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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
CASE NO. 91-2785

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT

INITIAL BRIEF OF PETITIONERS ON THE MERITS

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Introduction

Petitioners, Kenneth Dale Cunningham and Teresa Marie Cunningham, appellees below, seek review of the decision of the District Court of Appeal, First District, Case Number 91-2785, currently reported as Standard Guaranty Insurance Co. v. Cunningham, 17 Fla. L. Weekly D2380 (Fla. 1st DCA Oct. 12, 1992)(App. Tab 1). The decision below vacated a judgment, based upon a jury verdict, entered in petitioners' favor by the Circuit Court in and for Escambia County against respondent, Standard Guaranty Insurance Company, appellant below, in a bad faith failure to settle action. The district court certified to this court a question of great public importance (18 Fla. L. Weekly D241)(App. Tab 2) and this court has jurisdiction pursuant to Art. V, § 3(b)(4), Fla. Const.

References to the appendix to this brief will be made by designation "App." with the appropriate tab and page number. References to the record below will be made by designation "R," to the trial transcript by designation "T" and to the transcripts of hearings in the trial court by the letter assigned by the circuit court clerk (e.g., Transcript A).

Course of Proceedings Below

Mr. and Mrs. Cunningham initiated this action by filing a complaint against Joseph Grant James, seeking damages for injuries sustained by Mr. Cunningham which the complaint alleged were caused by James' negligent operation of a motor vehicle (R

1-2). James was insured by Standard Guaranty with a policy of automobile liability insurance which provided bodily injury liability limits of $10,000 per person and property damage liability limits of $10,000 (Plaintiffs' Exhibit 22, page 1).

After the action against James had been pending without settlement for approximately seven months, Mr. and Mrs. Cunningham filed an amended complaint for damages, adding Standard Guaranty as a party and alleging that Standard Guaranty acted in bad faith by failing to settle the Cunninghams' claim against James within its insured's policy limits (R 6-9). Several days after filing the amended complaint, Mr. and Mrs. Cunninghams' attorney wrote counsel for Standard Guaranty, reiterating the Cunninghams' contention that Standard Guaranty had acted in bad faith by failing to settle the claim and making the following proposal:

> 1. We will agree to try the bad faith case first and if a jury determines that Standard Guaranty is in bad faith your client will not be exposed to an excess judgment because Standard Guaranty will be responsible for the entire judgment.
>
> 2. If a jury determines there is no bad faith, our client will agree then to accept the $10,000 so that Mr. James will not be exposed to an excess judgment.
>
> 3. During the discovery in the bad faith case, we will agree to submit our client for deposition as well as all of his treating physicians so that Standard Guaranty will have an early opportunity to assess the magnitude of the claim.

(R 98, App. Tab 3 at 1). Standard Guaranty accepted the Cunninghams' offer to litigate the issue of bad faith prior to determination of liability and damages as confirmed by

correspondence between counsel and as announced on the record before the trial judge at pretrial conference (R 99-101, App. Tab 3 at 2-4; Transcript A 9-11, 69-70, App. Tab 4).

The bad faith action then proceeded towards trial. In its pretrial memorandum, Standard Guaranty admitted that the automobile accident was the fault of its insured, defendant James, and that the bodily injury damages sustained by Cunningham exceeded $10,000, the limits of Standard Guaranty's bodily injury liability coverage (R 103, App. Tab 5). After trial, the jury returned a verdict finding Standard Guaranty guilty of bad faith (R 328).

After verdict Standard Guaranty filed a motion for judgment in accordance with its motion for directed verdict and a motion for new trial (R 340, 351). At the hearing on the post-trial motions, Standard Guaranty, for the first time in these proceedings, challenged the trial court's subject matter jurisdiction and requested a new trial on the ground that the trial court lacked subject matter jurisdiction to determine Standard Guaranty's liability for bad faith failure to settle before determination of the underlying action and before entry of a judgment against the insured in excess of policy limits (Transcript C 40-41, App. Tab 6).

