

Application For Writs

No. 04 -C- 1436

COURT OF APPEAL, FIFTH CIRCUIT

STATE OF LOUISIANA

DEC 16 2004


Deputy Clerk

KAREN HABER AND KEITH FURY

VERSUS

JAWAD SHAKIR, WESTBANK CAB COMPANY, ABC INSURANCE COMPANY, BENNIE JEFFERSON
AND MAXIMAL INSURANCE, INC. D/B/A MAXIMAL INSURANCE AGENCY

IN RE BENNIE JEFFERSON AND MAXIMAL INSURANCE, INC. D/B/A MAXIMAL INSURANCE AGENCY

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF
JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE KERNAN A. HAND, DIVISION "H", NUMBER
593-465

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WRIT GRANTED.

(SEE ATTACHED)

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GRETNA, LOUISIANA, this 11TH day of January, 2005.

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KAREN HABER AND KEITH FURY

NO. 04-C-1436

VERSUS

FIFTH CIRCUIT

JAWAD SHAKIR, WESTBANK CAB
COMPANY, ABC INSURANCE COMPANY,
BENNIE JEFFERSON AND MAXIMAL
INSURANCE, INC. D/B/A MAXIMAL
INSURANCE AGENCY

COURT OF APPEAL
STATE OF LOUISIANA

WRIT GRANTED

Relators seek review of a ruling of the trial court denying their exception of no right of action. For the reasons stated herein, we grant the writ, reverse the ruling of the trial court and dismiss plaintiffs' amending and supplemental petition for damages against relators.

This lawsuit arises out of a vehicular collision which occurred on April 6, 2003 between a motorcycle operated by Keith Fury and containing passenger Karen Haber and a taxi cab driven by Jawad Shakir. In their petition filed on April 21, 2003 against Shakir, his employer and their insurer, plaintiffs claimed that Shakir negligently struck the side of their motorcycle causing them personal injury.

On August 7, 2003, plaintiffs filed an amending and supplemental petition for damages naming Bennie Jefferson, Maximal Insurance, Inc. and National Union Fire Insurance Company as additional defendants. Plaintiffs alleged that these additional defendants breached their obligation to procure insurance for Sharon Bell, the owner of the taxi cab which Shakir was operating on the date of the accident. Defendants Jefferson and Maximal Insurance filed

an exception of no right of action on the basis that plaintiffs have no interest in the cause of action asserted in the amending petition.

By judgment dated November 2, 2004, the trial court overruled defendant's exception of no right of action. Defendants now seek review of this ruling.

An action can be brought only by a person having a real and actual interest which he asserts. La. C.C.P. art. 681. The exception of no right of action tests whether the plaintiff has an interest to institute the suit. La. C.C.P. art. 927A(5). Its purpose is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. Louisiana Paddlewheels v. Louisiana Riverboat Gaming Com'n, 94-2015 (La. 11/30/94), 646 So.2d 885. It assumes that the petition states a valid cause of action and questions whether the plaintiff in the particular case has a legal interest in the subject matter of the litigation. Id.

The majority of Louisiana courts have held that a tortfeasor's insurance agent owes no legal duty to a tort victim to secure insurance coverage. Tu v. Guidry, 94-1168 (La. App. 3 Cir. 3/1/95), 653 So.2d 1, writ denied, 95-1510 (La. 9/22/95), 660 So.2d 485; Oliver v. Natchitoches Air Center, 506 So.2d 558 (La. App. 3 Cir. 1987), writs denied, 507 So.2d 220 (La. 1987); LeBouef v. Colony Ins.Co., 486 So.2d 760 (La. App. 1 Cir. 1986); Huffman v. Goodman, 33,647 (La. App. 2 Cir. 8/23/00), 766 So.2d 651.

The agent's duty to use due care in procuring proper insurance coverage for the insured/tortfeasor arises from the agreement between them, and it does not encompass the risk of harm to the

third party victim, such as plaintiffs in this case, who claim a duty on the part of the insurance agent to secure proper coverage for the insured. Campbell v. Continental-Emsco., 445 So.2d 70, 72-73 (La. App. 2 Cir. 1984), writ denied, 446 So.2d 1223 (La. 1984). The obligation is owed directly to the client whose interest in seeking liability insurance is to protect himself from possible financial loss due to claims against him. This obligation does not include a duty to protect the general public from risk of harm by the insured for which there is no coverage. Id.

Plaintiffs rely on the case of Sturcke v. Clark, 261 So.2d 717 (La.App. 4th Cir.1971) writ denied, 262 La. 308, 263 So.2d 46 (1972). In Sturcke, the subrogee of a plaintiff in a tort action was allowed to recover from an insurance agent who had collected a premium for liability as well as collision insurance and had, through clerical error, failed to procure the liability coverage. The court there found the agent undertook an obligation for the benefit of third parties citing La.C.C. Art. 1890 (now C.C. art. 1978) and found plaintiff had a right of action. We are not in accord with the holding in Sturcke and do not feel it is controlling on the issue before us.

Rather, we agree with the reasoning in the long line of cases rendered by the First, Second and Third Circuits which hold that tort victims have no right of action against insurance agents for their negligence in procuring insurance for the tortfeasor. Tu v. Guidry, 94-1168 (La. App. 3 Cir. 3/1/95), 653 So.2d 1, writ denied, 95-1510 (La. 9/22/95), 660 So.2d 485; Oliver v. Natchitoches Air Center, 506 So.2d 558 (La. App. 3 Cir. 1987), writs denied, 507 So.2d 220 (La. 1987); LeBouef v. Colony Ins.Co., 486 So.2d 760 (La. App. 1 Cir.

1986); Huffman v. Goodman, 33,647 (La. App. 2 Cir. 8/23/00), 766 So.2d 651. Campbell v. Continental-Emsco., 445 So.2d 70, (La. App. 2 Cir. 1984), writ denied, 446 So.2d 1223 (La. 1984).

In the present case, we do not perceive the contractual relationship between defendants and Sharon Bell as one for the benefit of these plaintiffs since it creates no obligation owed by the defendants to the plaintiffs. It affects only the parties to that contract and is enforceable by them alone. Such a contract for services imposed an obligation upon defendants Jefferson and Maximal to act as reasonable and prudent insurance agents in procuring the insurance desired by Bell. Any agreement between Bell and Jefferson exists separate and apart from the contract of insurance procured pursuant to such an agreement and is not governed by the same public policy considerations surrounding liability insurance

For the reasons assigned, the writ application is granted, the trial court's ruling is reversed, the exception of no right of action filed by defendants Bennie Jefferson and Maximal Insurance Agency is sustained, and plaintiffs' demands against them are dismissed with prejudice.

GRETNA, LOUISIANA, this 11TH day of January, 2005.



JUDGE WALTER J. ROTHSCHILD



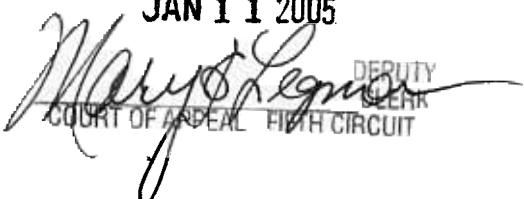
JUDGE SOL GOTHARD



JUDGE JAMES L. CANNELLA

A TRUE COPY
GRETNA

JAN 11 2005


DEPUTY CLERK
COURT OF APPEAL FIFTH CIRCUIT