IN THE SUPREME COURT OF FLORIDA

KENNETH DALE CUNNINGHAM and
TERESA MARIE CUNNINGHAM,

Petitioners,

vs.

STANDARD GUARANTY
INSURANCE COMPANY,

Respondent.
_____/

CASE NO. 81,056

DISTRICT COURT OF APPEAL
DCA No. 91-2785

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

David H. Burns (Fla. Bar No. 0350028)
Michael D. West (Fla. Bar No. 0710938)
Joseph E. Brooks (Fla. Bar No. 0880752)
Huey, Guilday, Kuersteiner & Tucker, P.A.
Highpoint Center, Suite 900
Post Office Box 1794
Tallahassee, Florida 32302
(904) 224-7091
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
Cases Cited ii
Statutes and Rules iv
Other Authorities iv

STATEMENT OF THE CASE AND FACTS 1

CERTIFIED QUESTION FOR REVIEW 2

DOES THE TRIAL COURT HAVE JURISDICTION TO DECIDE AN INSURER'S LIABILITY FOR BAD-FAITH HANDLING OF A CLAIM PRIOR TO FINAL DETERMINATION OF THE UNDERLYING TORT ACTION FOR DAMAGES BROUGHT BY THE INJURED PARTY AGAINST THE INSURED WHERE THE PARTIES STIPULATE THAT THE BAD-FAITH ACTION MAY BE TRIED BEFORE THE UNDERLYING NEGLIGENCE CLAIM?

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE DISTRICT COURT CORRECTLY APPLIED FIDELITY AND CASUALTY CO. v. COPE. 5

II. THE FACTUAL DISTINCTIONS MADE BY THE CUNNINGHAMS BETWEEN THE DECISION BELOW AND COPE ARE IMMATERIAL. 9

III. CASE LAW ADDRESSING THE CONCEPT OF SUBJECT MATTER JURISDICTION DOES NOT SUPPORT THE CUNNINGHAMS' POSITION. 13

IV. THE DISTRICT COURT'S DECISION IS CONSISTENT WITH BLANCHARD v. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. 20

V. THE CUNNINGHAMS FAIL MEANINGFULLY TO DISTINGUISH THIS CASE FROM DIXIE INSURANCE CO. v. GAFFNEY. 23

VI. POLICY CONSIDERATIONS DO NOT SUPPORT APPROVAL OF THE PROCEDURE FOLLOWED IN THIS CASE. 26

CONCLUSION 31

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

Cases Cited

BEC Constr. Corp. v. Gonzalez, 383 So.2d 1093 (Fla. 1st DCA 1980) 8

Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So.2d 1289 (Fla. 1991) 14, 20-22, 26

Bumby & Stimpson, Inc. v. Peninsula Utilities Corp., 179 So.2d 414 (Fla. 3d DCA 1965) 8

Camp v. St. Paul Fire & Marine Insurance Co., 18 F.L.W. S94 (Fla. February 4, 1993) 22, 23

Cates v. Heffernan, 154 Fla. 422, 18 So.2d 11, 16 (1944) (en banc) 10, 11

City of Miami v. Cosgrove, 516 So.2d 1125 (Fla. 3d DCA 1987) 17

Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979) 19

Deeb, Inc. v. Board of Public Instruction, 196 So.2d 22 (Fla. 2d DCA 1967) 16

Dixie Ins. Co. v. Gaffney, 582 So.2d 64 (Fla. 1st DCA 1991) 15, 23-25

Dixie Insurance Co. v. Gaffney, 16 F.L.W. 1585 (1st DCA June 14, 1991) 1

Drax Int'l Ltd. v. Division of Admin., 573 So.2d 105 (Fla. 4th DCA 1991) 19

Dyer v. Battle, 168 So.2d 175 (Fla. 2d DCA 1964) 16

Fidelity and Casualty Co. v. Cope, 462 So.2d 459 (Fla. 1985) 5-7, 9, 10, 14, 15, 19, 22, 26

Florida Export Tobacco v. Dep't of Revenue, 510 So.2d 936 (Fla. 1st DCA 1987), rev. denied, 519 So.2d 986 (Fla. 1987) 10

Florida Nat'l Bank v. Kassewitz, 156 Fla. 761, 25 So.2d 271 (1946) 11

Florida Physicians Ins. Reciprocal v. Avila, 473 So.2d 756 (Fla. 4th DCA 1985), rev. denied, 484 So.2d 7 (Fla. 1986) 8

Florida Power & Light Co. v. Canal Authority, 423 So.2d 421 (Fla. 5th DCA 1982) 15, 19, 20

Forston v. St. Paul Fire & Marine Ins. Co., 751 F.2d 1157 (11th Cir. 1985) 8

Hewitt v. State ex rel. Palmer, 108 Fla. 335, 146 So. 578 (1933) 16

Kelly v. Williams, 411 So.2d 902 (Fla. 5th DCA), review denied, 419 So.2d 1198 (Fla. 1982) 10

Lovett v. Lovett, 93 Fla. 611, 112 So. 768 (1927) . . 13, 15, 16

Malone v. Meres, 91 Fla. 709, 109 So. 677 (1926) 13-15

Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991) 10, 26

Principe Compania Naviera, S.A. v. Board of Comm'rs, 333 F.Supp. 353 (E.D. La. 1971) 18

Safeco Ins. Co. v. Ware, 401 So.2d 1129 (Fla. 4th DCA 1981) . 20

Schmauss v. Snoll, 245 So.2d 112 (Fla. 3d DCA 1971), cert. denied, 248 So.2d 172 (Fla. 1971) 18

Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (1930) . . . 16, 24

Shuster v. South Broward Hospital District Physicians Prof. Liab. Ins. Trust, 570 So.2d 1362 (Fla. 4th DCA 1990), approved, 591 So.2d 174 (Fla. 1992) 8

Standard Guaranty Ins. Co. v. Cunningham, 610 So.2d 458 (Fla. 5th DCA 1992) 5, 6, 24

State ex rel. Diamond Berk Ins. Agency v. Carroll, 102 So.2d 129 (Fla. 1958) 11

State ex rel. Washburn v. Hutchins, 101 Fla. 773, 135 So. 298 (1931) 17

State v. Sullivan, 95 Fla. 191, 116 So. 255 (1928) 16

Swebilius v. Florida Construction Industry Licensing Board, 365 So.2d 1069 (Fla. 1st DCA 1979) 17

