IN THE SUPREME COURT OF FLORIDA

METROPOLITAN CASUALTY
INSURANCE COMPANY,

Defendant/Petitioner,

v.

ROBERT TEPPER,

Plaintiff/Respondent.

_____/

CASE NO.: _____
5DCA CASE NO.: 5D06-3713
FLAGLER
L.T. CASE NO.: 06-497-CA

DEFENDANT/PETITIONER METROPOLITAN CASUALTY INSURANCE COMPANY'S BRIEF IN SUPPORT OF PETITION TO INVOKE DISCRETIONARY JURISDICTION

MICHAEL M. BELL #458340
Bell & Roper, P.A.
2816 East Robinson Street
Orlando, Florida 32803
407-897-5150
Fax: 407-897-6947
Attorney for Defendant/Petitioner
Metropolitan

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE AND OF THE FACTS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL, INTERPRETING THE PROVISIONS OF FLORIDA STATUTE §627.727(6)(b) AS TO WHEN AN UNDERINSURED MOTORIST CARRIER CAN ASSERT A SUBROGATION CLAIM AGAINST A TORTFEASOR AND HIS INSURER. 4

CONCLUSION 8

CERTIFICATE OF SERVICE 9

CERTIFICATE OF COMPLIANCE 10

TABLE OF AUTHORITIES

Cases

Dominion of Canada v. State Farm Fire & Casualty Co.,
754 So.2d 852 (Fla. 2nd DCA 2000) 3, 5, 6

Macola v. Government Employees Ins. Co.,
953 So.2d 451 (Fla. 2006).....5

Wagner v. Orange County,
960 So.2d 785 (Fla. 5th DCA 2007) 5

Statutes

Florida Statutes, § 627.727(6).....4, 5

Florida Statutes, § 627.727(6)(b).....3, 4, 6, 7

STATEMENT OF THE CASE AND OF THE FACTS

Plaintiff/Respondent, Robert Tepper ("TEPPER"), was injured in an accident that occurred on May 2, 2006, when the bicycle he was operating collided with an automobile operated by Angel Lucas ("LUCAS").

At all times material, TEPPER was insured under an automobile liability insurance policy issued by Defendant/Petitioner Metropolitan Casualty Insurance Company ("METROPOLITAN").

TEPPER filed a two count Complaint against LUCAS and METROPOLITAN in the Circuit Court in an for Flagler County, Florida. In Count I, TEPPER, asserted a negligence claim against LUCAS. In Count II, TEPPER, sought to recover underinsured benefits from METROPOLITAN.

LUCAS' insurance carrier offered to tender policy limits of $25,000.00 in settlement of TEPPER's claim. TEPPER's Counsel advised METROPOLITAN of said offer pursuant to Florida Statute Section 627.727(6). TEPPER's Counsel requested METROPOLITAN grant TEPPER permission to accept the settlement offer. METROPOLITAN did not grant TEPPER permission to accept the settlement offer, but instead paid TEPPER $25,000.00 in compliance with Florida Statute Section 627.727(6), to preserve its subrogation rights against LUCAS.

TEPPER accepted the funds tendered by METROPOLITAN. LUCAS subsequently filed a Motion to Dismiss the Count of TEPPER's

Complaint directed to LUCAS. In her Motion to Dismiss, LUCAS argued that TEPPER had "constructively or actually assigned his rights as against LUCAS to METROPOLITAN and it is METROPOLITAN that has the right to sue LUCAS and not [TEPPER]."

Over objection, the Trial Court granted LUCAS' Motion to Dismiss. The Trial Court's Order specifically provided "... if Lucas is to be a part of these proceedings based on the present status of the case, it would have to be based upon a third party action brought by Metropolitan Casualty Insurance Company." METROPOLITAN filed an appeal of the Order granting LUCAS' Motion to Dismiss to the Fifth District Court of Appeal. On October 19, 2007, the Fifth District Court of Appeal affirmed the Trial Court's ruling. The Fifth District Court of Appeal determined that the Trial Court correctly granted the Motion to Dismiss. The Fifth District Court of Appeal also determined that the Trial Court erred in finding that METROPOLITAN could bring a third party action against LUCAS. The Fifth District determined that METROPOLITAN could not file a third party action against LUCAS for subrogation until "final resolution of the underinsured motorist claim."

