SUPREME COURT OF FLORIDA

UNITED SERVICES AUTOMOBILE ASSOCIATION, a reciprocal interinsurance exchange,

Petitioner,

vs. CASE NO. 92,776

DALE E. JENNINGS, JR., and TAMMY M. JENNINGS,

Respondents.

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS, AMICUS CURIAE, SUPPORTING RESPONDENTS' POSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

This brief is submitted by the Academy of Florida Trial Lawyers ("AFTL"), amicus curiae, in support of respondents' position. AFTL accepts petitioner's statement of the case and facts as modified by respondents.

ISSUE PRESENTED FOR REVIEW

(as framed by the certified question)

WHETHER THE FACT THAT A THIRD PARTY BAD-FAITH CLAIM HAS BEEN BROUGHT PURSUANT TO A CUNNINGHAM STIPULATION RATHER THAN AN EXCESS JUDGMENT MAKES ANY DIFFERENCE WHEN ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES ARE ASSERTED DURING DISCOVERY IN THE BAD FAITH ACTION AS TO MATERIAL CONTAINED IN THE CLAIMS FILE

SUMMARY OF ARGUMENT

AFTL agrees with respondents' position that petitioner waived any attorney-client privilege or work product immunity attendant to its claims files by agreeing to try the bad faith action before adjudication of the underlying claim pursuant to a Cunningham Agreement. AFTL also agrees with respondents that the Cunningham Agreement serves as the "functional equivalent" of an excess judgment for purposes of discovery of the insurer's claims files.

Additionally, in response to concerns addressed by petitioner's amici, AFTL submits that materials related to the insurer's decision whether to accept a Cunningham proposal to try the bad faith case before determination of the underlying claim should be discoverable in a bad faith action. Because a Cunningham proposal fully protects the insured from an excess judgment, the insurer's decision whether to accept a Cunningham proposal implicates the interests of the insured as well as the insurer. Therefore, the insurer's fiduciary obligation owed to the insured continues during the period when acceptance of a Cunningham proposal is being considered by the insurer, subjecting materials related to this decision-making process to discovery in a subsequent bad faith action.

ARGUMENT

AFTL takes the position, as detailed in respondents' answer brief, that by stipulating to try the bad faith action before determination of the underlying tort claim pursuant to a Cunningham Agreement, the insurer in this case effectively waived any attorney-client privilege or work product immunity which otherwise would apply to material contained in its claims file. AFTL also agrees with respondents' argument that, based on this court's decision in Cunningham v. Standard Guaranty Ins. Co., 630 So. 2d 179 (Fla. 1994), and the specific language of the agreement executed by the parties in this case, the Cunningham Agreement serves as the "functional equivalent" of an excess judgment. Thus, as determined by the district court, there is no need to differentiate for discovery purposes between a bad faith action brought pursuant to a Cunningham Agreement and a bad faith action based on an excess judgment obtained by jury verdict. See United Services Auto. Ass'n v. Jennings, 707 So. 2d 384, 385 (Fla. 1st DCA 1998).

In addition to the above arguments developed fully by respondents' answer brief, AFTL wishes to address an issue raised by petitioner's amici concerning discovery of materials contained in the insurer's files which relate to the insurer's decision whether to accept a claimant's offer to try the bad faith action before determination of the underlying claim pursuant to a

Cunningham Agreement. In that regard, three categories of communications should be examined.

The first category includes communications and claims file materials concerning defense of the underlying tort claim brought against the insured by the injured claimant, including communications between the insurer and the attorney selected and retained by the insurer to defend the insured. Communications and materials in this category up to the date of the excess judgment are subject to discovery in a subsequent third-party bad faith action. See Dunn v. National Security Fire & Cas. Co., 631 So. 2d 1103, 1109 (Fla. 5th DCA 1993)(and cases cited therein). Such discovery is allowed because the insurer owes a fiduciary obligation to the insured and therefore participates in the adjustment and defense of the claim not only on its own behalf but on behalf of the insured. See Stone v. Travelers Ins. Co., 326 So. 2d 241 (Fla. 3d DCA 1976). Discovery of the insurer's claims file in this category is authorized in bad f\aith actions whether brought by the insured or the third-party claimant who stands in the insured's shoes. See Dunn, 631 So. 2d at 1109.