Tamiami Trail Tours v. Wooten, 47 So.2d 743 (Fla. 1950) 8

Tom v. State ex rel. Tom, 143 So.2d 226 (Fla. 2d DCA 1962) 8, 11

Tosohatchee Game Preserve, Inc. v. Central & Southern Florida Flood Control District, 265 So.2d 681 (Fla. 1972) . . . 19

Wollard v. Lloyds and Companies of Lloyds, 439 So.2d 217 (Fla. 1983) 12

Statutes and Rules

Florida Rules of Civil Procedure 1.130(a) 20

Florida Rules of Civil Procedure 1.140(h)(2) 8

Section 73.021, Florida Statutes 20

Section 112.532, Florida Statutes 17

Section 624.155(1)(b)1, Florida Statutes 20, 22

Section 627.428, Florida Statutes (1979) 12

Section 768.28(6), Florida Statutes 19

Other Authorities

20 Am. Jur. 2d Courts §§ 87-88 (1965) 16

Henry P. Trawick, Jr., Trawick's Florida Practice and Procedure § 10-4 (1992 edition) 7

STATEMENT OF THE CASE AND FACTS

For consistency and clarity, references will be made to the appendix in the Petitioners' Initial Brief by the designation "Initial Brief App." with the appropriate tab and page number. References to the appendix in this Answer Brief will be by the designation "Ans. Brief App." with the appropriate tab and page number. Where necessary, references to the record below will be made by the designation "R," to the trial transcript by designation "T," and to the transcripts of the hearings in the trial court by the letter assigned by the circuit court clerk (e.g., Transcript A).

Respondent Standard Guaranty Insurance Company ("Standard Guaranty") basically agrees with the Statement of the Case and Facts as set forth by Petitioners Kenneth Dale Cunningham and Teresa Marie Cunningham (the "Cunninghams") in their Initial Brief, except to clarify one point as follows. The Cunninghams note that at the hearing on Standard Guaranty's post-trial motions in circuit court, Standard Guaranty for the first time raised the defense that the circuit court lacked subject matter jurisdiction because no judgment in excess of policy limits had been entered in the underlying action (Initial Brief at 3). The hearing was held on June 26, 1991 (Transcript C). Standard Guaranty raised the defense at that time because Standard Guaranty had just become aware of the First District Court of Appeal's recently published decision in Dixie Insurance Co. v. Gaffney, 16 F.L.W. 1585 (1st DCA June 14, 1991), which indicated that the circuit court lacked jurisdiction

in the instant case because no judgment in excess of policy limits had been entered in the underlying action. This was the basis of Standard Guaranty's post-trial motion (Transcript C, 40-41; Initial Brief App. 6).

CERTIFIED QUESTION FOR REVIEW

DOES THE TRIAL COURT HAVE JURISDICTION TO DECIDE AN INSURER'S LIABILITY FOR BAD-FAITH HANDLING OF A CLAIM PRIOR TO FINAL DETERMINATION OF THE UNDERLYING TORT ACTION FOR DAMAGES BROUGHT BY THE INJURED PARTY AGAINST THE INSURED WHERE THE PARTIES STIPULATE THAT THE BAD-FAITH ACTION MAY BE TRIED BEFORE THE UNDERLYING NEGLIGENCE CLAIM?

SUMMARY OF ARGUMENT

Notwithstanding the parties' stipulation to try the bad faith claim first, the circuit court lacked subject matter jurisdiction to do so because there is no final judgment against the insured in excess of policy limits, and therefore a cause of action for bad faith handling of the Cunninghams' claim does not exist. The absence of an excess judgment is more than a mere pleading defect that can be waived, it is an essential ingredient for the exercise of the court's jurisdiction. Such a defect is never waived and can be raised even on appeal.

The stipulations between the parties do not constitute the "functional equivalent" of an excess judgment because there has been no determination of damages to the insured, and the stipulations do not legally obligate the insured to pay anything, nor can a lien attach. Moreover, deeming the stipulations to be the functional equivalent of an excess judgment would in effect overrule the well-established legal principles that parties cannot create subject matter jurisdiction by stipulation or other conduct. The Cunninghams are not deprived of any remedy and may still pursue a bad faith claim against Standard Guaranty after a judgment, if any, is entered against the insured in excess of policy limits in the underlying action.

The circuit court does not have subject matter jurisdiction in this case either in the general sense of the term or the particular sense, since a bad faith cause of action does not yet exist. The court's jurisdiction is not and cannot be lawfully invoked, and

therefore cannot be exercised, because the material fact most necessary to warrant the exercise of the court's power, an excess judgment, does not exist. The district court's decision is entirely consistent with the prior decisions of that court and this court.

Policy considerations do not support the trying of a bad faith claim before the underlying tort claim for damages. There is no assurance of increased judicial economy because there is no assurance that two actions will not be necessary even if the bad faith claim is tried first. Indeed, even though the bad faith claim was tried first here, the underlying claim for damages was subsequently noticed for trial. Additionally, a verdict on either the underlying claim or the bad faith claim is equally as likely to promote settlement of the other. Finally, requiring a determination of the underlying claim before trying the bad faith claim does not preclude agreements affording insureds complete protection from the financial consequences of an excess judgment.

The Cunninghams fail to show that plaintiffs pursuing bad faith claims are harmed or prejudiced under current law requiring an excess judgment first, or that approval of the procedure used in this case is of great importance or value to the public.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY APPLIED FIDELITY AND CASUALTY CO. v. COPE.

In Fidelity and Casualty Co. v. Cope, 462 So.2d 459 (Fla. 1985), this court held that, absent a prior assignment of the bad faith cause of action, an injured third party who has secured a judgment in excess of a tortfeasor's insurance coverage cannot maintain a bad faith claim against the insurer where the injured party has executed a release of his claim against the tortfeasor who has satisfied the judgment. As a basis for so holding, this court significantly said that since the judgment had been satisfied, the injured third party "no longer had a cause of action." Id. at 461 (emphasis supplied).