The trial court denied Standard Guaranty's post-trial motions and entered judgment for the Cunninghams on the issue of bad faith (R 356, 370). Standard Guaranty appealed the judgment to the District Court of Appeal, First District, raising a number of issues, including whether the trial court had subject matter

jurisdiction to determine the bad faith claim. In a per curiam decision, the district court of appeal vacated the judgment in favor of Mr. and Mrs. Cunningham based upon its finding that the trial court lacked subject matter jurisdiction to adjudicate the insurer's liability for bad faith failure to settle prior to resolution of the underlying tort claim (App. Tab 1).[1] The district court denied the Cunninghams' motions for rehearing and rehearing en banc, but certified to this court the issue set forth below as a question of great public importance (App. Tab 2).

ISSUE PRESENTED 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?

(as framed by the district court's certified question)

[1]Since the case was decided on jurisdictional grounds, the district court did not address the other issues raised by Standard Guaranty on appeal.

SUMMARY OF ARGUMENT

Notwithstanding the agreement of the parties to litigate the issue of the insurer's bad faith prior to final determination of the underlying tort claim, the district court determined that the trial court lacked subject matter jurisdiction over petitioners' action for bad faith failure to settle because a judgment in excess of policy limits had not been entered against the insured as required by Fidelity and Casualty Company of New York v. Cope, 462 So. 2d 459 (Fla. 1985), in which this court held that a bad faith cause of action could not be maintained where the injured party had released the tortfeasor and satisfied the excess judgment. The district court erred in that determination because Cope merely decided that in the absence of an excess judgment a cause of action for bad faith could not be stated. Contrary to the district court's decision below, Cope did not hold that the failure to plead and prove the entry of an excess judgment against the insured deprived the trial court of subject matter jurisdiction. In cases where an excess judgment has not been alleged, Cope merely affords the insurance company the right to assert as a defense the failure of the complaint to state a cause of action, a defense which can be waived and which was waived by respondent by agreement and by its failure to raise the issue until after trial.

Cope also is factually distinguishable from the case at bar because the insurer in this case stipulated to the liability of its insured and to the fact that petitioners' damages exceeded the policy limits available to the insured. Such stipulation was the

functional equivalent of an excess judgment for purposes of satisfying the requirements of Cope.

The court's subject matter jurisdiction refers to the court's authority to adjudicate the general class of cases represented by the complaint and does not depend on whether the complaint is subject to dismissal for failure to state a good cause of action. The cause of action alleged at bar, a bad faith insurance action for damages in excess of the jurisdictional monetary limits of the court's authority, was representative of the class of cases over which the circuit court maintains jurisdiction, and the deficiency in the complaint relating to the absence of an excess judgment made the complaint subject to dismissal for failure to state a cause of action, but did not divest the court of subject matter jurisdiction.

The procedure followed by agreement of the parties in this case to try the bad faith case prior to final determination of the underlying claim promotes settlement of cases and conserves judicial and litigant resources. The agreement also affords insureds exposed to the financial devastation of an excess judgment complete protection and should be approved by this court on policy grounds.

ARGUMENT

I.

The district court incorrectly applied Fidelity and Casualty Company of New York v. Cope, 462 So. 2d 459 (Fla. 1985).

In reversing the judgment based on jurisdictional grounds, the district court, relying on Fidelity and Casualty Company of New York v. Cope, 462 So. 2d 459 (Fla. 1985)(App. Tab 7), found "that the trial court lacked subject-matter jurisdiction to determine whether Standard 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." Slip. op. at 1-2 (App. Tab 1). The district court also relied on its decision in Dixie Insurance Co. v. Gaffney, 582 So. 2d 64 (Fla. 1st DCA 1991)(App. Tab 8), which it found indistinguishable from the facts of the present case. Slip op. at 2-3 (App. Tab 1). Judge Wolf, in a specially concurring opinion, agreed with the majority's disposition of the case because he believed Dixie Insurance was indistinguishable and controlling. Judge Wolf noted, however, that while Cope requires a prior judgment which exceeds the policy limits as an essential element of a bad faith failure to settle cause of action, he did "not believe that the failure to allege and prove this essential element rises to the level of a jurisdictional defect which cannot be waived." Slip op. at 4 (App. Tab 1).