METROPOLITAN filed a Motion for Rehearing, Clarification and/or Certification on November 5, 2007. By Order of November 28, 2007, the Fifth District Court of Appeal denied METROPOLITAN'S motion. This timely petition to invoke this Court's discretionary jurisdiction followed.

SUMMARY OF ARGUMENT

The Trial Court concluded that METROPOLITAN could file a third party action against LUCAS for subrogation.

The Fifth District Court of Appeal concluded that the Trial Court erred in finding that METROPOLITAN to bring a third party action against LUCAS. The Fifth District Court of Appeal concluded that METROPOLITAN could file a third party action against LUCAS, only after the final resolution of TEPPER's underinsured motorist claim. The Fifth District based its decision on the express language of Florida Statute Section 627.727(6)(b), which provides: "thereafter, upon final resolution of the underinsured motorist claim, the underinsured motorist insurer is entitled to seek subrogation against the underinsured motorist and the liability insurer for the amount paid to the injured party."

The Opinion of the Fifth District Court of Appeal expressly and directly conflicts with an Opinion of the Second District Court of Appeal in Dominion of Canada v. State Farm Fire and Casualty Co., 754 So. 2d 852 (Fla. 2nd DCA 2000). In Dominion, the Second District concluded that the last sentence of subsection (6)(b) was a permissive provision. The Second District held that the subject provision does not preclude the institution of a subrogation action until after the underinsured claim is resolved.

ARGUMENT

THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL, INTERPRETING THE PROVISION OF FLORIDA STATUTE SECTION 627.727(6)(B) AS TO WHEN AN UNDERINSURED MOTORIST CARRIER CAN ASSERT A SUBROGATION CLAIM AGAINST A TORTFEASOR AND HIS INSURER.

In the instant case, the Trial Court granted the tortfeasor's Motion to Dismiss. However, the Trial Court's Order specifically provided that as METROPOLITAN complied with the provisions of the Florida Statute Section 627.727(6), it could assert its right of subrogation against the tortfeasor by way of a third party action. The Fifth District Court of Appeal concluded that METROPOLITAN could not assert a third party action against LUCAS in the pending lawsuit. The Court concluded that Florida Statute Section 627.727(6)(b) required METROPOLITAN to wait until after a final resolution of TEPPER's underinsured motorist claim before asserting its subrogation claim against tortfeasor LUCAS, in a separate action.

More specifically, the Fifth District's Opinion provides:

> We do conclude, however, that the trial Court erred in finding that Metropolitan could bring a third-party action against Lucas. The last sentence of section 627.727(6)(b) specifically provides that a UM insurer is entitled to seek subrogation against the alleged tortfeasor (and its liability insurer) "upon final resolution of the underinsured motorist claim." Based on this clear and unambiguous language, we conclude that Metropolitan may not file a third-party action against Lucas, but, instead, must wait to bring a separate action against Lucas after final resolution of Tepper's UM claim.

The Fifth District acknowledged in footnote four of its opinion, that its interpretation of Florida Statute Section 627.727(6) was problematic, specifically indicating:

> We recognize that our decision requiring a separate action does not promote judicial efficiency because, absent settlement, the trial court may well be required to have two trials. We also agree that our decision increases the likelihood of inconsistent judgments. However, where legislative language is clear and unambiguous, we are not free to disregard such language. See Macola v. Gov't Employees Ins. Co., 953 So. 2d 451, 457 (Fla. 2006); Wagner v. Orange County, 960 So. 2d 785, 789 (Fla. 5th DCA 2007).

The Fifth District's opinion expressly and directly conflicts with the opinion of the Second District Court of Appeal in Dominion of Canada v. State Farm Fire and Casualty Co., 754 So. 2d 852 (2nd DCA 2000).

In Dominion, Canadian residents, Albert and Lucille Mitchel were struck by an automobile driven by Johnson while riding their bicycles in Seminole, Florida. At all times material, Johnson was insured under an automobile liability policy issued by State Farm. The Mitchels were insured under a policy issued by Dominion of Canada which provided underinsured motorist coverage. State Farm offered to tender its policy limits of $20,000.00 to settle the Mitchel claims against Johnson. Dominion refused to consent to the settlement and instead paid $20,000.00 on behalf of Johnson and State Farm to preserve its right of subrogation.

