097

FILED
SID J. WHITE
APR 9 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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

REPLY BRIEF OF PETITIONERS

LOUIS K. ROSENBLOUM
Fla. Bar No. 194435
LEFFERTS L. MABIE, JR.
Fla. Bar No. 49231
JAMES A. HIGHTOWER
Fla. Bar No. 196438
Levin, Middlebrooks, Mabie,
Thomas, Mayes & Mitchell, P.A.
Post Office Box 12308
Pensacola, Florida 32581
904/435-7132
Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **Page**

CONSTITUTION, RULES AND STATUTES:

OTHER AUTHORITIES:

ARGUMENT

I.

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

Standard Guaranty contends, supported by language quoted from Fidelity and Casualty Company of New York v. Cope, 462 So. 2d 459, 461 (Fla. 1985), that the absence of an excess judgment represents a failure to have a cause of action which creates a deficiency in the court's subject matter jurisdiction that cannot be waived by the parties. The Cunninghams, on the other hand, also supported by language from Cope, have argued that the absence of an excess judgment means that the complaint is subject to dismissal for failure to state a cause of action, an affirmative defense which can be waived by agreement.

The issue having been framed, Standard Guaranty relies on the following passage from Trawick's treatise on civil procedure which highlights the disagreement between the parties regarding the legal effect of the failure to plead the entry of an excess judgment:

> Defects that are not asserted in the motion 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.

Trawick, Trawick's Florida Practice and Procedure § 10-4 (footnote omitted). Trawick cites no authority for the above-quoted statement but the difference between a pleading which fails to

state a cause of action and a pleading which attempts to state a cause of action "unknown to the law" is obvious. For example, an action filed today for alienation of affections would fall within the category of actions unknown to the law of Florida. An action for bad faith failure to settle, however, is a frequently litigated cause of action well-known to Florida law and recognized by this court over fifty years ago. Auto Mut. Indemnity Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1938).

At page seven of its answer brief, Standard Guaranty argues that "[u]ntil 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," citing BEC Construction Corp. v. Gonzalez, 383 So. 2d 1093 (Fla. 1st DCA 1980), rev. denied, 389 So. 2d 1110 (Fla. 1980); Bumby & Stimpson, Inc. v. Peninsula Utilities Corp., 179 So. 2d 414 (Fla. 3d DCA 1965); and Tom v. State ex rel. Tom, 143 So. 2d 226 (Fla. 2d DCA 1962). In BEC, the court found the judge of industrial claims lacked jurisdiction over a workers' compensation claim because no claim had been filed by the estate of a worker who died after filing his claim for benefits. This holding recognizes that the court's jurisdiction must be invoked by filing at least some form of pleading by the party seeking relief. Lovett v. Lovett, 93 Fla. 611, 112 So. 768 (1927). This requirement was absent in BEC, but was sufficiently presented by the complaint filed in the case at hand.

In Bumby & Stimpson and Tom, the district courts

dismissed appeals because the notices of appeal were filed prematurely before entry of the final judgment from which the appeals were purportedly taken. Those dismissals acknowledged the rule that a court's jurisdiction is derived from the constitution or from statutes and rules adopted or enacted pursuant to constitutional authority. Caudell v. Leventis, 43 So. 2d 853 (Fla. 1950). The constitution, clarified by rules adopted pursuant to constitutional authority, did not confer jurisdiction over cases appealed prior to entry of final judgment, thus requiring dismissal. The action filed at bar, however, clearly fell within the circuit court's constitutional and statutory grant of authority and was within the court's subject matter jurisdiction.

In their initial brief (page 10), the Cunninghams cited several cases in which actions had been dismissed because the plaintiff had not suffered damages resulting from the entry of an excess judgment. Shuster v. South Broward Hospital District Physicians' Professional Liability Trust, 591 So. 2d 174 (Fla. 1992); Shuster v. South Broward Hospital District Physicians' Professional Liability Trust, 570 So. 2d 1362 (Fla. 4th DCA 1990); 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 (11th Cir. 1985). In each of these cases the dismissal was grounded upon the failure of the plaintiff to state a cause of action rather than lack of subject matter jurisdiction. In response, Standard Guaranty argues that merely because the actions filed in those

cases were dismissed for failure to state a cause of action does not mean they could not have been dismissed for lack of subject matter jurisdiction (answer brief at 8-9). Standard Guaranty's argument, however, fails to acknowledge that if the courts in those cases did not have subject matter jurisdiction over the causes before them, they obviously lacked jurisdiction to rule on a motion to dismiss for failure to state a cause of action. While a court certainly retains jurisdiction to determine its own jurisdiction, State ex rel. B.F. Goodrich Co. v. Trammell, 140 Fla. 500, 192 So. 175 (1939), that authority does not extend to the substantive issues raised by the pleadings unless jurisdiction first is determined to exist.