In the instant case, the district court noted that the Cunninghams' bad faith claim against Standard Guaranty was tried before their underlying negligence claim for damages against Standard Guaranty's insured, and that the only issue tried was whether Standard Guaranty had acted in bad faith. Standard Guaranty Ins. Co. v. Cunningham, 610 So.2d 458, 460 (Fla. 5th DCA 1992). Citing Cope, the district court said, "[n]o claim for damages was presented to the jury, nor could such claim be presented prior to entry of a verdict against the insured which exceeded the policy limits." Id. (emphasis supplied). The district court plainly recognized that the Cunninghams could not bring a bad faith claim because they did not have one.

The Cunninghams contend that the answer to the question certified by the district court depends upon whether the failure to plead the existence of an excess judgment constitutes a defect that deprives the trial court of subject matter jurisdiction or a defect that presents the defense of failure to state a cause of action, which can be waived (Initial Brief at 7-8). The Cunninghams mischaracterize this case and misapprehend the law.

First, this case is not about a mere pleading defect; it is not about the mere failure to state a cause of action, but about the fundamental failure to have a cause of action. Nowhere in its opinion does the district court indicate that its decision was based upon a mere pleading deficiency. To the contrary, the district court said, "[w]e find that the trial court lacked subject-matter jurisdiction to determine whether Standard [Guaranty] acted in bad faith in handling the negligence claim against the insured, James, absent a final judgment against its insured which exceeded the policy limits." 610 So.2d at 459 (emphasis supplied). Similarly, the issue in Cope was not whether there was a mere failure to state a cause of action. Rather, the issue was whether a cause of action for bad faith any longer existed. See 462 So.2d at 460-61. This court held that the release and satisfaction of judgment meant that the injured party "no longer had a cause of action." Id. at 461 (emphasis supplied). More compelling than Cope, the Cunninghams have never had a cause of action.

Second, lack of subject matter jurisdiction and failure to state a cause of action are not mutually exclusive defects in this case. The Cunninghams' failure to plead the existence of an excess judgment resulted in their failure to state a cause of action, which they admit (Initial Brief at 15), and the absence of an excess judgment as a matter of law means they have no bad faith claim, and therefore no subject matter, over which the circuit court can exercise jurisdiction. The Cunninghams cannot simply correct a defect in their pleading by amending their complaint to allege an excess judgment. None exists. As a noted authority on civil procedure has stated:

> Defects [in pleading] that are not asserted in the motion [to dismiss] are waived, but this applies only to those defects that are remediable. If the pleading attempts to state a cause of action that is unknown to the law, the defect is never waived. The distinction is between a defectively stated cause of action and no cause of action at all. [Footnote and citation omitted.]

Henry P. Trawick, Jr., Trawick's Florida Practice and Procedure § 10-4 (1992 edition).

Not only does the Cunninghams' Amended Complaint fail to state a cause of action for bad faith (R. 6-9), it cannot state a cause of action for bad faith because no excess judgment exists. Such a defect is never waived because an excess judgment is an "essential ingredient" to a legally cognizable cause of action for bad faith. See Cope, 462 So.2d at 461. Until an excess judgment is entered, there is no cause of action at all and therefore no basis for a court to exercise jurisdiction over a bad faith claim, i.e., the

court lacks subject matter jurisdiction. Cf. BEC Constr. Corp. v. Gonzalez, 383 So.2d 1093 (Fla. 1st DCA 1980) (since claim for industrial claims benefits on behalf of deceased client was a nullity, industrial claims judge and court lacked jurisdiction over it and associated claim for attorneys' fees); Bumby & Stimpson, Inc. v. Peninsula Utilities Corp., 179 So.2d 414 (Fla. 3d DCA 1965) (until rendition of a final judgment, notice of appeal cannot confer jurisdiction on court); Tom v. State ex rel. Tom, 143 So.2d 226 (Fla. 2d DCA 1962) (same). The fact that Standard Guaranty stipulated to trying the purported bad faith action first, thereby choosing not to raise the defense of failure to state a cause of action, did not prevent it from challenging the authority of the circuit court to hear and determine the matter when it later discovered that the lack of an excess judgment is a jurisdictional defect, which is never waived. See, e.g., Fla.R.Civ.P. 1.140(h)(2); Tamiami Trail Tours v. Wooten, 47 So.2d 743, 745 (Fla. 1950).

Finally, the mere fact that the bad faith claims in the other cases cited by the Cunninghams (Initial Brief at 10)[1] may have been dismissed for failure to state a cause of action does not mean that this was the exclusive defect and that no bad faith claims can be

[1] Shuster v. South Broward Hospital District Physicians Prof. Liab. Ins. Trust, 570 So.2d 1362 (Fla. 4th DCA 1990), approved, 591 So.2d 174 (Fla. 1992); Florida Physicians Ins. Reciprocal v. Avila, 473 So.2d 756 (Fla. 4th DCA 1985), rev. denied, 484 So.2d 7 (Fla. 1986); Forston v. St. Paul Fire & Marine Ins. Co., 751 F.2d 1157 (11th Cir. 1985).

dismissed for lack of subject matter jurisdiction when there is no excess judgment.

II.

THE FACTUAL DISTINCTIONS MADE BY THE CUNNINGHAMS BETWEEN THE DECISION BELOW AND COPE ARE IMMATERIAL.

The Cunninghams attempt to distinguish this case from Cope on the grounds that the parties here stipulated that they would try the bad faith claim first, that Standard Guaranty's insured was negligent, and that the Cunninghams' damages exceeded the available policy limits. The Cunninghams contend that these stipulations constitute the "functional equivalent" of an excess judgment (Initial Brief at 11-12.). This argument lacks merit.

Like the Cunninghams, the plaintiff in Cope also attempted to avoid the requirement that the insured must first suffer damages by being exposed to an excess judgment. Rejecting the plaintiff's argument that his claim was a separate cause of action based on a duty owed directly to him by the insurer, this court stated that the basis for the plaintiff's action "remained the damages of an insured from the bad faith action of the insurer which caused its insured to suffer a judgment for damages above his policy limits." 462 So.2d at 461 (emphasis supplied). Here, as in Cope, absent an injury or damages to the insured in the form of an excess judgment, there is no cause of action for bad faith handling of the plaintiffs' claim.

