IN THE SUPREME COURT OF FLORIDA

METROPOLITAN CASUALTY INSURANCE COMPANY,

Petitioner, **CASE NO: SC07-2428**
LOWER TRIBUNAL NO: 5D06-3713

vs.

ROBERT TEPPER, and ANGEL M. LUCAS,

Respondents.
_____/

RESPONDENT, ANGEL M. LUCAS' AMENDED BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE AND FACTS

The plaintiff in the trial court is Robert Tepper, hereinafter, "Tepper," who brought a personal injury claim against an alleged tortfeasor, Angel M. Lucas, hereinafter, "Lucas," and Tepper's uninsured motorist carrier, Metropolitan Casualty Insurance Company, hereinafter, "Metropolitan." The action against Tepper and Metropolitan is still pending in the Circuit Court for Flagler County, Case No: 06-497-CA. As an initial caveat, the caption of the Petitioner's Brief on Jurisdiction is misleading and incomplete. The caption fails to identify that an Appellee below, and Respondent before this court is Angel M. Lucas. It is assumed that this mistake was not intended by Metropolitan, however, it must be identified at this point so that the remaining comments in this brief are clear.

As set forth in the Fifth District Court's opinion, Lucas was dismissed by the trial court upon motion filed by his attorney based upon the fact that Metropolitan had tendered Lucas' underlying policy limits on behalf of Allstate Insurance Company, Lucas' insurer, in order to preserve its right of subrogation, and these limits had been accepted by Tepper, who had asked permission from Metropolitan to accept the tendered Allstate policy limits. Lucas' Motion was based upon the provisions of Florida Statute 627.727 (6). The statute provides that Metropolitan's action against Lucas for subrogation must be brought, "upon final resolution of the

underinsured motorist claim." Since the action as between Tepper and Metropolitan in which Tepper was seeking underinsured motorist coverage from Metropolitan was not "finally resolved," the court dismissed the action between Tepper and Lucas. This dismissal was affirmed by the Fifth District Court of Appeal.

Metropolitan has filed this Petition contending that this decision is in direct conflict with the decision of the Second District Court rendered in Dominion of Canada v. State Farm Fire and Casualty Co., 754 So.2d 852 (2nd DCA 2000).

Dominion dealt with a specific and unique set of facts. In that case the plaintiff had filed an action in Canada seeking damages against an alleged tortfeasor, Johnson, and plaintiff's Canadian automobile insurer, Dominion, arising out of an accident in Florida, which took place March 1, 1993. For whatever reason, this action was never prosecuted and the action "lapsed" under Canadian law. In January of 1998, Dominion filed an action in Florida Johnson and State Farm seeking subrogation for the $20,000 it had paid to the plaintiff in April of 1994. The defendants asserted the Statute of Limitations as a defense and the trial court dismissed the action because facially the 4 year statute for bringing a personal injury claim had run before January of 1998. This dismissal based upon the Statute of Limitations was appealed to the Second District Court of Appeals.

The point of law addressed was a determination as to (a) what type of subrogation action was involved (i.e. contractual versus equitable) and (b) which limitations action would apply once the type of subrogation action was identified.

In Metropolitan, the plaintiff brought the action against both Lucas and Metropolitan after having accepted the tendered policy limits of Allstate which was paid by Metropolitan to plaintiff in order to preserve its' right of subrogation in accordance with Fla. Stat. 627.727 (6). Since the plaintiff had accepted the sums on behalf of the tortfeasor, Lucas and therefore waived any right to seek any excess judgment as to Lucas, the claim as between Tepper and Lucas was resolved and subject to dismissal by the court. The trial court dismissed Lucas from the action and Metropolitan appealed that order. The Fifth District determined that Metropolitan had standing to appeal the decision and specifically addressed the legal effect of the provisions of Fla. Stat. 627.727 (6), providing that an insurer in Metropolitan's position could only seek subrogation, "upon final resolution of the underinsured motorist claim."

