ORIGINAL

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 MUTUAL AUTOMOBILE INSURANCE COMPANY, an ILLINOIS CORPORATION, HERMAN B. FINE, CERRATO-FINE AGENCY INC., and FIREMAN'S FUND INSURANCE COMPANY, a CALIFORNIA CORPORATION,

Appellees.
/

APPELLANT'S REPLY BRIEF

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

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ARGUMENT

In their respective briefs, the appellees bring forth several arguments to support the position that a claim against an insurance agent or insurance company for breach of duty in the placement of insurance should be found to be a "'personal" as opposed to a "non-personal" tort, thereby precluding assignment. Each of these rationales result in a disservice to the overriding purpose of liability insurance, which is to provide insurance coverage to third-parties who are the intended beneficiaries of liability insurance owned by insureds, and which are intended to provide coverage in the event that the insured's negligence causes damages to that third-party. These arguments seek to have this Court create an artificial extension of a doctrine which was intended to apply in a limited fashion to specific types of relationships.

Appellant does not dispute that purely personal torts cannot be assigned. The logic behind precluding assignment of claims for personal injuries, medical malpractice, and claims which are personal in nature is well placed. The public policy rationale for extending the definition of a personal tort to include legal malpractice is likewise well-reasoned and not disputed. However, the attempts to legitimize the comparison of the relation of a lawyer and client to that of an insurance agent to insured falls distinctly short of the mark.

The automobile insurance agent is in a retail oriented vocation. Limited knowledge of the needs of an insured are required and may be easily ascertained by utilization of a complete application form. Coverage, and the costs of coverage, are readily

quoted, and often-times there is not even direct contact with between the agent and the insured for the purposes of procuring the necessary automobile coverage at the fair market price. This contrasts greatly with the strict regulation of the Florida Bar and the concomitant obligations of an attorney regarding diligence, confidence, and competence. The nature of the task of an attorney requires a relationship which is of a much greater personal nature and which involves a relationship which is highly confidential. These were the criteria that were used in ***Washington v. Fireman's Fund Insurance Company, 459*** So. *2d 1148 (Flu. 4th DCA 1984)* to justify extending the doctrine of personal torts to legal malpractice claims. Likewise, the logic of ***Joos v. Drillock, 338 N.*** *W.2d 736 (Mich Ct. App. 1983)* would appear to protect against an unintended result which Appellees suggest will most certainly result from a ruling in favor of Appellant, to wit: an increase in litigation. In ***Joos,*** the court suggested that allowing assignment of a legal malpractice claim would lead to secondary litigation wherein a defendant could defray the cost of a judgment by assigning a claim for malpractice against the attorney for defendant to the plaintiff/creditor. Those same clear implications would seem to be inapplicable to the issue before this court, as there has been no showing that there exists an overwhelming number of claims by insured's against its insurer or agent for breach of a duty in the placement of insurance. Absent such a showing, it is tenuous speculation at best to suggest that allowing the assignment of a claim such as this would contribute to the number of cases filed in this state.

Florida clearly allows the assignment of a claim by an insured for bad-faith against its insurer to the injured party. ***See, Higgs v. Industrial Fire & Casualty Insurance***

Company, *501* So. *2d* 644 *(Flu. 3rd DCA 1986).* An insured can assign a cause of action against its insurer for breach of contract, bad faith, negligence, and fraud in the causing of a judgment in excess of the policy limits. ***Aaron v. Allstate Insurance Company,*** *559* ***So.*** *2d 275 (Flu. 4th DCA 1990),* relying upon ***Selfridge v. Allstate Insurance Company, 219*** So. *2d* 127 *(Flu. 4th DCA* 1969). Clearly these cases, which allow an insured to assign a claim against an insurer for breaching duties owed to the insured, suggest that the courts of this state recognize these claims to be sufficiently non-personal so as to be assignable. To make a distinction that an insured can assign a claim against an insurer for breaching a duty to settle and act reasonably to as to not place an insured in jeopardy of receiving a verdict in excess of coverage is not so dissimilar from a claim that an insurer breached a duty to make sure that there was not a gap between the outer limits of the insured's liability coverage and the bottom limits of the umbrella coverage. The end result, i.e., exposure beyond what the insured would have experienced but for the breach, is the same.

In attempting to distinguish these cases, Appellees argue that these claims emanate from contact and are therefore *ex contractu*, and Appellant's claim is purely negligence. This is an oversimplification which Appellant disputes. Clearly there are contractual implications with regard to the relationship between the insured and insurer or insurance agent arises out of contract in the same way the duty of an insurer to settle within the policy limits when doing so is reasonable arises out of the insurance contact. This further supports the position of Appellant in suggesting that assignment be validated. See, *generally,* ***McNulty v. Nationwide Mutual Insurance Company, 221 So.*** *2d 208 (Flu. 3rd DCA* 1969). Any duties of the insurer or the insurance agent emanated from the insurance

contract. This element renders the attempts by Appellees to distinguish ***Selfridge, Aaron,*** and their progeny misplaced.

Appellees cites this ***court*** to ***Carpenter v. Bachman Enterprises, Inc.,*** *657* So. *2d* 42 *(Flu. 3rd DCA 1995),* which relied heavily upon the case of ***Robarts v. Diaco,*** 581 So. *2d* 911 *(Fla. 2nd DCA* 1991). These cases uphold the right to assign a right to contribution which arose out of a tort liability scenario where the issue of damages was settled. Clearly this lends persuasive authority to the position of Appellant that a claim such as this, seeking to recover from the insurer or the insurance agent for an liquidated amount (i.e., the amount of the gap) should be assignable. The parallels between ***Carpenter*** and the case at bar are great enough to give guidance to this Honorable Court in justifying a refusal to accept the invitation of Appellees to extend an artificial protection to insurance companies and their agents when the duty of reasonable care is not met in the procurement of the insurance contract.

Contrary to the unsuported fears of Appellees, the sky of litigation will not fall if this Court were to conclude that assignments such as this are valid, as the failure of an insurance agent or company to properly place the insurance contract are not personal torts. Rather, a greater protection to the rights of those injured by tortfeasors will result, which is the ulitmate goal and reflective of manifest justice.

CONCLUSION

This Honorable Court should answer the certified question in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail to Thomas R. Conrad, Esquire, Attorney for Defendant, STATE FARM, 2500 Hollywood Boulevard, Suite 401, Hollywood, Florida 33020, and Scott R. McNary, Esquire, Attorney for Fireman's Fund, Grove Forest Plaza, 2937 Southwest 27th Avenue, Suite 203, Miami, Florida 33 133, this 13th day of February, 1997.

By _____
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