In light of this analysis, the answer to the certified question presented turns on the question whether the failure to

plead and prove the entry of an excess judgment in a bad faith action constitutes a defect which deprives the trial court of subject matter jurisdiction or whether the defect presents the defense of failure to state a cause of action which can be waived. On the one hand, the defense of lack of subject matter jurisdiction cannot be waived by failure to plead or by stipulation of the parties and may be raised at any time during the course of the proceedings. Fla.R.Civ.P. 1.140(h)(2); Brautigam v. MacVicar, 73 So. 2d 863 (Fla. 1954). "Failure to state a cause of action," on the other hand, is one of the affirmative defenses enumerated by Fla.R.Civ.P. 1.140(b) which may be asserted by motion or responsive pleading at the option of the pleader.[2] Unlike subject matter jurisdiction, the defense of failure to state a cause of action can be waived. See Nationwide Mutual Fire Insurance Co. v. Vosburgh, 480 So. 2d 140 (Fla. 4th DCA 1985)(defense of failure to state a cause of action deemed waived if not presented before or during trial); Curico v. Cessna Finance Corp., 424 So. 2d 868 (Fla. 4th DCA 1982)(same); see also 5A Wright & Miller, Federal Practice and Procedure, § 1392 (1990). For the reasons and authorities cited hereafter, petitioners contend that the failure to plead and prove the existence of an excess judgment raised the defense of failure to state a cause of action, which can be and was waived by respondent. The court below thus erred by holding that the trial

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[2]Unlike other affirmative defenses, the defense of failure to state a cause of action (and failure to join an indispensable party) also may be asserted by motion for judgment on the pleadings or at the trial on the merits. Fla.R.Civ.P 1.140(h)(2).

court lacked subject matter jurisdiction.

In Cope, this court specifically decided that "once an injured party has released the tortfeasor from all liability, or has satisfied the underlying judgment, no such action [bad faith] may be maintained." Cope, 462 So. 2d at 459. Thus, the insured in that case, who had entered into an agreement which had the legal effect of releasing the insured and satisfying the excess judgment, was precluded from bringing a bad faith action against the insurer. The bad faith claim in Cope was not rejected, however, on jurisdictional grounds, but because the insured no longer had a cause of action after the injured party executed the release and satisfaction:

> An essential ingredient to any cause of action is damages. In this case Brosnan originally suffered a judgment in excess of his policy. Before the action was filed, however, the judgment was satisfied. Upon its being satisfied Brosnan no longer had a cause of action; if he did not, then Cope did not. Cope's action was not separate and distinct from, but was derivative of Brosnan's.

Cope, 462 So. 2d at 461 (emphasis supplied).

This court has cited Cope for the more general proposition that "[t]hird-party actions do not allow for the recovery of the excess judgment in cases in which the insured is not damaged by the excess liability." McLeod v. Continental Insurance Co., 591 So. 2d 621, 625 (Fla. 1992). Neither this court, however, nor the district courts applying Cope, have interpreted the decision as raising an issue of subject matter jurisdiction as the court below decided. Instead, parties whose

recoveries have been defeated by Cope have met their fate because their claims failed to state a cause of action, not because the trial court was deprived of subject matter jurisdiction.

For example, in Shuster v. South Broward Hospital District Physicians' Professional Liability Insurance Trust, 570 So. 2d 1362 (Fla. 4th DCA 1990), approved, 591 So. 2d 174 (Fla. 1992), a physician sued his insurer for bad faith even though the insurer settled the claim against the physician within policy limits and the physician was not subjected to an excess judgment. The physician argued nonetheless that the insurer's settlement against his wishes had damaged his business and reputation and that he suffered resulting emotional distress. The trial court dismissed the physician's complaint for failure to state a cause of action rather than on jurisdictional grounds. Relying on Cope, the district court affirmed and held "that such a complaint fails to state a cause of action." Shuster, 570 So. 2d at 1363 (emphasis supplied). This court approved the district court's opinion, and, while not citing Cope, held under the circumstances presented that "a cause of action for breach of a good faith duty owing to the insured will not lie . . . ." Shuster v. South Broward Hospital District Physicians' Professional Liability Insurance Trust, 591 So. 2d 174, 178 (Fla. 1992). The trial court's subject matter jurisdiction was not discussed at either the district court or supreme court level. See also Florida Physicians Insurance Reciprocal v. Avila, 473 So. 2d 756 (Fla. 4th DCA 1985); rev. denied, 484 So.2d 7 (Fla. 1986); Forston v. St Paul Fire and Marine