The decision of the Fifth District Court did not have anything to do with when the statute of limitation ran, but rather the direct meaning of the aforesaid language of the Statute. Therefore, it is believed by Lucas that the cases are factually and legally dissimilar and not in direct conflict.

SUMMARY OF ARGUMENT

The decisions of the Fifth District Court of Appeal and the Second District Court of Appeal are not in direct conflict as defined by law and therefore this Court's discretionary jurisdiction to review this decision should be denied.

ARGUMENT

The discretionary review powers of this court are set forth in Article V, Section 3, of the Florida Constitution and Florida Rule of Appellate Procedure 9.030 (a) (2) (A). In this instance the Petitioner is relying upon the direct conflict provisions, which specifically state the jurisdiction may be granted if the decision, "(iv) expressly and directly conflict(s) with a decision of another district court of appeal or of the supreme court on the same question of law." The focus of the review must therefore be whether the two decisions directly conflict with each other "on the same question of law."

This court in Nielsen v. City of Sarasota, 117 So.2d 731,735 (Fla. 1960), stated that, "In order to assert our power to set aide the decision of a Court of Appeal on the conflict theory we must find in that decision, a real, live, and vital conflict ... " Such a conflict does not exist in this instance. In addition, the opinion must contain a conflicting statement or citation effectively establishing a point of

law upon which the decision rests. The Florida Star v. B.J.F.., 530 So.2d 286 (Fla. 1988).

In Dominion, the Second District reversed a dismissal of a subrogation claim based upon a running of the four year statute of limitations for a personal injury claim. In attempting to reconcile the "type" of subrogation action created by Fla. Stat. 627.727 (6), it argued that Dominion's view of the statute created a third type of subrogation action (as opposed to either a contractual or equitable claim). In an attempt to distinguish this claim as equitable subrogation and not subject to dismissal in the same manner as a contractual claim the court reviewed the legislative intent of Fla. Sta. 627.727 (6) (b) stating "In our view, the last sentence of subsection (6) (b) is a permissive provision, reflecting the legislature's intention that after an uninsured motorist insurer has paid its insured the amount of the proposed settlement, it is entitled to "seek subrogation."

The decision upheld a dismissal of the claim based upon contract and allowed the case to be returned to the trial court with the carrier amending its complaint to sound in equitable terms not barred by the statute of limitations.

The interpretation of the Statute by the Second District was not a legal holding dealing with whether the uninsured motorist carrier had a right to require the plaintiff to assert a claim against the tortfeasor after the plaintiff had accepted

the tendering of the tortfeasor's limits made by the underinsured carrier. Rather, the case involved a situation where the plaintiff allowed his tort claim and UIM claim to lapse. In the Metropolitan case, the plaintiff sued both the tortfeasor and Metropolitan before the uninsured motorist claim had been resolved. In Dominion, the UM claim was resolved. The case was dismissed by operation of law in Canada and, thus, there was finality within the terms of the Statute.

The Fifth District Court reconciled the statute and the contractual obligations created by the insuring agreements with respect to the joinder of the tortfeasor at the instance of the UM insurer, recognizing that once the plaintiff has agreed to accept the policy limits and to execute a full release in favor of the tortfeasor and his carrier, that there is no other reason for the plaintiff to sue the tortfeasor any longer because he is not seeking payment beyond the policy limits.

The Dominion case did not expand upon these issues in any manner, save to express in *dicta* that the statute would not have been designed to mandate when a UM insurer seeks subrogation in such circumstances. In contrast, the Metropolitan decision looks to the statute itself for direction as to when the suit is to be brought. The court held that "Thereafter, upon final resolution of the underinsured motorist's claim, the underinsured motorist insurer is entitled to seek subrogation against the

underinsured motorist and the liability insurer for amounts paid to the injured party. "

It is respectfully submitted that these rulings are not only not in conflict that they are in fact harmonious in that the Dominion court sought to prevent an injustice created by the UM carrier not being able to collect back from the tortfeasor's carrier due to an interpretation of which statute of limitations would apply. The Metropolitan decision makes it clear that after the final resolution of the UIM action, the time period begins and the collection process would include not only the tortfeasor, but properly the tortfeasor's carrier. Due to the non-joinder statute, neither the plaintiff nor the UIM carrier can bring the tortfeasor's carrier into the existing litigation, but it can after the resolution of the claim. The two decisions should be read as reconciling the law and not creating conflict.