In Cope, this court cited with approval Kelly v. Williams, 411 So.2d 902 (Fla. 5th DCA), review denied, 419 So.2d 1198 (Fla. 1982). In Kelly, the 5th DCA held that a cause of action for bad faith "arises when the insured is legally obligated to pay a judgment that is in excess of his policy limits." Id. at 904 (emphasis in the original). Since the parties in Kelly stipulated that the insured's liability was limited to the $50,000 policy amount, no cause of action for bad faith existed. Id. Similarly, Standard Guaranty's insured is not legally obligated to pay an amount in excess of policy limits or an excess judgment. The stipulations are not the "functional equivalent" of an excess judgment because they in no way legally obligate the insured to pay anything. Indeed, the underlying claim for damages has been noticed for trial by the Cunninghams' counsel to determine the legal obligation (Ans. Brief App. 1). Furthermore, unlike a judgment, no lien attaches to the stipulations.

If the stipulations were deemed the "functional equivalent" of an excess judgment, the effect would be to overrule well-established rules of law. Parties cannot create subject matter jurisdiction by stipulation even though they desire to do so. E.g., Martinez v. Scanlan, 582 So.2d 1167, 1171 n. 2 (Fla. 1991); Cates v. Heffernan, 154 Fla. 422, 18 So.2d 11, 16 (1944) (en banc). And subject matter jurisdiction cannot be created by waiver, acquiescence, or agreement of the parties, or by error or inadvertence of the parties or their counsel. E.g., Florida Export Tobacco v. Dep't of Revenue, 510 So.2d 936, 943 (Fla. 1st DCA 1987)

(citing Florida Nat'l Bank v. Kassewitz, 156 Fla. 761, 25 So.2d 271 (1946)), rev. denied, 519 So.2d 986 (Fla. 1987). The parties' agreement in this case to try a cause of action that as a matter of law does not exist cannot confer subject matter jurisdiction on the circuit court. Cf. Tom, 143 So.2d at 227 (notice of appeal filed before rendition of final judgment cannot confer jurisdiction, and the parties' attempt to cure the premature notice by stipulating that it was entered at a later date could not confer jurisdiction, either).

The intended effect of the parties' stipulation here was to supply the essential ingredient—an excess judgment—so that the bad faith claim could be heard, even though the underlying claim for damages had not been determined. Certain facts, however, cannot be stipulated to, including those that would confer jurisdiction. For example, parties cannot stipulate to an earlier date of rendition of a judgment in order to cure a prematurely filed notice of appeal and thereby confer subject matter jurisdiction on an appellate court. Tom, 143 So.2d at 227. See also State ex rel. Diamond Berk Ins. Agency v. Carroll, 102 So.2d 129 (Fla. 1958); Cates v. Heffernan, 154 Fla. 422, 18 So.2d 11 (1944).

Similarly, parties cannot stipulate to the existence of an excess judgment. They can stipulate to the entry of a judgment, but a judgment must be entered by the court in the underlying action before a legal obligation exists which the court can recognize as the basis for the bad faith action. The result arguably might be different here if, pursuant to the parties'

stipulation, a consent final judgment for an amount certain in excess of policy limits had been entered by the circuit court.

The Cunninghams' reliance on Wollard v. Lloyds and Companies of Lloyds, 439 So.2d 217 (Fla. 1983), is misplaced. In Wollard, this court held that a negotiated settlement of a coverage dispute between an insured and insurer before trial was the functional equivalent of a confession of judgment or verdict in favor of the insured for the purpose of awarding attorneys' fees pursuant to Section 627.428, Florida Statutes (1979). The policy basis for that decision was that it would be unjust if an insurer could avoid liability for statutory attorneys' fees simply by paying the insurance proceeds after suit is filed but before final judgment is entered. This would either deprive the insured of his remedy or require the plaintiff to continue litigation, despite an acceptable settlement offer, in order to recover his attorneys' fees. Id. at 218.

In the instant case, however, the absence of an excess judgment and resulting lack of subject matter jurisdiction does not deprive the Cunninghams of their remedy. They may still pursue their bad faith claim against Standard Guaranty after a judgment, if any, is entered against the insured in excess of policy limits in the underlying action. Further, Wollard did not involve two causes of action, one of which was dependent upon the outcome of the other for its existence. The plaintiff in Wollard was required to obtain a judgment in an action first merely in order to be

awarded attorneys' fees in that same action.[2] The Cunninghams, on the other hand, are required to obtain an excess judgment in one action first in order to establish a lawful basis for bringing another, different action. Finally, a court's continuing jurisdiction to determine an award of statutory attorneys' fees in a proper existing case is not like its jurisdiction to hear and determine the case to begin with.

III.

CASE LAW ADDRESSING THE CONCEPT OF SUBJECT MATTER JURISDICTION DOES NOT SUPPORT THE CUNNINGHAMS' POSITION.

The Cunninghams contend that the circuit court's subject matter jurisdiction refers to its authority to deal with the general class of cases to which the particular case represented by the complaint belongs, citing Malone v. Meres, 91 Fla. 709, 109 So. 677, 683 (1926), Lovett v. Lovett, 93 Fla. 611, 112 So. 768, 775 (1927) (Initial Brief at 6, 13). The Cunninghams' reliance on these cases also is misplaced. The instant case does not belong to the general class of cases over which the circuit court has subject matter jurisdiction—namely, bad faith insurance actions—because the basis for this case is not an excess judgment but an agreement to try a bad faith action that does not exist as a matter of law. This case merely purports to be a bad faith action.

---

[2] There is no claim for attorneys' fees in this case, nor are the Cunninghams entitled to attorneys' fees.

As the Cunninghams point out (Initial Brief at 13), subject matter jurisdiction "does not depend upon the ultimate existence of a good cause of action in the plaintiff." Malone, 109 So. at 683 (emphasis supplied). Subject matter jurisdiction, however, must of necessity depend upon the existence of a cause of action, because absent the existence of a cause of action there is nothing over which the court's jurisdiction can be lawfully exercised. The language from Malone cited above simply means that subject matter jurisdiction in a given case does not depend upon the outcome of that particular case, even though the cause of action may be defectively stated.

Thus, subject matter jurisdiction in a bad faith action is not dependent upon the outcome of the bad faith action, i.e., whether or not the insurer acted in bad faith in handling the plaintiff's claim against the insured. Subject matter jurisdiction in a bad faith action is dependent, however, upon the outcome of another action—the underlying tort action for damages. Absent an excess judgment against the insured in the underlying action, there is no bad faith action to exercise jurisdiction over. See Cope; Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So.2d 1289 (Fla. 1991). The cases cited by the Cunninghams do not involve the jurisdictional situation where the existence and determination of one action is dependent upon the determination and outcome of another action.