II.

The decision below is factually distinguishable from Cope.

Citing Kelly v. Williams, 411 So. 2d 902 (Fla. 5th DCA 1982), rev. denied, 419 So. 2d 1198 (Fla. 1982), Standard Guaranty argues at page ten of its brief that Cope is factually indistinguishable because, like the insured in Cope, the Standard Guaranty "insured is not legally obligated to pay an amount in excess of policy limits or an excess judgment." (emphasis in original). While the precise amount of the Cunninghams' damages has not been determined, Standard Guaranty stipulated to the important fact that those damages exceed the insured's policy limits of $10,000 (R 103, App. Tab 5). This stipulation of fact means that Standard Guaranty's insured will indeed be obligated for an amount of money in excess of his insurance coverage limits to be

determined following the jury's decision that Standard Guaranty acted in bad faith.

Standard Guaranty's argument also fails to recognize that Cope does not apply to this case for a more basic and fundamental reason. In Camp St. Paul Fire & Marine Insurance Co., 18 Fla. L. Weekly S94 (Fla. Feb. 4, 1993), this court recently explained its holding in Cope:

> In Cope, we held that, if an excess judgment has been satisfied, absent an assignment of that cause of action prior to satisfaction, a third party cannot maintain an action for a breach of duty between an insurer and its insured. The release executed in Cope eliminated the harm that resulted from the excess judgment.

Camp, 18 Fla. L. Weekly at S95.

This statement reflects that Cope was based on the fundamental proposition that by satisfying the excess judgment and fully releasing the insured, no damages were recoverable by the injured party. The fatal defect in Cope was not the absence of an excess judgment, but that the excess judgment had been fully satisfied, eliminating any possibility of recovery. At bar, an excess judgment has not been satisfied and the insured tortfeasor has not been fully released from liability. Unlike Cope, damages remain recoverable in the present case and, in fact, Standard Guaranty stipulated that the Cunninghams' damages exceed the tortfeasor's policy limits. The holding in Cope should be limited to the particular factual circumstances involved, i.e., satisfaction of an excess judgment and release of the judgment debtor, and should not be extended to preclude maintenance of the

bad faith claim under the facts of the present case.

III.

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

Judicial opinions and learned treatises contain numerous definitions of the term "subject matter jurisdiction," but this court concisely defined the term in Lovett v. Lovett, 93 Fla. 611, 112 So. 768 (1927), to require the following:

> (1) That the court has jurisdictional power to adjudicate the class of cases to which such case belongs; and (2) that its jurisdiction has been *invoked* in the particular case by lawfully bringing before it the necessary parties to the controversy; (3) the controversy itself by pleading of some sort sufficient to that end; and (4) when the cause is one in rem, the court must have judicial power or control over the res, the thing which is the subject of the controversy.

Lovett, 112 So. at 776 (italics the court's; underlining supplied). The second and fourth requirement are not at issue in this case. Concerning the first requirement, the subject cause of action clearly falls within the class of cases over which the circuit court may exercise jurisdictional power, namely, actions at law for damages in excess of the court's monetary limits, or, stated differently, contract actions, i.e., actions based upon an insurance policy for bad faith failure to settle. Contrary to Standard Guaranty's position, the third element quoted above does not require a pleading which states all the "essential ingredients" of the cause of action but requires only a complaint of "some sort" sufficient to recognize the court's power to adjudicate the cause.

See Tide Water Associated Oil Co. v. Superior Court of Los Angeles County, 43 Cal. 2d 815, 279 P.2d 35, 42 (1955)("It is the general rule that the failure to state facts sufficient to constitute a cause of action does not deprive a court of the power to hear and determine a controversy if it has jurisdiction of the parties and the subject matter."); Abbott v. Beth Israel Cemetery Ass'n of Woodbridge, 13 N.J. 528, 100 A.2d 532, 536 (1953)("Jurisdiction over the subject matter does not depend upon the sufficiency of a complaint in a particular case, nor the technical manner in which the cause is pleaded.").

