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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

UNITED SERVICES AUTOMOBILE ASSOCIATION,	)	
Petitioner,	)	
vs.	)	**CASE NO.: 92,776**
DALE E. JENNINGS, JR., and TAMMY M. JENNINGS,	)	
Respondents.	)	

RESPONDENTS JENNINGS' ANSWER BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

STATUTORY PROVISIONS AND RULES — PAGE(S)

INTRODUCTION

This case is before this Court pursuant to Rule 9.030(a)(2)(A)(V), Florida Rules of Appellate Procedure. The District Court of Appeal, First District, certified the following question as being one of great public importance.

> 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?

The Florida Defense Lawyers Association submitted an amicus brief on the aforementioned question. In addition, State Farm Mutual Automobile Insurance Company moved this Court for amicus curiae status. State Farm's proposed amicus issue will be addressed at the conclusion of this brief.

Herein, Respondent will be referred to as "Jennings" or "Respondents" and Petitioner will be referred to as "USAA" or "Petitioner"; any other person or entity will be appropriately identified. An Appendix was filed by USAA and will be referred to as USAA (A-1), USAA (A-2), etc. USAA's initial brief will be referred to as USAA (P-1), USAA (P-2), etc.; an Appendix is being filed with this brief and will be referred to as Jennings (A-1), Jennings (A-2), etc.; any reference to any other document will be by appropriate identification.

I. Respondents' Statement of the Case and of the Facts

In this case, there are certain facts which were inaccurately presented by Petitioner. In addition, there are certain facts which were omitted. Respondents' statement of the case and of the

facts are in two sections. First, Respondent will correct certain misstatements made by Petitioner. Then, Respondent will provide certain supplemental facts.

A. Correction of Petitioner's Facts

In the initial brief, USAA states "prior to Jennings filing the earlier lawsuit against Broxton, the Jennings and USAA reached an agreement to settle the Jennings claim against Broxton for the amount of $100,000.00, USAA's policy limits." USAA (P-3). In fact, no agreement was achieved because USAA changed the terms of the offer to settle. USAA required, in addition to a release proposed by counsel for Jennings, that Jennings and their counsel execute a hold harmless/indemnity agreement and that USAA would include the name of University Medical Center on the settlement check as an additional payee. Neither of these were terms consistent with the offer to settle by Jennings' counsel. See USAA (A-4).

In footnote 1, at page 3 of the initial brief, USAA indicates that University Medical Center submitted a Notice of Lien claim "perfecting its lien on any settlement or settlement agreement . . . " There is a substantial question in this case as to whether or not any lien claim was properly perfected due to defects in the Notice of Lien (see USAA A-3) as compared against the Jacksonville Lien Ordinance (see USAA A-2). In addition, USAA is aware that Jennings contests whether or not the lien claim was ever properly perfected and has questioned whether USAA conferred with its insured over these issues. See Jennings (A-2).

USAA also stated:

> By letter of May 3, 1994 (see A-8), Abbott refused this offer and forwarded to USAA a "courtesy copy" of a Complaint that he stated he intended to file against Broxton. This letter received by USAA on May 5, 1994, threatened that the Jennings would seek an excess judgment against Broxton, thereby exposing USAA to potential liability for bad-faith refusal to settle. (emphasis in original) Jennings (P-4)
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> * * *
>
> At the time of the above-referenced correspondence, USAA was unaware that on or about May 3, 1994, the Jennings filed their lawsuit against Broxton in the earlier case. USAA (P-5)

In fact, Abbott's letter dated May 3, 1994 informed USAA "a courtesy copy of the lawsuit is enclosed for your benefit, along with the discovery. Please furnish the Complaint and discovery to your attorneys so that they can timely comply with the appropriate deadlines." Furthermore, nowhere in Abbott's May 3, 1994 letter does he threaten any claims against USAA for bad-faith refusal to settle. This is argument on the part of USAA. Instead, Abbott pointed out that USAA exposed its insured to an excess judgment. USAA (A-8)

Thereafter, USAA states in its initial brief that

> By letter dated May 13, 1994 (see A-10), Abbott returned the two checks to USAA, and stated that USAA was in bad faith for failing to agree to issue a settlement check without University Medical Center's name as a payee. USAA (P-4 and 5)

No such statement was made by Abbott in his letter. Instead, Abbott raised the question of why USAA did not choose to settle the case and who would pay the excess judgment.