As the cases relied upon by Cunninghams clearly show, subject matter jurisdiction must be properly invoked before it can be

exercised. Lovett, 112 So. at 775-76; Florida Power & Light Co. v. Canal Authority, 423 So.2d 421, 423-24 (Fla. 5th DCA 1982). This requires that there must be a right in dispute between two or more parties. Id. Here, because a cause of action for bad faith has not arisen, there is no right in dispute and therefore no jurisdiction. Dixie Ins. Co. v. Gaffney, 582 So.2d 64 (Fla. 1st DCA 1991). Successfully invoking the court's subject matter jurisdiction also requires that "each material fact necessary to warrant the court to deliberate thereon" be pled, even though the complaint might not otherwise be sufficient to withstand a motion to dismiss. Lovett, 112 So. at 776. Here, the single most necessary material fact—the "essential ingredient"—is an excess judgment. Cope, 462 So.2d at 461. An excess judgment was not pled (R. 6-9) and, most significantly, cannot be pled. Where, as here, the court's jurisdiction is not and cannot be lawfully invoked, it cannot be exercised. Lovett, 112 So. at 775; Florida Power, 423 So.2d at 423.

The Cunninghams also neglect the fact that "subject matter jurisdiction" is sometimes used in the general sense and sometimes in the particular sense. While in the general sense it signifies the abstract right of a court to exercise its powers in a certain class of cases, as the Cunninghams note (Initial Brief at 13), it also signifies the right of the court to exercise its power concerning a particular matter. See, e.g., Malone, 109 So. at 684 (subject matter jurisdiction "is the power to act upon the general, and, so to speak, the abstract, question, and to determine and

adjudge whether the particular facts presented call for the exercise of the abstract power") (emphasis supplied); Lovett, 112 So. at 775 ("jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power") (emphasis supplied); State v. Sullivan, 95 Fla. 191, 116 So. 255, 263 (1928) ("'Jurisdiction' is the power of a court to hear and determine a cause") (emphasis supplied); Sheldon v. Powell, 99 Fla. 782, 128 So. 258, 263 (1930) ("Jurisdiction has reference to the power of a court to adjudicate or determine any issue or cause submitted to it") (emphasis supplied); Hewitt v. State ex rel. Palmer, 108 Fla. 335, 146 So. 578, 581 (1933) (in prohibition proceedings brought to determine whether county court had jurisdiction, "the actual facts of each case may therefore be looked to") (emphasis supplied); Deeb, Inc. v. Board of Public Instruction, 196 So.2d 22, 24 (Fla. 2d DCA 1967) ("Jurisdiction is the power of the court to hear and determine the particular cause") (emphasis supplied); Dyer v. Battle, 168 So.2d 175, 176 (Fla. 2d DCA 1964) ("jurisdiction is the power conferred on a court by the sovereign to take cognizance of the subject matter of a litigation . . . and to hear and determine the issues") (emphasis supplied). See generally 20 Am. Jur. 2d Courts §§ 87-88 (1965).

Thus, in Hewitt, this court noted that the jurisdiction of the county court rested on substance and not form alone with respect to the actual controversy before it. As a result, the court looked at

the particular matter before it, and where the facts showed there was a substantial basis that the real controversy was one of forcible entry and unlawful detainer, not one of title to lands, the county court had jurisdiction over the subject matter of the law suit, not the circuit court. 146 So. at 580-81. In State ex rel. Washburn v. Hutchins, 101 Fla. 773, 135 So. 298 (1931), the plaintiff filed suit in county court for eviction for the nonpayment of rent. The county court had jurisdiction of the general class of cases involving eviction for nonpayment of rent. Because the facts showed that the contract between the parties did not create the relationship of landlord-tenant, however, the county court lacked jurisdiction over the subject matter of the particular suit between the parties.

Similarly, in Swebilius v. Florida Construction Industry Licensing Board, 365 So.2d 1069 (Fla. 1st DCA 1979), although the Board had jurisdiction to prosecute complaints against contractors for alleged statutory violations during construction, it did not have subject matter jurisdiction where the facts showed that the Board did not first forward the complaint to the existing local board as required by statute. And in City of Miami v. Cosgrove, 516 So.2d 1125 (Fla. 3d DCA 1987), although the trial court had jurisdiction for suits seeking injunctive relief under the Policemen's Bill of Rights, § 112.532, Florida Statutes, where the particular suit sought damages and not injunctive relief, the court lacked subject matter jurisdiction.

Clearly, then, it is the facts of the particular case before the court that determine whether the court has subject matter jurisdiction. Although this case purports to be a bad faith insurance action generally, the facts show that there is no excess judgment that would support a bad faith cause of action and, therefore, no basis for the exercise of the court's jurisdiction.

In attempting to illustrate the distinction between failure to state a cause of action and lack of subject matter jurisdiction, the Cunninghams note that failure to allege a waiver of sovereign immunity in a tort action against a governmental agency affects the court's subject matter jurisdiction, citing Schmauss v. Snoll, 245 So.2d 112 (Fla. 3d DCA 1971), cert. denied, 248 So.2d 172 (Fla. 1971) (Initial Brief at 15). Schmauss supports Standard Guaranty's position. In Schmauss, the court held that a state's sovereign immunity relates to subject matter jurisdiction and is not an affirmative defense. Sovereign immunity, of course, is a doctrine that precludes a litigant from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes unless the sovereign consents to suit. See, e.g., Principe Compania Naviera, S.A. v. Board of Comm'rs, 333 F.Supp. 353, 355 (E.D. La. 1971). If a court lacks subject matter jurisdiction because of sovereign immunity in cases involving otherwise meritorious causes of action, then it follows that a court lacks subject matter jurisdiction where, absent an excess judgment, there is no cause of action.