It is acknowledged by the Respondent that the Dominion court did indeed discuss Fla. Stat. 627.727 (6) (b) and the meaning of the words, "...after the claimant's uninsured motorist claim is finally resolved." Supra at 856. That court's view was that this sentence in the statute does not, "...employ language to the effect that no action for subrogation may be filed until then."

The Metropolitan court found the language of the statute in this regard to be clear and unambiguous and held that Metropolitan could not seek to enforce its

subrogation rights in the pending underinsured motorist claim, "...but instead, must wait to bring a separate action against Lucas after final resolution of Tepper's UM claim."

These rulings are inconsistent as to the interpretation of the statutory language but not inconsistent as to the point of law upon which the interpretation of statutory language is based. If this court finds that point of law set forth in Metropolitan rests upon a conflicting point of law (i.e. when a subrogation action can be brought under the Statute) when compared to the Dominion decision then this court would have within its discretion the power to review the case. However, the Respondent raised this alleged conflict in decisions with the Fifth District Court in a timely filed Motion for Rehearing, which was denied. Thus, the Fifth District implicitly did not believe that its decision created any confusion in the law of this state. The Fifth District limited the application of the case to situations where the plaintiff has expressly stated that he is not seeking an excess judgment from the tortfeasor. This limitation may create some level of confusion in the law because the procedure whereby the underinsured motorist carrier steps in to pay the tortfeasor's policy limits in order to preserve it's subrogation rights is specifically outlined in Fla. Stat. 627.727 (6) (a), which provides that upon notification by the plaintiff/insured to his underinsured motorist carrier of a

proposed settlement that the UIM carrier then has 30 days to consider "authorization of the settlement or retention of the subrogation rights." The statute further states that if the underinsured motorist carrier does not elect to pay the amount of the settlement that the "...injured party may proceed to execute a full release in favor of the uninsured motorist carrier's liability insurer and its insurer to finalize the proposed settlement without prejudice to any uninsured motorist claim." The last sentence of the statute establishes that the criteria for a proposed settlement between the tortfeasor and tortfeasor's insurer and the plaintiff is that the plaintiff is willing to accept the tortfeasor's liability insurance limits and to execute a full release in favor of the tortfeasor and the liability carrier. This release effectively extinguishes the uninsured motorist carrier's right to collect the payments it makes from either the liability carrier or the tortfeasor himself. When the plaintiff proposes a settlement to the liability carrier under this statute, he always agrees to accept the policy limits in exchange for a complete release of their tortfeasor and the liability carrier. When the uninsured motorist carrier elects to make the payment of the policy limits on behalf of the tortfeasor and his carrier, it is contractually accepting the terms of the underlying settlement offer with respect to the settlement terms between the plaintiff and the tortfeasor. The plaintiff by accepting these tendered limits on behalf of the tortfeasor is equitably

estopped from seeking further damages from the tortfeasor himself because the terms of the settlement included the condition precedent of a release being executed. Therefore, the Metropolitan decision correctly holds that a tortfeasor must be dismissed from litigation where the UIM carrier has tendered the settlement offer or policy limits on his behalf and that it may bring a separate action against the tortfeasor and his insurer after the final resolution of the claim.

CONCLUSION

Wherefore, Respondent respectfully submits that there is not a direct conflict in the Metropolitan decision and the Dominion decision for the reasons set forth herein.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U. S. Mail this 7th day of February, 2008 to: Michael M. Bell, Esq., 2816 East Robinson St., Orlando, FL 32803 and to Jonathan Rotstein, Esq., 309 Oakridge Blvd., Suite B, Daytona Beach, FL 32118.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Rule 9.210 (a) (2), Fla. R. App. P. and is submitted to the Court in Times New Roman 14 pt. font.

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