B. Statement of Facts Supplemental to Those Set Forth in the Petition

At approximately 10:00 p.m. on December 20, 1993, Dale Jennings was driving home from work at the Ritz-Carlton at Amelia Island. Jennings worked as a chef. USAA (A-4)

As Jennings proceeded down State Road A1A in Fernandina Beach, a car driven by 16-year old, Christopher Broxton, owned by Bobby Broxton and insured by USAA, crossed the center line and hit Dale Jennings' car head on. The passenger in Broxton's car, Nathan Howard, died at the scene. Christopher Broxton died shortly thereafter. Broxton's blood alcohol level was .07. The investigating officer for the highway patrol cited Broxton for driving while under the influence and cited him for causing his own death, the death of his passenger, and severe injuries to Dale Jennings. See USAA (A-4).

Jennings was rushed to the ICU Trauma Center at University Medical Center in Jacksonville. He was forced to undergo reconstructive surgery on his face, with multiple plates and screws. A thoracostomy was performed and a tube was placed in his chest for a collapsed lung. He suffered multiple additional fractures including his leg, ankle, fractures to his mandible and injuries to his knee. USAA (A-4)

Within approximately eight (8) days following the accident, Jennings had suffered approximately $54,000.00 in medical bills.

Broxton was insured for only $100,000.00 through USAA. See USAA Appendix 4.

University Medical Center served a lien claim, initially in the amount of $49,846.61 and then a supplemental lien claim in the amount of $53,335.06. USAA (A-3) The validity of the lien is at issue in the underlying litigation. See Jennings (A-5).

Following attempts by Jennings' attorneys to resolve the case for policy limits, suit was ultimately filed. Thereafter, a mediation took place, resulting in a Cunningham Agreement settlement. See USAA (A-11, A-12 and A-13). The Cunningham Agreement provided that USAA would pay the plaintiff Broxton's entire $100,000.00 policy limits. In addition, the plaintiff would be permitted to proceed against USAA in a bad-faith claim in exchange for a release of Broxton. Broxton is fully protected from liability for his personal assets. Thus, USAA is the only entity that has any potential additional liability. If the plaintiff proves bad faith on the part of USAA, then USAA is liable for additional sums of money, limited to $75,000.00 in damages and any legally recoverable attorney's fees and costs. This "Cunningham Agreement" is consistent with the case of Cunningham v. Standard Guaranty Life Insurance Company, 630 So.2d 179 (Fla. 1994) which is recited in certain of the settlement documents. See USAA (A-11, A-12 and A-13).

The Cunningham Agreement provides that, "the parties agree that USAA shall not be allowed to raise the giving of [a] release [to Broxton] as a defense to the [Jennings's] 'bad faith claim'."

USAA's (A-11) (Cunningham Agreement at ¶6). The Cunningham Agreement also provides that the Jennings need not have an assignment from Broxton in order to pursue their bad-faith claims against USAA. USAA (A-11) (Cunningham Agreement at ¶4). In addition, Broxton agreed "to fully cooperate with both Jennings and USAA ..." USAA's (A-13) (Stipulation and Agreement at ¶5).

The Jennings brought a three-count complaint against USAA, pursuing common-law and statutory bad-faith claims. Jennings (A-1) (Amended Complaint and Demand for Jury Trial).[1] Count I is a common-law bad-faith claim providing that the Jennings were damaged when USAA breached its duty to its insured, Broxton, to settle the claims against same within policy limits. Jennings (A-1) (Amended Complaint and Demand for Jury Trial at ¶ 20). Count II is a statutory bad-faith claim providing that the Jennings were damaged because USAA breached its statutory duties to Broxton. Jennings (A-1) (Amended Complaint and Demand for Jury Trial at ¶¶ 21-22). Count III is a statutory bad-faith claim providing that the Jennings were damaged because USAA breached its statutory duties to the Jennings.[2] Jennings (A-1) (Amended Complaint and Demand for Jury Trial at ¶¶ 23-24).

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[1] The lower court has stricken portions of the Amended Complaint and Demand for Jury Trial. So that the record might be complete, the Appendix also includes the Orders striking various allegations of this pleading.

[2] Count III was recently stricken by the trial Judge based upon the authority of State Farm Fire and Casualty Company v. Zebrowski, 706 So.2d 275 (Fla. 1997). See Jennings (A-4).