The Cunninghams also rely on several cases concerning failure by plaintiffs to comply with the statutory provision requiring notice to governmental agencies before suing the agencies under the Florida statute waiving sovereign immunity, § 768.28(6) (Initial Brief at 16). Those cases generally hold that compliance with the required statutory notice is a condition precedent to maintaining suit against the agency, but that failure to plead compliance may be waived. See, e.g., Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979); Drax Int'l Ltd. v. Division of Admin., 573 So.2d 105 (Fla. 4th DCA 1991). Such cases are wholly inapposite; they do not involve two causes of action, one of which is dependent upon the outcome of another. Moreover, the instant case does not involve a statutory pre-suit notice requirement or a mere condition precedent to stating a cause of action, which may be waived or cured upon dismissal without prejudice. Rather, the instant case involves a purported cause of action that as a matter of law does not exist, a pleading defect that cannot be cured, and an essential ingredient that cannot be waived. See Cope.

Finally, the Cunninghams also misplace their reliance on Florida Power & Light v. Canal Authority. There, the court noted that, in accordance with Tosohatchee Game Preserve, Inc. v. Central & Southern Florida Flood Control District, 265 So.2d 681 (Fla. 1972), a condemning authority must attach an authorizing resolution (if required) to its petition for condemnation in order to state a cause of action, but that the failure to do so did not deprive the court of subject matter jurisdiction. 423 So.2d at 422-23. The

court determined that the defect was not jurisdictional because circuit courts have jurisdiction over the class of cases known as condemnation suits, and the petitions at issue followed the condemnation statute (§ 73.021, Florida Statutes) and set out all the material facts. The omitted resolution merely affected the stating of a cause of action, not the existence of a cause of action. Id. at 425. Similarly, a complaint based on a written instrument does not state a cause of action until the instrument or an adequate portion thereof is attached to or incorporated in the complaint, in conformity with Florida Rule of Civil Procedure 1.130(a). E.g., Safeco Ins. Co. v. Ware, 401 So.2d 1129 (Fla. 4th DCA 1981). Failure to do so, however, is not a jurisdictional defect.

In the instant case, however, the material fact essential to the cause of action—an excess judgment—was not and cannot be pled, and the cause of action does not exist. The consistent difference, again, is between failing to state a cause of action and failing to have a cause of action.

IV.

THE DISTRICT COURT'S DECISION IS CONSISTENT WITH BLANCHARD v. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.

In Blanchard, the Eleventh Circuit certified to this court the question whether an insured's bad faith claim against his uninsured motorist insurance carrier under Section 624.155(1)(b)1, Florida Statutes, accrues before the conclusion of the underlying action

against the uninsured motorist for damages and against the carrier for uninsured motorist benefits. 575 So.2d at 1290. The federal district court had previously dismissed the action on the grounds that the insured had split his cause of action by not bringing the bad faith claim in the original suit for damages and uninsured motorist benefits. This court answered the certified question in the negative, holding that:

> an insured's underlying first-party action for insurance benefits against the insurer necessarily must be resolved favorably to the insured before the cause of action for bad faith in settlement negotiations can accrue. It follows that an insured's claim against an uninsured motorist carrier for failing to settle the claim in good faith does not accrue before the conclusion of the underlying litigation for the contractual uninsured motorist insurance benefits. Absent a determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages, a cause of action cannot exist for a bad faith failure to settle.

Id. at 1291 (emphasis supplied).

It is clear that the fundamental defect in Blanchard was not merely that the insured did not state a cause of action, but that the insured did not have a cause of action that could be stated. The existence of the bad faith action was dependent upon the outcome of the underlying action for uninsured motorist benefits. The Cunninghams contend that the decision in Blanchard was based upon the lack of a cause of action, which does not equate with the lack of subject matter jurisdiction (Initial Brief at 19). If no bad faith cause of action exists, however, then there is no subject matter over which the court can lawfully exercise jurisdiction.

The Cunninghams further attempt to distinguish Blanchard on the grounds that Blanchard involved a first-party bad faith action brought under Section 624.155(1)(b)1, Florida Statutes, whereas the instant case involves a third-party bad faith action brought under the common law (Initial Brief at 19). This distinction is also meritless because in either case there can be no cause of action for bad faith unless there is first an excess judgment. Otherwise, the requirement of Blanchard and Cope, that there must be a determination of the insured's damages, would be meaningless.

Finally, the Cunninghams attempt to distinguish Blanchard on the grounds that it did not involve the stipulations present in this case, which effectively resolved the underlying claim (Initial Brief at 19). As set forth in Section II above, however, the underlying claim against Standard Guaranty's insured has not been resolved because the insured is not legally obligated to pay an amount in excess of the policy limits or an excess judgment for an amount certain. In fact, a notice for trial has been filed to resolve the underlying claim, but the action is stayed pending the appeal of the judgment in the purported bad faith action (Ans. Brief App. 1 and 2).

The district court's decision below is also consistent with this court's recent decision in Camp v. St. Paul Fire & Marine Insurance Co., 18 F.L.W. S94 (Fla. February 4, 1993). In Camp, the Eleventh Circuit certified to this court the question whether a named insured's bankruptcy and discharge from liability prior to exposure to an excess judgment precluded an injured party's or

bankruptcy trustee's subsequent bad faith cause of action against the insurance company. The insurance company had refused to settle the plaintiff's claim against the insured for the $250,000 policy limit, and the case proceeded to trial where the jury returned a verdict in the plaintiff's favor for more than $3 million. The insurance company contended that no cause of action for bad faith existed because the insured's bankruptcy and discharge from liability meant that he was never harmed by or personally liable for the excess verdict. This court determined that, although the insured was not personally harmed or liable, his bankruptcy estate stood in his shoes, in effect becoming the insured, and was harmed by the increased debt of the estate attributable to the excess judgment. As a result, this court held that the bankruptcy estate's trustee had a cause of action for bad faith against the insurance company.

Unlike Camp, however, no entity in the instant case has been harmed or is liable because there is no excess judgment. Therefore, there is no cause of action and no basis for jurisdiction.

V.

THE CUNNINGHAMS FAIL MEANINGFULLY TO DISTINGUISH THIS CASE FROM DIXIE INSURANCE CO. v. GAFFNEY.