The Mitchels filed suit against Johnson and Dominion in Canada. Subsequently, the Mitchels decided not to pursue their claim and allowed it to lapse. Dominion contacted State Farm

seeking reimbursement of the $20,000.00 it paid the Mitchels to preserve its right of subrogation against Johnson and State Farm. State Farm refused to reimburse Dominion. Dominion filed suit against State Farm for subrogation. State Farm argued that Dominion's claim is barred by the statute of limitations. The Trial Court agreed and Dominion appealed the Trial Court's dismissal to the Second District Court of Appeal.

In Dominion v. Canada v. State Farm Fire and Cas. Co., 754 So. 2d 852 (Fla. 2nd DCA 2000), the Second District Court of Appeal's opinion contains a lengthy dissertation as to when an insurer may seek subrogation against a tortfeasor and his insurer pursuant to Florida Statute Section 627.727(6)(b). Specifically, the Court discussed the language of the statute which provides:

> *...Thereafter, upon final resolution of the underinsured motorist 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.* Fla. Stat. §627.727(6)(b)[emphasis added]

The Second District's opinion notes as follows:

> ... From this language Dominion infers that its right to file a subrogation action did not accrue until final resolution of the uninsured motorist claim and that, therefore, the limitations period did not commence until that event. Although we disagree with Dominion's reasoning, we concluded that its action should not have been dismissed in its entirety. Dominion, 754 So.2d @ 855.

The Court's opinion goes on to note that Dominion's interpretation of the statute, which is the same interpretation of the statute applied by the Fifth District Court of Appeal in

the instant case, would

> ...alter the nature of subrogation rights referred to in the statute in a significant way, in that it would create yet a third category of subrogation cases for purposes of a statute of limitations. In situations governed by the statute, the period for filing a subrogation action would not commence until the uninsured motorist claim was resolved, thus permitting the subrogee to sue for enforcement of the tortfeasor's liability long after the limitations period for either a contractual or equitable subrogation action had expired. Dominion, 754 So.2d @ 856.

The Second District further determined that Dominion's position, as with that of the Fifth District Court of Appeal in the instant case, would serve to enhance an uninsured motorist insurer's subrogation rights outside of the intended purpose and scope of the statute.

The Second District indicated:

> In our view, the last sentence of subsection (6)(b) is a permissive provision, reflecting the legislation'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 sentence contemplates that the uninsured motorist insurer would do so after the claimant's uninsured motorist claim is finally resolved. But it does not impose the latter as a condition precedent to the former, nor employ language to the effect that no action for subrogation may be filed until then. *Cf. §766.104(1),* Fla. Stat. (1977); §§766.106(2) and (3) Fla. Stat. (1977); §768.28(6)(a), Fla. Stat. (1997). Dominion, 754 So.2d @ 856-857.

The Fifth District's opinion in the instant case clearly and expressly conflicts with the decision of the Second District Court of Appeal in Dominion. Moreover, the position of the Fifth District Court of Appeal, by its own admission, will result in lack of judicial efficiency and inconsistent verdicts.

Further, the Fifth District's interpretation of Florida Statute Section 627.727(6)(b), as indicated by the Second District in Dominion, results in an enhancement of an uninsured motorist insurer's subrogation rights unintended by the legislature when it amended the statute in 1992.

CONCLUSION

This Court should exercise its discretion to take jurisdiction of this case and resolve the express and direct conflict between the Fifth District Court of Appeal's Opinion below and the decision of the Second District Court of Appeal on the same issue of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U. S. Mail this _____ day of January, 2008, to: **Jonathan Rotstein, Esquire,** The Law Offices of Rotstein & Shiffman, LLP, 309 Oakridge Boulevard, Suite B, Daytona Beach, Florida 32118 (386-252-5560 Fax: 386-238-6999); **Edward E. Haenftling, Jr., Esquire,** 210 South Beach Street, Suite 200, Daytona Beach, Florida 32114 (386-252-8999; 386-248-0808); and **Chobee Ebbets, Esquire,** Ebbets, Armstrong & Traster, P.A., 210 South Beach Street, Suite 200, Daytona Beach, Florida 32114 (386-253-2288).

MICHAEL M. BELL
#458340
Bell & Roper, P.A.
2816 East Robinson Street
Orlando, Florida 32803
407-897-5150
Fax: 407-897-6947
Attorney for Defendant/Petitioner
Metropolitan

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the brief complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P., and is submitted in the Courier New 12-point font.

MICHAEL M. BELL
#458340
Bell & Roper, P.A.
2816 East Robinson Street
Orlando, Florida 32803
407-897-5150
Fax: 407-897-6947
Attorney for Defendant/Petitioner
Metropolitan