The Jennings allege that USAA failed to advise Broxton of its intention to reject their offers to settle for the policy limits, or to advise him of any negotiations, counteroffers or proposed counteroffers. Jennings (A-1) (Amended Complaint and Demand for Jury Trial at ¶13). In addition, the Jennings allege that USAA failed to seek Broxton's input as to any liability that he might incur when USAA failed to accept their offer. Jennings (A-1) (Amended Complaint and Demand for Jury Trial at ¶14[3]). Finally, the Jennings allege that USAA breached its duty to Broxton to settle the claim within the policy limits when, under all of the circumstances, it could and should have done so had it considered Broxton's interests. Jennings (A-1) (Amended Complaint and Demand for Jury Trial at ¶13).

A review of the correspondence between Fred Abbott and USAA reveals that Bobby J. Broxton was provided a copy of USAA's first letter dated April 4, 1994, acknowledging the claim and tendering the policy limits. See USAA (A-7). Thereafter, in each of its letters addressing the dispute with the Jennings and addressing counter-offers, USAA failed to copy its insured, Bobby J. Broxton [see letters dated April 21, 1994 - USAA (A-7) and May 9, 1994 - USAA (A-9)].

USAA correctly points out that "Jennings and Broxton ultimately settled their earlier personal injury accident at

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[3] Although this allegation was stricken, the court below provided that evidence of this allegation would be admissible if the court found that it was relevant to the Jennings's claim. Jennings (A-3).

mediation and therefore, no verdict or judgment was entered against Broxton" USAA (P-5). However, at the mediation, the parties stipulated to a Cunningham Agreement which provided that the Jennings could pursue a bad-faith claim against USAA; that the Jennings did not need an assignment from Broxton to pursue the claim; that the Jennings would release Broxton conditionally upon being permitted to pursue the bad-faith claim; and that the release would not serve as a defense to the bad-faith claim. See USAA (A-11). Thereafter, the Cunningham Agreement was executed and the Cunningham Agreement expressly provides that " . . . this stipulation and agreement serve as the functional equivalent of an excess judgment in the amount of $75,000 . . . ". See USAA (A-13), (P-2).

USAA also states:

> The basis of the lower Court's ruling was that Broxton waived his attorney-client and work product privileges when he signed the "Stipulation and Agreement" on July 18, 1995, (the Cunningham stipulation) (see A-18, pages 59 through 66). (emphasis in original) (USAA P-6)

While this statement is correct, it is incomplete. The trial Judge made the aforementioned statement only after defense counsel began questioning the Judge about the announced basis for the Court's ruling. At page 60 and 61 of the referenced transcript, USAA (A-18), the trial Judge informed defense counsel that the Cunningham Agreement transferred all of Mr. Broxton's rights against USAA to Mr. Jennings. The Court stated that Mr. Jennings " . . . stands in the shoes as if he were, in fact, Mr. Broxton."

II. Summary of the Argument

The Cunningham Agreement in this case expressly provides that " . . . the stipulation and agreement serve as the functional equivalent of an excess judgment in the amount of $75,000.00 . . . ". The Cunningham case also provides that a Cunningham Agreement serves as the functional equivalent of an excess judgment. Thus, there is no basis for treating a Cunningham Agreement differently than an excess judgment.

Public policy requires that a Cunningham Agreement serve as the equivalent of an excess judgment in bad faith litigation unless the agreement specifically delineates to the contrary. The purpose of Cunningham Agreements is to simplify and shorten litigation and to save costs to the parties and the Court system. If Cunningham Agreements are treated as legally different than an excess judgment, then neither the parties, the attorneys, nor Judges will know what is bargained for when a Cunningham Agreement is executed. Thus, there will be increased costs, and instead of simplifying and shortening litigation, there will be significant additional risk and litigious issues. As a result, there would be a significant disincentive to enter into Cunningham Agreements. If a party wishes to treat the Cunningham Agreement differently than an excess judgment, then those limitations, or changes, should be clearly written into the Cunningham Agreement.

The agreement entered into between the Jennings and USAA/Broxton expressly provides that the Cunningham Agreement is the equivalent of an excess judgment. Therefore, as a matter of

law, the Jennings then step into the shoes of Broxton for purposes of a bad faith action. Thus, the parties bargained for the Jennings to have the right to discover Broxton's claims files to determine the bad faith issues. Historically, Florida law permits the discovery of claims and attorneys files relating to the handling of the insured's litigation up through the time of an excess judgment. Because the Cunningham Agreement substitutes for an excess judgment, USAA and Broxton knew and understood that they were bargaining to give Jennings the right to review claims files and defense attorney materials. Thus, neither Broxton nor USAA should now be permitted to argue that they are unduly prejudiced through production of these materials.