The second category for purposes of this analysis refers to communications and file materials related to the insurer's decision whether to accept a proposal submitted by the injured claimant to try the bad faith case before adjudication of the underlying claim pursuant to a Cunningham Agreement. AFTL submits that such communications and materials should be

discoverable in bad faith actions. If the Cunningham proposal is accepted by the insurer, the insured will be released and fully protected from an excess judgment. See Cunningham, 630 So. 2d at 182. Therefore, the insurer's decision whether to accept a Cunningham proposal implicates not only the insurer's liability for bad faith damages, but also the insured's personal exposure to an excess judgment. Because both the insurer's and insured's interests are at stake, the insurer's fiduciary obligation that forms the underlying rationale for discovery of the insurer's claims files continues during the period when the Cunningham proposal is being considered by the insurer.

Concerning this second category, petitioner's amici suggest that evidence concerning the insurer's decision whether to accept a Cunningham proposal should not be admissible in a subsequent bad faith action. AFTL disagrees. First, as argued previously, the decision whether to accept a Cunningham proposal implicates the interests of both the insurer and insured, and, therefore, the insurer's fiduciary obligation owed to the insured necessarily pervades the decision-making process. Any evidence from which a jury could find that the insurer breached its fiduciary obligation to the insured, exposing the insured to an excess judgment, should be admissible in evidence in a subsequent bad faith action. See Baxter v. Royal Indemnity Co., 285 So. 2d 652 (Fla. 1st DCA 1973), cert. discharged, 317 So. 2d 725 (Fla. 1991). Second, "[a]n insurance company acts in bad faith in

failing to settle a claim against its insured within its policy limits when, under all the circumstances, it could and should have done so, had it acted fairly and honestly towards its insured and with due regard for his interests." Fla. Std. Jury Instr. (Civ.) MI 3.1 (emphasis supplied). In AFTL's opinion, "all the circumstances" include evidence regarding the insurer's acceptance or rejection of a Cunningham proposal.[1]

The third category, one which apparently causes State Farm concern, addresses communications between the insurer and counsel separately retained by the insurer to advise the company regarding its potential liability for bad faith. In this respect, AFTL generally agrees with Judge Farmer's analysis in United Services Auto. Ass'n v. Crews, 614 So. 2d 1213, 1215 (Fla. 4th DCA 1993)(Farmer, J., concurring), that in bad faith actions the attorney-client "privilege is reserved for those discrete communications occurring between the carrier and counsel specifically asked to assess the case from a bad faith standpoint." If, however, an in camera inspection of the insurer's file discloses that such communications also address the insurer's decision whether to accept a Cunningham proposal, the insured's interests and, consequently, the insurer's fiduciary obligation owed to the insured would be involved,

[1] If the insurer accepts a Cunningham proposal, discovery of communications and materials related to the decision-making process, as well as other specific details concerning discovery, could be limited by agreement of the parties.

subjecting such communications to discovery under the second category discussed above.

CONCLUSION

The certified question should be answered in the negative and the decision of the district court approved.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Thomas S. Edwards, Esquire, 1301 Riverplace Boulevard, Suite 1609, Jacksonville, Florida 32207, Robert C. Gobelman, Esquire and Evan G. Frayman, Esquire, Suite 1700, SunTrust Building, 200 West Forsyth Street, Jacksonville, Florida 32202, George A. Vaka, Esquire and Tracy Raffles, Gunn, Esquire, Post Office Box 1438, Tampa, Florida 33601, and to Stephen E. Day, Esquire and Rhonda B. Boggess, Esquire, 50 North Laura Street, Suite 3500, Jacksonville, Florida 32202 by U.S. Mail this 16th day of July, 1998.

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