In support of its position, Standard Guaranty draws the distinction between jurisdiction in the "general sense," the power to adjudicate a general class of cases, and jurisdiction in the "particular sense," the power to adjudicate the particular matter before it (answer brief at 15). In response, the Cunningham's would initially note that this court observed over fifty-five years ago that "[t]here is some confusion in the use of this term 'subject-matter' in some of the cases dealing with the question of jurisdiction." Lovett, 112 So. at 775. A reading of Standard Guaranty's argument comparing subject matter jurisdiction in the "general sense" to subject matter jurisdiction in the "particular sense" reveals that much confusion remains. The Cunninghams submit, however, that the following statement made by this court in Lovett confirms that the concept of subject matter jurisdiction applicable to the question presently pending before this court refers to subject matter jurisdiction in the "general sense," i.e.,

the exercise of the court's authority over the general class of cases to which the subject case belongs:

> Sometimes it [subject matter jurisdiction] is applied with reference to the power of the court to deal with the class of cases to which the particular case belongs, and sometimes it is applied to the res within the court's control or under its jurisdiction, or to the rights--that is, the questions of personal or property rights, the controversy--before the court in the particular case. The rule that jurisdiction of the subject-matter, in the general abstract sense--the power of the to adjudicate the class of cases to which the particular case belongs--cannot be conferred by the acquiescence or consent of the parties is so universally recognized as to require no citation of authority. The kind of jurisdiction referred to by this rule is the power conferred on the court by the sovereign--which means with us the Constitution or statute, or both--to take cognizance of the subject-matter of a litigation and the parties brought before it, and to hear and determine the issues and render judgment upon the issues joined. Brown on Jurisdiction, § 2 (2d Ed.); 35 C.J. 426; 16 C.J. 723, 734. "The power to hear and determine a cause is jurisdiction; it is 'coram judice,' whenever a case is presented which brings this power into action." Unites States v. Arredondo, 6 Pet. 709, 8 L. Ed. 547. "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." Foltz v. St Louis, etc., R. Co., 60 F. 316, 8 C.C.A. 635.

Lovett, 112 So. at 775. See also Cobb v. State ex rel. Hornickel, 136 Fla. 479, 187 So. 151 (1938); Curtis v. Allbritton, 101 Fla. 853, 132 So. 677 (1931); Crill v. State Road Department, 96 Fla. 110, 117 So. 795 (1928). The action filed by the Cunninghams clearly fell within the general class of cases for which the

circuit court holds the power to adjudicate, vesting the circuit court with subject matter jurisdiction over the cause.

The cases on this point[1] discussed by Standard Guaranty do not support approval of the decision subject to review because they all involved specific constitutional or statutory grants of jurisdictional authority, and jurisdiction was determined by whether the factual circumstances brought the case within the statutory jurisdiction of the court. For example, in Swebilius, disciplinary action taken by the Florida Construction Industry Licensing Board was challenged by a licensee on the ground that the board lacked subject matter jurisdiction to prosecute the complaint because it failed to forward a copy of the complaint to the local board. The statute clearly required the state board to forward the complaint to the local board and conferred jurisdiction in the state board only if no local board existed. Since the state conceded the existence of a local board, the state board clearly lacked subject matter jurisdiction over the complaint. In the instant case, there is no analogous specific grant of jurisdictional authority.

IV.

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

In its initial brief the Cunninghams argued that

---

[1] Hewitt v. State ex rel. Palmer, 108 Fla. 335, 146 So. 578 (1933); State ex rel. Washburn v. Hutchins, 101 Fla. 773, 135 So. 298 (1931); City of Miami v. Cosgrove, 516 So. 2d 1125 (Fla. 3d DCA 1987); Swebilius v. Florida Construction Industry Licensing Board, 365 So. 2d 1069 (Fla. 1st DCA 1979).

Blanchard v. State Farm Mutual Automobile Insurance Co., 575 So. 2d 1289 (Fla. 1991), was distinguishable because the parties in that case, unlike the parties at bar, had not stipulated that the tortfeasor was responsible for damages in excess of his policy limits, effectively resolving the underlying claim. In response, Standard Guaranty emphasizes that the underlying claim has not been fully adjudicated by an exact calculation of the Cunninghams' damages. In the context of a third-party faith case, the insured's responsibility for damages in excess of his policy limits should control the question whether the cause of action has accrued, not whether the exact amount of that excess has been calculated.

V.

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

Standard Guaranty's attempt to justify the correctness of the decision below on the basis of Dixie Insurance Co. v. Gaffney, 582 So. 2d 64 (Fla. 1st DCA 1991), is completely unavailing. Dixie Insurance simply recognizes the fundamental principle generally applicable to all actions that "[a]ny attempt by a mere colorable dispute to obtain the opinion of the court upon a question of law, where in fact there is no real controversy, is not countenanced by the courts." Lieber v. Lieber, 40 So. 2d 111, 113 (Fla. 1949). Similarly, the Declaratory Judgment Act, Chapter 86, Florida Statutes, under which the insurer sought relief in Dixie Insurance, requires the party requesting the declaratory decree to demonstrate a justiciable controversy between the parties. Advisory opinions

may not be obtained. Bryant v. Gray, 70 So. 2d 581 (Fla. 1954).