Jennings steps into Broxton's shoes for purposes of the bad faith litigation. The Cunningham Agreement did nothing to change that. Thus, Broxton has no privilege to raise. Likewise, USAA has no privilege which it can assert against its insured, Broxton, or against the Jennings who stands in his shoes. Thus, the Jennings have the right to review all claims files and other materials relating to the handling of the insured's litigation up through the date of the Cunningham Agreement, which serves as the equivalent of an excess judgment.

As to State Farm's amicus issue relating to review by independent attorneys, this Court should determine what will constitute privileged materials and what will not. Any review which addresses the rights of the insured, potential liabilities of the insured, or case or claim evaluation, should properly be

discoverable, as in any bad faith litigation. If a separate attorney is retained exclusively for the purpose of advising the insurance company regarding its own risk relating to a particular Cunningham Agreement, without consideration of any of the other issues, then a privilege may attach. However, the insurance carrier then has additional duties to the insured as a result of a potential conflict of interest. In handling the insured's litigation, the insurance carrier acts as a fiduciary. As a result of the potential conflict of interest, the insurance carrier has a duty to fully advise the insured, in terms that it can understand, of the existence of the conflict. In addition, the insured should be strongly encouraged to seek independent representation. If the insurance carrier fails to meet these responsibilities, then these factors may be considered in determining whether or not it committed acts of bad faith.

III. Argument

To obtain relief from this Court, USAA must show that the order of the court below "(1) constitutes a departure from the essential requirements of law, (2) will cause [USAA] material harm, and (3) cannot be adequately remedied by appeal." Adelman Steel Corp. v. Winter, 610 So.2d 494, 496 (Fla. 1st DCA 1992), clarification denied on reh'g (Fla. 1st DCA 1992), superseded by statute on other grounds, Reed v. Reed, 643 So.2d 1180, 1182 n. 4 (Fla. 1st DCA 1994). The presumption is that the order of the court below is correct, and a writ of certiorari should issue only when it is essential to correct what constitutes more than legal

error, when there is "an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." Jones v. State, 477 So.2d 566, 569 (Fla. 1985)(Boyd, J., concurring specially).

Because the privileges that USAA has asserted against discovery of Broxton's claims file either have been waived or were never available, the claims file is discoverable, and the order providing for same does not constitute a departure from the essential requirements of law. Therefore, USAA is not entitled to the relief that it seeks and this Court should deny its Petition.

Moreover, the Jennings would suffer material harm were Broxton's claims file not discoverable. This action is factually identical to Odom v. Canal Ins. Co., 582 So.2d 1203 (Fla. 1st DCA 1991). In Odom, a bad-faith claim was brought against an insurer that refused to settle within policy limits without making a possible lienholder a co-payee of the settlement check. 582 So.2d at 1204. The court reversed the trial court's entry of summary judgment in favor of the insurer, which was based solely on whether it was reasonable to require that the lienholder be a co-payee. 582 So.2d at 1206. The court held that the trial court erred in preventing the plaintiff from presenting evidence that the insurer had failed to advise its insured of offers to settle or of the risks associated with the offers to settle. 582 So.2d at 1205. Relying on Boston Old Colony Insurance Company v. Gutierrez, 386 So.2d 783, 785 (Fla. 1980), the court stated:

> The insurer's duty to exercise good faith specifically obligates it "to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same." [cite omitted] Thus, even if the law concerning the reasonableness of Canal's conditional offer in 1983 were absolutely certain, a jury might still find that Canal breached its duty to act in the good faith manner described in [Boston Old Colony], 386 So.2d at 785.

582 So.2d at 1205.

The law requires that USAA consider Broxton's best interests in deciding whether to settle. The contents of Broxton's claims file is the most compelling evidence of whether USAA acted in bad faith, by failing to advise Broxton of the settlement negotiations, failing to seek his input regarding his interests, and by failing to settle with the Jennings when USAA should have or when it was instructed to do so by Broxton. The only way for a jury to finally determine what USAA communicated to Broxton, what Broxton conveyed to USAA and whether USAA properly considered its insured's interests in relation to all available information, is to have Broxton's claims file for review. Therefore, this Court should deny USAA's Petition.

