary litigation,

deleteriously affect the finality of any trial result, and undoubtedly have a chilling effect on a parties ability to secure counsel.

The rationale of the Joos court forms a sound basis for the refusal by the courts to allow assignment of legal malpractice claims. The basis for this rationale is also one which is unique to attorneys, and does not exist in the insurance agent/consumer relationship. Accordingly, the trial court's emphasis on Joos, as a basis to extend the definition of a personal tort prohibiting assignment of claims of negligence against insurance agents and their companies is grossly misplaced. Hardly analogous, the nature of the attorney/client relationship bears little resemblance to the relationship of the insurance agent and customer. Rather, the relationship between attorney and client is much closer in nature to that of a physician and patient, as purely personal and privileged matters are discussed and addressed, which cannot be revealed without permission. The differences between the nature of the relationships are so extensive, and significant that this Court should reject the trial court's invitation to extend this doctrine of personal tort to include such as claims as it is a position not well-founded.

A case which is far closer to being on point, and which should receive strong consideration by this Court in answering this question, is Peterson v. Brown, 457 N.W. 2d 745 (Minn. Ct. App. 1990). Peterson, appears to be the only case

directly on point regarding the assignability of a claim for negligence of an insurance agent. In that case, an employer assigned his claim against his insurance agent for failing to obtain proper insurance coverage to trustees of employees who were killed in an explosion at the employer's place of business. That court upheld the assignment of the cause of action against the insurance agent and the insurer as the "claimed violations [were] of a property right and not an injury to the person . . . . " Id., at 749. Thus, this Court determined that the negligent claim of an insured against his insurance agent and insurer for failure to procure proper coverage is **not** a "personal tort". Tnstead, it was determined that such a claim concerned a property right, and can therefore be validly assigned. This Court should rule consistent with this decision.

There is much persuasive case law in Florida concerning assignability of claims against insurance companies based upon allegations of negligence. This body of law suggests that any negligence in the handling of a claim by an insurer is not a personal tort and can be assigned. See, Aaron v. Allstate Insurance Company, 559 So. 2d 275 (Fla. 4th DCA 1990). In Aaron the tortfeasor assigned that portion of a j udgment which exceeded the policy limits afforded the tortfeasor to the Plaintiff, who filed a complaint against the insurer alleging breach of contract, bad faith, negligence and fraud. That court acknowledged that legal malpractice cannot be assigned to a third-party, but held that where a complaint alleged negligence "in

causing; the entrv of the excess judgment," that such negligence was not a personal tort. Id., at 277 (emphasis added). Thus, it would seem that Florida's appellate courts have recognized that a claim by an insured against an insurer for negligence is not a personal tort. Additionally, and significantly, it is axiomatic in Florida that a tortfeasor may assign a claim for bad faith against his insurer to a prevailing plaintiff for the amount awarded in excess of the coverage. See. e.g., Selfridge v. Allstate, 2 19 So. 2d 127 (Fla. 4th DCA 1969).

It is submitted as wholly illogical and highly inconsistent to rule that a tortfeasor who has a judgment entered against him for a sum in excess of his policy limits cannot assign a claim against his insurance agent or insurer for failure to procure appropriate coverage while a tortfeasor who has a judgment rendered against him for a sum in excess of his policy limits may assign a claim against this insurer for failure to negotiate in good faith. Both claims arise out of a failure of the insurer to meet their duty of care in the processing of insurance for their customer.

It is equally illogical to hold that an insurance agent's task to procure appropriate coverage involves unique circumstances similar to that of an attorney representing a client. To the contrary, placing insurance is a relatively easy task

requiring only a cursory inquiry into the needs of an insured.' In stretching the doctrine of invalidity of assigning legal malpractice claims to include insurance agent/insurer negligence claims, the trial court incorrectly bridged two wholly inconsistent vocations, and improperly dismissed Appellant's claim.

PART TWO

The Second Amended Complaint Should Not Have Been Dismissed with Prejudice

Moreover, even if the trial court were correct in this dismissal, the court erred in dismissing the case with prejudice, when a potential claim by Appellant against Appellees for breach of contract may have been plead. A complaint may not be dismissed with prejudice where the plaintiffs claims do not support the legal theory he relies upon since the court must determine if the allegations provide for relief on any possible theory. Robertson v. Johnston, 376 F.2d 43 (5th Cir. 1967). Tf granted an opportunity to file a Third Amended Complaint, Appellant could have alleged a breach of contract action, which is a validly assignable right, absent an agreement to the contrary. A Motion to Dismiss made pursuant to Federal Rule of Civil Procedure 12(b)(6) should only be granted when it appears beyond doubt that the plaintiff

1. It is suggested that an insurance agent's task of ensuring that a person's primary insurance liability limits meet the bottom of the umbrella policy limits is so basic in nature that it would not require knowledge of the special "circumstances" of the insured to place such coverage.

can prove no set of facts in support of his claim which would entitle him to relief, Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1975); Tiftarea Shopper. Inc. v. Georgia Shopper Inc., 786 F.2d 1 115, 1117-1 8 (1 lth Cir. 1986)(quoting Conley). Additionally, liberality should be used in allowing amendments to pleadings. Friedlander v. Nims, 755 F.2d 810 (1 lth Cir. 1985). Thus, this Honorable Court must determine whether the trial court abused its discretion in granting the Motion to Dismiss with prejudice.

CONCLUSION

This Honorable Court should reverse the Order Granting Defendant's Motion to Dismiss, and remand with directions to deny the Motion to Dismiss. Additionally, if this Honorable Court should find that the Motion to Dismiss was well-founded, then the case should be remanded with directions to modify the ruling to be a dismissal without prejudice to allow Appellant an opportunity to file a Third Amended Complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing were mailed by U.S. mail to R. Scott McNary, McNary & Befera, 2937 Southwest 27th Avenue, Suite 203, Miami, Florida 33133, Thomas A. Conrad, Esquire, Heller & Conrad, P.A., 2500 Hollywood Boulevard, Suite 401, Hollywood, Florida 33020, and Wood & Quintairos, the Florida Defense Lawyers Association, 7990 Red Road, Miami, Florida 33 143, this 1st day of November, 1996.

By _____

JOSEPH R. DAWSON, ESQUIRE
LAW OFFICES OF JOSEPH R. DAWSON, P.A.
320 Davie Boulevard
Fort Lauderdale, Florida 333 15
(954) 467-2100