Insurance Co., 751 F.2d 1157, 1161 (11th Cir. 1985).[3]

II.

The decision below is factually distinguishable from Cope.

The essence of the court's ruling in Cope is that in the absence of an excess judgment, the insured cannot demonstrate that he has been damaged by the insurer's failure to exercise good faith in the handling and settlement of the claim brought against him. See McLeod v. Continental Insurance Co., supra. The injured party in Cope, for example, entered into an agreement which released the insured and satisfied the excess judgment and thus negated the insured's damages. In the case at bar, unlike Cope, the parties agreed to try the bad faith case before a final judgment in excess of the policy limits had been entered against the insured, and, pursuant to this agreement, the insurer waived the affirmative defense of failure to state a cause of action based upon plaintiffs inability to plead the entry of an excess judgment against the insured. Standard Guaranty also agreed in the pretrial stipulation that its insured was negligent and that the damages sustained by Cunningham, the injured party, exceeded the available policy

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[3]Forston involved an action for first-party bad faith brought pursuant to Section 624.155. As an interesting contrast, one issue decided by Forston concerned whether diversity of citizenship existed between the parties, presenting a classic example of a question affecting the court's subject matter jurisdiction. The district court dismissed the complaint for lack of diversity and, consequently, lack of subject matter jurisdiction. The court of appeals reversed the jurisdictional ruling but affirmed the judgment because the action was filed prematurely before resolution of the underlying action and the "complaint thus failed to state a cause of action." Forston, 751 F.2d at 1161 (emphasis supplied).

limits. These stipulations had the practical effect of supplying the missing element required by Cope, i.e., a judgment for damages in excess of the policy limits. Cf. Wollard v. Lloyd's and Companies of Lloyd's, 439 So. 2d 217 (Fla. 1983)(settlement by insurer of underlying claim "functional equivalent of a confession of judgment" for purposes of awarding attorneys fees).

The district court below thus erred by relying on Cope and characterizing Cunninghams' failure to plead the presence of an excess judgment as a defect in their cause of action which deprived the trial court of subject matter jurisdiction. The failure to plead and prove that the insured was subjected to an excess judgment, as suggested by Judge Wolf's concurring opinion, entitles the insurer to assert as an affirmative defense the complaint's failure to state a cause of action, a defense which was waived by respondent. Moreover, Standard Guaranty's concession of liability and admission that damages exceeded the policy limits served as the "functional equivalent" of an excess judgment, affording a further basis for distinguishing Cope.

III.

Case law addressing the abstract concept of subject matter jurisdiction supports petitioners' position.

Petitioners' position also is supported by case law addressing the abstract concept of "subject matter jurisdiction" and by analysis of the cases drawing the distinction between matters affecting the subject matter jurisdiction of the court and those affecting whether the complaint states a cause of action for

which relief can be granted.

The court's "subject matter jurisdiction" concerns "the power of the court to deal with the class of cases to which the particular case belongs . . . ." Lovett v. Lovett, 93 Fla. 611, 112 So. 768, 775 (Fla. 1927). Stated differently:

> "Jurisdiction," in the strict meaning of the term, as applied to judicial officers and tribunals, means no more than the power lawfully existing to hear and determine a cause. It is the power lawfully conferred to deal with the general subject involved in the action. It does not depend upon the ultimate existence of a good cause of action in the plaintiff, in the particular case before the court. It is the "power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in the particular case."

Malone v. Meres, 91 Fla. 709, 109 So. 677, 683 (1926)(citations omitted).