The Cunninghams contend that the district court "overlooked several important distinguishing factors" that make inapplicable its prior decision in Dixie Insurance (Initial Brief at 21). The

Cunninghams first argue that a "non-binding opinion" was sought in Dixie Insurance, whereas there was an agreement here for the parties to be bound by the result and to provide complete protection to the insured by trying the claim for bad faith before the underlying tort claim (Initial Brief at 21). In fact, however, in Dixie Insurance the insurer filed a declaratory judgment action seeking a judgment finding that it was not guilty of bad faith in its handling of the injured party's claim. 582 So.2d at 64. Nowhere in Dixie Insurance does it indicate that the insurer sought a non-binding opinion. A declaratory judgment is, of course, binding. See, e.g., Sheldon, 128 So. at 263 (noting that "there is no difference between a declaratory judgment or decree and any other judgment between opposing parties" except that coercive relief is available in the latter instance).

The district court refused to approve the declaratory judgment procedure in Dixie Insurance for the same reason that it refused to approve the procedure used in this case—namely, because there is no jurisdiction to render a judgment determining the bad faith of an insurance company in one action prior to the entry of an excess judgment against the insured in the other. Standard Guaranty, 610 So.2d at 459-60. Just as there was no justiciable controversy in Dixie Insurance, so there is no justiciable controversy or legally cognizable right in dispute here. Indeed, the district court noted "[t]here is no material difference between the two cases." Standard Guaranty, 610 So.2d at 460.

Second, the Cunninghams contend that, even though an excess judgment has not been entered, Standard Guaranty, unlike the insurer in Dixie Insurance, stipulated that the injured party's damages exceeded the insured's policy limits, and the stipulation effectively eliminates the necessity for actual entry of an excess judgment (Initial Brief at 21). As previously noted in Section II above, however, there is no bad faith cause of action unless and until there is first an excess judgment against the insured, and the stipulation is not the functional equivalent of an excess judgment because it in no way legally obligates the insured to any amount. Moreover, the necessity for entry of an excess judgment has not been eliminated; the underlying claim has been noticed for trial by the Cunninghams' counsel but has been stayed pending the outcome of this appeal (Ans. Brief App. 1 and 2).

Finally, the Cunninghams argue in the alternative that Dixie Insurance was incorrectly decided and should be disapproved because bad faith actions sound in contract rather than tort, and because the Declaratory Judgment Act would be an appropriate vehicle to determine such issues, since its goal is to settle and afford relief from insecurity and uncertainty with respect to rights and obligations under contracts such as insurance policies (Initial Brief at 21-22). It is problematic whether this court's disapproval of Dixie Insurance would of necessity require a different result in this case from that reached by the district court. In any event, the Cunninghams put the cart before the horse and again ignore the fact that the basis for a bad faith cause of

action is damages caused by an excess judgment against the insured. Cope, 462 So.2d at 461; Blanchard, 575 So.2d at 1291. It would indeed be anomalous to obtain a declaration of bad faith in a given case only to have it subsequently determined that damages to the insured did not exceed policy limits. Clearly, there would be no right or obligation at issue that would warrant a declaratory judgment action for bad faith unless or until there is first an excess judgment. See Martinez, 582 So.2d at 1171 ("there still must exist some justiciable controversy between adverse parties that needs to be resolved for a court to exercise its jurisdiction" in a declaratory action) (emphasis supplied). Thus, whether the vehicle for relief is a declaratory judgment action or a common law negligence action, there can be no basis for exercising jurisdiction until the threshold requirement of an excess judgment is first met.

VI.

POLICY CONSIDERATIONS DO NOT SUPPORT APPROVAL OF THE PROCEDURE FOLLOWED IN THIS CASE.

The policy considerations that allegedly support the trying of a bad faith claim before the underlying tort claim for damages are, in the first instance, moot where the cause of action has not yet arisen and subject matter jurisdiction therefore does not exist. In effect, the Cunninghams seek to have the judicial power of the court invoked and exercised even though a cause of action does not exist. Even assuming this was a valid function of the court, the

policy reasons offered by the Cunninghams are insufficient to warrant it.

The Cunninghams' contention that trying the bad faith claim first saves resources and promotes settlement (Initial Brief at 23), is illusory. If the insurance carrier is found not to have acted in bad faith, an injured third party may nevertheless wish to pursue his claim against the insured depending upon a variety of factors, including insurance limits and other available assets, which may vary widely from case to case. If the insurance carrier is found to have acted in bad faith, the plaintiff and the carrier may not reach agreement as to the amount of damages and therefore have to try the underlying case. Thus, there is no assurance that two actions will not be necessary even if the purported bad faith claim is tried first. Indeed, after the purported bad faith trial in this case, the Cunninghams' counsel noticed the underlying action for trial on damages (Ans. Brief App. 1), and it was necessary for the circuit court to issue a stay pending the outcome of the appeal of the final judgment on the bad faith issue (Ans. Brief App. 2). Furthermore, a damages verdict on the underlying claim is just as likely to promote settlement of the resulting bad faith claim as a verdict on the bad faith claim is to promote settlement of the underlying damages action.

In further support of their contention that the procedure employed in this case encourages settlement and promotes judicial economy, the Cunninghams also note that their counsel stated to the trial court that he had tried six cases pursuant to a similar

agreement and in all six cases the insurance company, having been found liable for bad faith, settled without incurring the expense of a trial in the underlying action (Initial Brief at 23-24). The Cunninghams overlook the fact that, as noted above, a similar settlement has not been reached in this case, and the underlying action has been noticed for trial. The Cunninghams also fail to consider the meager percentage of total tort cases that six cases represents over their counsel's many, many years of practice. In reality, cases where there would be both an excess judgment above policy limits and bad faith handling of the claim by the insurer represent a minuscule fraction of the total number of tort claims litigated annually in this state. Although the procedure the Cunninghams advocate is perhaps of great importance to their counsel, it does not appear to be of great importance or value to the public.

The Cunninghams also contend that the procedure of trying the bad faith claim before the underlying tort claim is good policy because, under the particular type of agreement involved in this case, it results in "complete financial protection" to insureds who are otherwise exposed to excess judgments (Initial Brief at 23, 24). First, this contention erroneously assumes that the public has an interest in providing complete financial protection to financially able tortfeasors who contractually assume the risk of excess judgments when they bargain for inadequate limits of insurance in exchange for minimal premiums. To the contrary, the public interest would be better served by encouraging such

insureds to obtain adequate limits of insurance. If an insurance carrier is ultimately determined to have acted in bad faith, the insurance carrier—not the insured—pays the excess judgment. On the other hand, if the insurance carrier ultimately is determined not to have acted in bad faith, the insured is properly liable for an excess judgment to the extent of the risk he assumed in his bargain with his insurer.