The factual circumstances giving rise to the action filed by the insurer in Dixie Insurance led the court to conclude that the controversy between the parties had not ripened into a bona fide, justiciable dispute and, as recognized by the district court, involved nothing more than a request for an advisory opinion. In contrast, a real and bona fide dispute exists between the parties at bar as reflected by the action brought by the Cunninghams against Standard Guaranty for money damages, not for a judicial declaration of rights.

The Declaratory Judgment Act was enacted "to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations." Martinez v. Scanlan, 582 So. 2d 1167, 1170 (Fla. 1991). While a justiciable controversy is required to maintain an action for declaratory relief, the Declaratory Judgment Act serves as an appropriate judicial instrument for actions involving threatened litigation and future acts and events and the rights and liabilities of the parties arising therefrom. § 86.051, Fla. Stat. (1987); Platt v. General Development Corp., 122 So. 2d 48, 50 (Fla. 2d DCA 1960)(declaratory judgment appropriate where "ripening seeds of controversy" have developed between the parties), cert. dismissed, 129 So. 2d 143 (Fla. 1960). Although factually distinguishable from the case at bar, these principles support petitioners' position that Dixie Insurance was incorrectly decided and 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.

Disagreeing with the Cunninghams' contention that the type of agreement entered into by the parties at bar promotes judicial economy by fostering settlement of bad faith cases without the time and expense of two trials, one resolving the underlying tort claim and the other determining the insurer's bad faith, Standard Guaranty first suggests that if the insurer is exonerated by a finding of no bad faith, the injured party may still pursue his claim against the judgment debtor to collect assets other than the available liability insurance. As experience dictates, however, most Floridians do not own collectable assets and that option is an illusory one at best.

Standard Guaranty next argues that if the insurer is found guilty of bad faith, there still is no assurance that the case will be settled, as evidenced, Standard Guaranty notes, by the Cunninghams having filed a notice for trial in this case following the jury verdict finding bad faith. The instant case, however, represents an exception to the course of action generally followed after the jury finding of bad faith, a course of action obviously engendered by Standard Guaranty's decision to repudiate its written agreement and to instead challenge the court's jurisdiction. Standard Guaranty's position also ignores the settled proposition that our legal system favors resolution of disputes by agreement and settlement agreements should be enforced whenever possible.

Robbie v. City of Miami, 469 So. 2d 1384 (Fla. 1985); Utilities Commission of City of New Smyrna Beach v. Florida Public Service Commission, 469 So. 2d 731 (Fla. 1985). These principles strongly suggest that any doubt about the validity of the agreement should be resolved in favor of recognizing the court's jurisdiction to fully enforce the agreement consistent with the parties' intent.

Standard Guaranty also questions whether protection of insureds from financial disaster is an appropriate judicial concern. First, Standard Guaranty refers to "financially able tortfeasors" in its discussion. This case and the issues before the court have nothing to do with financially able tortfeasors. If the injured party holds a judgment against a financially responsible tortfeasor, he will pursue the tortfeasor's collectable assets before undertaking a bad faith action, as the former represents the easier, less costly method of obtaining full compensation. This case, however, does not involve a financially responsible tortfeasor, but involves instead the typical Floridian whose only real asset is his liability insurance policy and the protection it supposedly affords.

Standard Guaranty's position that courts should not express a policy favoring protection of insureds from financial ruination resulting from bad faith committed by insurers is not unlike the position taken by the insurer in American Fire and Casualty Co. v. Davis, 146 So. 2d 615 (Fla. 1st DCA 1962), where the insurer contended it should not be liable in bad faith for an excess judgment entered against its insured because the insured was

judgment proof and therefore had not sustained any realistic damages. The court rejected the insurer's argument and held that payment of the excess judgment by the insured was not a necessary prerequisite to recovery of damages for bad faith failure to settle. The court also observed regarding the insurer's position:

> Such an argument in this era of credit living is illogical and void of merit. A man's credit in this day and age is one of his most valuable assets and without it, a substantial portion of the American people would be without their homes, washing machines, refrigerators, automobiles, television sets, and other mechanical paraphernalia that are now regarded as necessities of life.

American Fire, 146 So. 2d at 619. These observations still hold true today and courts should be vigilant to protect, if possible, the creditworthiness and financial stability of all of our citizens.

CONCLUSION

The certified question should be answered in the affirmative and the decision of the district court quashed.

Respectfully submitted:

LOUIS K. ROSENBLOUM
Fla. Bar No. 194435
LEFFERTS L. MABIE, JR.
Fla. Bar No. 49231
JAMES A. HIGHTOWER
Fla. Bar No. 196438
Levin, Middlebrooks, Mabie,
Thomas, Mayes & Mitchell, P.A.
Post Office Box 12308
Pensacola, Florida 32581
904/435-7132
Attorneys for Petitioners

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 April, 1993.

LOUIS K. ROSENBLOUM