As recognized by this court in Malone and Lovett, the subject matter jurisdiction of Florida courts is derived from the Florida Constitution or by statutes enacted by the legislature pursuant to constitutional directive. Caudell v. Leventis, 43 So. 2d 853 (Fla. 1950). In the case of the circuit court, the constitutional and statutory provisions confer jurisdiction over actions at law for damages that exceed, as applicable to this case, the sum of $5,000. Art. V, § 5(b), Fla. Const.; §§ 26.012, 34.01(1)(c)2., Fla. Stat. (1987).

Subject matter jurisdiction is invoked in the following manner:

> A court's jurisdiction is generally invoked in a given case by a party filing a proper

> pleading which alleges material facts demonstrating (1) the existence of a judicial controversy (a right in dispute between two or more parties) within the subject matter jurisdiction of the court and (2), when a binding judicial determination requires the court to act directly on an object (a res), that such court has, or can acquire, jurisdiction over such res.

Florida Power & Light Company v. Canal Authority of the State of Florida, 423 So. 2d 421, 423-24 (Fla. 5th DCA 1982)(footnotes omitted). Once the court's jurisdiction has been properly invoked, it is perfected by acquiring jurisdiction over the person through issuance and service of process, an issue not contested at bar. Id.

In discussing the first requirement enumerated above, a pleading alleging facts sufficient to bring the matter within the subject matter jurisdiction of the court, this court in Lovett explained:

> The pleading bringing the matter before the court need not necessarily be sufficient in law to withstand the test of a demurrer, but as a general rule it must state, at least inferentially, each material fact necessary to warrant the court to deliberate thereon and grant the relief accorded, which must usually be the relief prayed, or at least not foreign thereto--though as to the latter, the form of relief, when different from that asked, the judgment or decree may be merely voidable, but not void.

Lovett, 112 So. at 776. See also Calhoun v. New Hampshire Insurance Co., 354 So. 2d 882, 883 (Fla. 1978)("Generally, [subject matter jurisdiction] is tested by the good faith allegations, initially plead, and is not dependent upon the ultimate disposition of the lawsuit.").

Applying these principles to the facts at bar, petitioners' complaint filed against Standard Guaranty for bad faith failure to settle was not sufficient to withstand a motion to dismiss for failure to state a cause of action, if filed, because the entry of a judgment against the insured in excess of the policy limits was not alleged. Nonetheless, the court possessed jurisdiction over the class of cases represented by the complaint, i.e., actions for damages exceeding $5,000, generally, and, specifically, insurance bad faith cases, and the complaint thus alleged sufficient facts to warrant the court exercising its jurisdiction over the matter and granting the relief requested. The pleading deficiency thus did not affect the trial court's subject matter jurisdiction and its judgment was not void.

Other situations recently arising under Florida law illustrate the distinction between pleading deficiencies affecting whether the complaint states a cause of action and those deficiencies which divest the court of subject matter jurisdiction. For example, the complete failure to allege waiver of sovereign immunity in a tort action brought against a governmental agency extends to the fundamental authority of the court to adjudicate that type of case and therefore affects the court's subject matter jurisdiction. E.g., Schmauss v. Snoll, 245 So. 2d 112 (Fla. 3d DCA 1971), cert. denied, 248 So. 2d 172 (Fla. 1971). The claimant in such cases must comply with the written notice requirement of section 768.28(6), Fla. Stat., as a condition precedent to a tort suit against a governmental agency, and compliance must be plead to