Second, the Cunninghams assume that all stipulations to try bad faith claims first will be of the particular type involved in this case, whereby the plaintiff agrees to accept policy limits and release the insured if the jury makes a finding of no bad faith. The question certified by the district court, however, is general in scope and refers only to a stipulation to try the bad faith claim first; it does not further define the parameters or set forth any other terms of the stipulation. There is no assurance that the agreements drawn up from case to case would be similar to this one or adequate in all respects and not simply become another source of dispute and litigation.

Finally, the Cunninghams' professed concern for the economic welfare of the insured absent a procedure such as this, is disingenuous at best. A plaintiff can (and probably will) always agree to protect the insured from an excess judgment where it is expedient. Indeed, it is not difficult to conceive of other cases where plaintiffs would be willing to release an insured who is judgment-proof, but would not be willing to release an insured who has substantial insurance limits or other available assets and whom

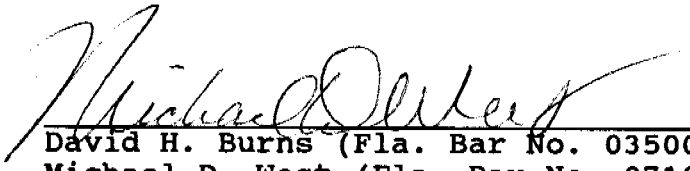
plaintiffs therefore may wish to pursue if the insurer is found not to have acted in bad faith.

Clearly, the Cunninghams have not shown how plaintiffs pursuing bad faith claims are harmed or prejudiced under current law requiring an excess judgment first, nor how a change would with certainty benefit or be of great importance to the public. In reality, it appears that it may only benefit and be of importance to the Cunninghams' counsel, and then only in an insignificant number of cases. As a result, the Cunninghams have failed to show a valid basis for approving the procedure they advocate or that the decision of the district court is of great public importance such that this court should exercise its discretionary jurisdiction.

CONCLUSION

For the foregoing reasons, this court should decline to exercise its discretionary jurisdiction or, in the alternative, should answer the certified question in the negative and affirm the decision of the district court.

Respectfully submitted,



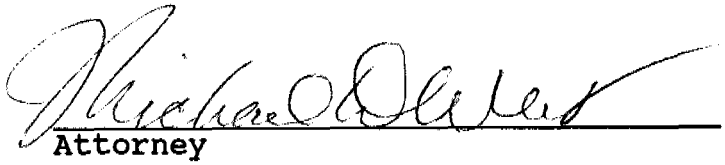
David H. Burns (Fla. Bar No. 0350028)
Michael D. West (Fla. Bar No. 0710938)
Joseph E. Brooks (Fla. Bar No. 0880752)
Huey, Guilday, Kuersteiner & Tucker, P.A.
Highpoint Center, Suite 900
Post Office Box 1794
Tallahassee, Florida 32302
(904) 224-7091
Counsel for Respondent, Standard
Guaranty Insurance Company

and

Robert D. Bell (Fla. Bar No. 0004962)
Bell, Schuster & Wheeler
119 West Garden Street
Post Office Box 12564
Pensacola, Florida 32573
(904) 438-1691
Co-Counsel for Respondent, Standard
Guaranty Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Lefferts L. Mabie, Jr., James A. Hightower, and Louis K. Rosenbloum, 226 S. Palafox Place, Post Office Box 12308, Pensacola, Florida 32581; and Robert G. Kerrigan, 400 East Government Street, Pensacola, Florida 32589, by regular U. S. Mail this 15th day of March, 1993.



Attorney

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

STANDARD GUARANTY INSURANCE COMPANY,

Defendant/Appellant,

vs.

CASE NO.: 87-4869
DIVISION: E

KENNETH DALE CUNNINGHAM and TERESA MARIE CUNNINGHAM, Husband and Wife,

Plaintiffs/Appellees.
_____/

NOTICE FOR TRIAL

COMES NOW the Plaintiffs/Appellees, KENNETH DALE CUNNINGHAM and TERESA MARIE CUNNINGHAM, husband and wife, and request that this matter be set for trial by jury, pursuant to Rule 1.440, Florida Rules of Civil Procedure, and show as follows:

1. The action is at issue and ready to be set for trial.

2. The Plaintiffs/Appellees estimate that the trial of this cause should take approximately two days.

3. Plaintiffs maintain its demand for a jury trial on the original action.

* * * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert D. Bell, Esq., 119 W. Garden Street, Pensacola, FL 32501 and to James A. Hightower, Esq., Seville Tower, 226 S. Palafox Street, Pensacola FL

32501 by hand delivery; and to David A. Burns, Esq., P.O. Box 1794, Tallahassee, FL 32302 by regular U.S. Mail this 4 day of October, 1991.

ROBERT G. KERRIGAN
Kerrigan, Estess, Rankin & McLeod
400 East Government Street
Post Office Box 12009
Pensacola, Florida 32589
(904) 432-2317
Fla. Bar No. 0134044

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY FLORIDA

KENNETH DALE CUNNINGHAM and THERSIA MARIE CUNNINGHAM, formerly Husband and Wife,

Plaintiffs

vs.

JOSEPH GRANT JAMES and STANDARD GUARANTY INSURANCE COMPANY,

Defendants.

CASE NO.: 86-4869
DIVISION: "E"

O-R-D-E-R

THIS CAUSE coming before the Court on the Defendants' Motion to Stay Proceedings, and the Court having reviewed the memoranda and having heard argument of counsel, it is therefore ORDERED and ADJUDGED that:

1. This case is removed from the Court's trial docket and the trial of this case as to damages is stayed pending the outcome of the appeal of the final judgment on the bad faith issue.

2. The parties are directed to cooperate with regard to conducting discovery on the damages issue with the goal of preparing this matter to be ready for trial on damages if such a trial becomes necessary.

DONE and ORDERED at Pensacola, Escambia County, Florida, this 4 day of February, 1992.

/S/ NANCY GILLIAM

NANCY GILLIAM
Circuit Judge

Copies furnished to:

Robert D. Bell, Esq.
David H. Burns, Esq.
Robert G. Kerrigan, Esq.
Lefferts L. Mabie, Jr., Esq./James A. Hightower, Esq./Louis K. Rosenbloum, Esq.