A. Public Policy Encourages Treating a Cunningham Agreement As If It Was an Excess Judgment for Purposes of Jurisdiction, Discovery and in Every Other Respect, Unless Specifically Delineated to the Contrary in the Cunningham Agreement.

USAA argues that there is a difference between discovery and jurisdiction as it relates to the effect of a Cunningham Agreement. USAA acknowledges that with an excess judgment, the injured third

party becomes a third-party beneficiary to the insurance contract between the insured and the insurer. Thus, the injured party stands in the shoes of the insured to whom the insurer owes a fiduciary duty. USAA (P-9). USAA further acknowledges that this change in status occurs automatically, thereby entitling the insured to discovery of the claims files, attorney materials, and other documents and materials relevant to a bad faith action. See USAA (P-9 and 10).

USAA then attempts to distinguish between discovery and jurisdictional issues for the purpose of giving effect to the Cunningham Agreement. However, no public policy reason, nor any logical explanation is supplied to support its position. Instead, USAA simply argues that because a contract is entered into, but no excess judgment is obtained, Jennings' status does not automatically convert by operation of law. See USAA brief, (P-11).

In fact, in the case of Cunningham v. Standard Guaranty Insurance Company, 630 So.2d 179 (Fla. 1994), this Court stated "the stipulation was the functional equivalent of an excess judgment for purposes of satisfying Cope."[4] Cope merely requires an excess judgment as a condition precedent to a bad faith claim. In Cunningham, this Court recognized that the parties could stipulate to this requirement. In this case, USAA stated in its stipulation and agreement, that the " . . . stipulation and agreement serve as the functional equivalent of an excess judgment

[4] See Fidelity and Casualty Company of New York v. Cope, 462 So.2d 459 (Fla. 1985).

in the amount of $75,000 . . . ". USAA (A-13, P-2). USAA did not limit the manner in which the Cunningham Agreement was to serve as a functional equivalent of an excess judgment. The agreement does not state that it is only the equivalent of an excess judgment for the purpose of jurisdiction, but not for discovery.

In fact, public policy favors construing Cunningham Agreements as the equivalent of an excess judgment for all purposes in the prosecution of a bad faith claim unless the Cunningham Agreement expressly and clearly delineates terms to the contrary. This Court enunciated the reasons behind permitting Cunningham Agreements. In Cunningham, you found:

> This Court has looked with favor upon stipulations designed to simplify, shorten, or settle litigation and save costs to parties. Such stipulations should be enforced if entered into with good faith and not obtained by fraud, misrepresentation, or mistake, and not against public policy. [citations omitted] In an arrangement such as the one in the instant case, trying the bad faith claim before the underlying negligence action would result in a full release of the insured if no bad faith were found, thereby avoiding a time-consuming and expense trial on negligence and damages. We see no reason why the stipulation should not have been recognized. Cunningham at 182.

It was this Court's view that settlements are to be encouraged. Moreover, it was this Court's intent that stipulations should simplify and shorten litigation and save costs to the parties.

If this Court rules consistent with USAA's position, then every plaintiff's lawyer representing an injured party with a potential bad faith claim would be foolish to enter into a

Cunningham Agreement. The insurance carriers will have the ability to set up numerous pitfalls and land mines upon which any plaintiff's lawyer can step. Thus, the effect will be to dampen and restrict the number of instances in which parties will attempt to " . . . simplify, shorten or settle litigation and save costs to parties."

The purpose of the Cunningham Agreement is to serve as the "functional equivalent of an excess judgment" for purposes of staying the underlying personal injury suit, to protect the insured, and to litigate the legitimate issues over whether or not an excess recovery should be permitted against the insurance carrier. The onus should be upon the insurance carrier to insert limiting language in the Cunningham Agreement which serves to restrict the rights of the parties if it wishes to do so. Absent that, the parties should enjoy the same rights they would have under an excess judgment.

In sum, if this Court permits insurance carriers to treat Cunningham Agreements as something other than "the equivalent of an excess judgment" in determining how trial Judges should rule on the myriad of issues confronted in these cases, then the plaintiff's lawyers, Judges and defense lawyers are left with a wide variety of complicated issues which will serve as nothing but an impediment to the savings that were anticipated through Cunningham stipulations. An entire new body of case law will be necessary.