state a cause of action. Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979). The failure, however, to plead the required statutory notice does not divest the court of subject matter jurisdiction, and any defect in the pleadings regarding statutory notice may be waived if the governmental agency fails to assert the defense of failure to state a cause of action within the time limits prescribed by Fla.R.Civ.P. 1.140(h). Drax International Ltd. v. Division of Administration, State of Florida Department of Transportation, 573 So. 2d 105 (Fla. 4th DCA 1991); Bryant v. Duval County Hospital Authority, 502 So. 2d 459 (Fla. 1st DCA 1986), rev. denied, 511 So. 2d 998 (Fla. 1987); McSwain v. Dussia, 499 So. 2d 868 (Fla. 1st DCA 1986), rev. denied, 511 So. 2d 198 (Fla. 1987); In re Forfeiture of 1978 Green Datsun Pickup Truck, 475 So. 2d 1007 (Fla. 2d DCA 1985), rev. denied, 486 So. 2d 598 (Fla. 1986); City of Pembroke Pines v. Atlas, 474 So. 2d 237 (Fla. 4th DCA 1985), rev. denied, 486 So.2d 595 (Fla. 1986); City of Jacksonville Beach v. Duncan, 392 So. 2d 25 (Fla. 1st DCA 1980), rev. denied, 399 So. 2d 1141 (Fla. 1981). See also Hospital Corporation of America v. Lindberg, 571 So. 2d 446 (Fla. 1990)(failure to comply with presuit notice requirements of medical malpractice screening statute did not divest trial court of subject matter jurisdiction); Lusker v. Guardianship of Lusker, 434 So. 2d 951 (Fla. 2d DCA 1983)(court lacked authority to appoint standby guardian without consent of natural guardian but court had subject matter jurisdiction over the cause).

The decision in Florida Power & Light Company v. Canal

Authority of the State of Florida, supra, represents another example. In that case, Florida Power filed a Rule 1.540 motion in 1981 to vacate judgments of condemnation entered in 1967 on the ground that the petitions upon which the judgments were based did not have attached authorizing resolutions of the condemning authority as required by a subsequently decided decision of this court (Tosohatchee Game Preserve, Inc. v. Central and Southern Florida Flood Control District, 265 So. 2d 681 (Fla. 1972)), and that consequently the trial court entering the judgments lacked subject matter jurisdiction. After first agreeing that Tosohatchee required the attachment as alleged by Florida Power, the failure of which exposed the petitions for condemnation to motions to dismiss for failure to state a cause of action, the district court, quoting Lovett and numerous other authorities, affirmed the judgment entered against Florida Power and stated:

> Even if at the time the petitions for condemnation in this case were filed the failure of the condemning authority to attach resolutions to their petitions for condemnation made those petitions subject to motions to dismiss, such deficiencies in the pleading invoking the jurisdiction of the trial court did not deprive the court of jurisdiction. Clearly the trial court in the instant cases, being the circuit court, had subject-matter jurisdiction over the class of cases known as condemnation suits.

Florida Power, 423 So. 2d at 421 (footnotes omitted). Similarly, in the present case the complaint for bad faith was subject to a motion to dismiss for failure to state a cause of action, but the pleading deficiency did not prevent the trial court from exercising subject matter jurisdiction over the type of case alleged or

prevent the respondent from waiving the deficiency by agreement. The trial court was empowered by the pleadings to fully adjudicate the controversy presented and the district court thus erred in holding that the trial court lacked jurisdiction.

IV.

This court's decision in Blanchard v. State Farm Mutual Automobile Insurance Co., 575 So. 2d 1289 (Fla. 1991), is inapplicable.

This court's decision in Blanchard v. State Farm Mutual Automobile Insurance Co., 575 So. 2d 1289 (Fla. 1991), relied upon by respondent below, does not support the result reached by the district court. In Blanchard, the Eleventh Circuit certified to this court the question whether an insured's bad faith claim brought against his uninsured motorist insurance carrier under section 624.155(1)(b)1 accrues before the conclusion of the underlying action against the uninsured motorist. The district court previously dismissed the action because the insured, in the judgment of the district court, had been guilty of splitting his cause of action by not joining the bad faith claim with the original suit for uninsured motorists benefits. Answering the question in the negative, this court held:

> Thus, 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.

Blanchard, 575 So. 2d at 1291 (emphasis supplied).

Blanchard is distinguishable on several grounds. First, and most obvious, Blanchard involved a first-party bad faith suit brought pursuant to section 625.155(1)(b)1, while the instant case is a common law bad faith action brought by the injured party as authorized by Thompson v. Commercial Union Insurance Company of New York, 250 So. 2d 259 (Fla. 1971). See Sarko v. Fireman's Insurance Co. of Newark, New Jersey, 573 So. 2d 1076 (Fla. 4th DCA 1991)(common law bad faith action not preempted by § 624.155(1)(b)1). Second, this court's decision in Blanchard was not based on subject matter jurisdictional grounds, but, as reflected by the underscored language quoted above, was decided based upon the existence of a cause of action. Finally, the Blanchard reasoning, that a first-party bad faith action cannot be brought prior to final determination of the underlying action, differs factually from the present case. While the tortfeasor's liability for damages had not been finally adjudicated in the case at hand, Standard Guaranty, unlike the insurer in Blanchard, admitted on the record the insured tortfeasor's liability for the damages sustained by Cunningham (R 103, 358, App 5) and that Cunningham's damages exceeded the policy limits (R 103), effectively resolving the underlying claim.

V.

The present case is factually distinguishable from Dixie Insurance Company v. Gaffney, 582 So. 2d 64 (Fla. 1st DCA 1991).

In addition to relying on Cope, the district court relied upon its decision in Dixie Insurance Co. v Gaffney, supra. In that case the insurer, during the pendency of a tort action filed against its insured, filed a declaratory judgment action asking the court to decide that it was not guilty of bad faith with respect to the claim then pending against its insured. Neither the insured nor the injured party objected to the declaratory procedure initiated by the insurance company. The trial court dismissed the action, however, because it found no justiciable controversy and consequently concluded that it lacked jurisdiction to hear the case. The district court affirmed and recognized that the insurer sought nothing more than a non-binding advisory opinion on the issue of bad faith which the court determined was "too attenuated or contingent an issue to support the declaration sought." Dixie Insurance, 582 So. 2d at 66.

In the decision of the district court subject to review, the court disagreed with the Cunninghams' position that Dixie Insurance was distinguishable because the insurer in Dixie Insurance sought declaratory relief while the complaint filed in the instant case sought money damages. Slip op. at 2-3 (App. Tab 1). The district court found the cases indistinguishable because in neither case was a claim for bad faith damages submitted to the jury, nor could such claim, the court noted, be presented prior to

entry of an excess judgment. Slip op. at 3 (App. Tab 1).

The district court in its analysis overlooked several important distinguishing factors which make Dixie Insurance inapplicable. First, unlike Dixie Insurance, the complaint in the present case did not seek a non-binding opinion and, instead, the parties at bar agreed to bound by the result of the bad faith trial. While petitioners fully recognize that the parties cannot by agreement confer subject matter jurisdiction upon the court, there was no agreement in Dixie Insurance for the parties to be bound by the result or to provide, as here, complete protection to the insured by trying the issue of bad faith before determination of the underlying tort action. Second, in comparing the facts of the instant case with the facts in Dixie Insurance, the district court stated: "In Dixie Ins, Co., supra, the parties also sought to have the bad-faith issue resolved prior to determination of monetary damage claim against the insured." Slip op. at 3 (App. Tab 1). In the present case, the final determination of monetary damages against the insured was not made, but the insurer stipulated, unlike the insurer in Dixie Insurance, that the injured party's damages exceeded the policy limits available to the insured, a stipulation which effectively eliminated the necessity for the actual entry of an excess judgment.

In the alternative, Mr. and Mrs. Cunningham respectfully submit that Dixie Insurance was incorrectly decided and should be disapproved. A common law action for bad faith failure to settle arises from the insurer's contractual obligation to exercise good

faith and thus sounds in contract rather than in tort. Government Employees Insurance Co. v. Grounds, 332 So. 2d 13 (Fla. 1976). The Declaratory Judgment Act expressly grants jurisdiction to the circuit court to declare rights and obligations under contracts whether before or after breach. §§ 86.011, 86.021, 86.031, Fla. Stat. Declaratory judgment actions have been particularly effective in resolving disputes arising under liability insurance policies, Tindall v. Allstate Insurance Co., 472 So. 2d 1291 (Fla. 2d DCA 1985), rev. denied, 484 So. 2d 10 (Fla. 1986), and may be utilized prior to establishment of the insured's responsibility to a third party. Stonewall Ins. Co. v. W.W. Gay Mechanical Contractor, Inc., 351 So. 2d 403 (Fla. 1st DCA 1977).

The fifth district cogently observed that permitting parties to seek judicial declaration of their rights under contract avoids protracted and often unnecessary litigation, and that "[i]f a declaratory judgment action is permitted then all parties know at an early date their rights and obligations under the policy and are able to deal appropriately with each other." Allstate Insurance Co. v. Conde, 595 So. 2d 1005, 1007 (Fla. 5th DCA 1992). Considering the goal of the Declaratory Judgment Act "to settle and to afford relief from insecurity and uncertainty," § 86.101, Fla. Stat., the relief which the insurer sought to employ in Dixie Insurance was consistent with that purpose and Dixie Insurance should be disapproved by this court.

VI.

Policy considerations support approval of the procedure followed in this case of trying the bad faith issue prior to determination of the underlying claim.

The favorable ramifications of the agreement between the parties to try the issue of bad faith prior to final determination of the underlying action deserve careful consideration. First, the procedure employed in this case encourages settlement and promotes judicial economy and cost savings to the litigants. Many bad faith cases involve critical, if not catastrophic, injuries which are extremely time consuming and expensive to try to conclusion. Bad faith insurance cases, on the other hand, while not as simple as many other types of civil cases, have become relatively routine and less of a burden on the court system and litigants than medical expert-intensive catastrophic injury cases. When the bad faith case is tried under the type of agreement involved in this case, before the underlying trial of liability and damages, a verdict in favor of the insurer results in a full release of the insured and the trial of the more expensive underlying case becomes unnecessary. If the bad faith trial results in a finding of bad faith, the insurer faces the prospect of paying all the injured party's damages without regard for the policy limits, greatly enhancing the realistic probability of settlement. Indeed, in response to an inquiry from the trial judge, counsel for petitioners noted below that he had tried six cases pursuant to an agreement with the insurance carrier to try the issue of bad faith prior to determination of the underlying action and in all six

cases the insurance company, after having been found responsible for bad faith, settled the claim without the parties incurring the significant expense of a trial of the underlying action (Transcript A 25).

On the other hand, if the underlying claim is tried first to obtain an excess judgment as a prerequisite to the subsequent bad faith action, the case is virtually impossible to settle at that point because the insured rarely has sufficient funds to contribute to a settlement above the policy limits and the insurer's liability for the excess has not been established, making the carrier reluctant to contribute above policy limits. A second trial therefore becomes necessary to resolve the bad faith issue.

Perhaps of even greater importance, trial of the bad faith case first, with the agreement to accept policy limits and release the insured if the jury makes a finding of no bad faith, provides complete financial protection to the insured and prevents his financial ruination. Insurers would no doubt complain that this procedure places them in an untenable position -- forced to accept the agreement to extricate the insured from his predicament. Better insurance claims practices, not disapproval of the procedure employed in this case, will rectify the insurer's dilemma.

CONCLUSION

The question certified by the district court should be answered in the affirmative and the decision of the district court reversing the final judgment entered in favor of petitioners should be quashed.

Respectfully submitted:

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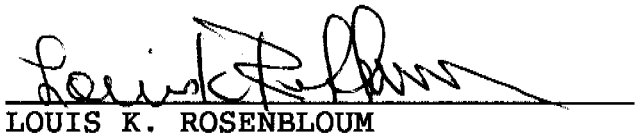
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to David H. Burns, Esquire, Michael D. West, Esquire, Joseph E. Brooks, Esquire, Post Office Box 1794, Tallahassee, Florida 32301; Robert D. Bell, Esquire, Post Office Box 12564, Pensacola, Florida 32573 and to Robert G. Kerrigan, Esquire, Post Office Box 12009, Pensacola, Florida 32589 by regular U.S. Mail this 8th day of February, 1993.



LOUIS K. ROSENBLOUM

APPENDIX