Insurance companies have bright, competent, well-paid lawyers. They are fully capable of delineating limitations upon Cunningham

Agreements, in the event they feel that such limitations are appropriate. In fact, in the case at bar, defense counsel actually limited the Cunningham Agreement to the issue of whether there is a proper bad faith claim against USAA " . . . for failure to settle Jennings' claims against Broxton within USAA's policy limits when, under all of the circumstances, USAA could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests." In so doing, it has been USAA's position that certain other types of bad faith claims are precluded from this litigation. USAA also limited the recoverable bad faith damages to $75,000.00. Had USAA intended to further restrict the rights of the parties by limiting the ability to obtain discovery, which is universally permitted in bad faith claims, USAA had the ability and the obligation to write those limitations into the agreement. It failed to do so and should not now be heard to complain.

B. History of Bad Faith Litigation

Permitting the recovery of claims files, attorney-client materials and other documents in bad faith litigation, whether through an excess judgment, or through a Cunningham Agreement, is consistent with the long history of the development of this area of law. In Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969), this Court concluded that an injured third party was an intended third party beneficiary of the insurance contract as a result of the public policy of the State of Florida.

Thereafter, in Thompson v. Commercial Union Insurance Company of New York, 250 So.2d 259 (Fla. 1971), this Court held that the injured third party, while not a formal party to the contract, still has the right to sue for damages sustained as a result of the acts of one of the parties to the insurance contract. This Court went on to hold that the injured third party was a direct intended beneficiary under the terms of the contract. Therefore, as a judgment creditor, the injured party had the right to bring suit directly against the tortfeasor's liability insurance carrier for recovery of amounts in excess of the policy limits based upon fraud or bad faith.

It was this Court's view that this was consistent with the public policy of this state which was to encourage compromise and settlement of controversies. No assignment was needed from the insured party upon entry of an excess judgment. 250 So.2d at 264. Thus, the injured third party, upon obtaining an excess judgment, "stands in the shoes of the insured". As such, the injured third party has historically been permitted to recover claims files, communications with insurance defense counsel, etc. See Boston Old Colony Insurance Company v. Gutierrez, 325 So.2d 416, 417 (Fla. 3d DCA 1976), cert. den. 336 So.2d 599 (Fla. 1976); Stone v. Travelers Insurance Company, 326 So.2d 241, 243 (Fla. 3d DCA 1976) and Dunn v. National Security Fire and Casualty Company, 631 So.2d 1103 (Fla. 5th DCA 1993).

Pursuant to Thompson, the injured third party's right to obtain claims files, communications with insurance defense counsel,

and other defense materials is not contingent upon obtaining any waiver of rights or assignment from the insured. The rights vest as a matter of law when the excess judgment is entered and the injured third party thereby steps into the shoes of the insured. Id.

Cunningham (supra) is simply an extension of this same body of law. Cunningham permits the bringing of a cause of action against the insurance carrier prior to the recovery of an excess verdict. Thus, as in the case at bar, no documentation is provided by the insured which waives the insured's right to the attorney-client or work product privilege.

By litigating the bad faith action first, the strain upon the Courts of this state are lessened, better protection is obtained for insureds, and litigation is simplified and made less expensive. Cunningham, 630 So.2d at 182. USAA and its amicus now ask this Court to abrogate the historic reference and insert minefields and pitfalls for any attorney entering into a Cunningham Agreement. This will create even more litigation. This Court should decline to take this step.

C. Because the Cunningham Agreement Gave the Jennings the Right to Discover Broxton's Claims File, Broxton Had No Privileges to Preserve or Waive, and The Claims File is Discoverable.

The Jennings contracted with USAA and Broxton to have the right to pursue a bad-faith claim against USAA. As the plaintiff in such a bad-faith action, the Jennings stand in the shoes of the insured, and are entitled to discover all materials that would have been discoverable by the insured. Therefore, as to the Jennings,

Broxton has no privileges to assert or to waive, and the order does not depart from the fundamental requirements of law by providing that Broxton's claims file is discoverable.

There is not one Florida case which supports USAA's proposition that the Jennings are not entitled to discover Broxton's claims file up to the date of the Cunningham Agreement. To the contrary, numerous cases hold that the plaintiff in a bad-faith action is entitled to discovery of all materials in the insurer's claims file up to either the date of judgment or the Cunningham settlement of the underlying litigation. Stone v. Travelers Ins. Co., 326 So.2d 241, 243 (Fla. 3d DCA 1976). United States Fire Ins. Co. v. Clearwater Oaks Bank, 421 So.2d 783 (Fla. 2d DCA 1982); and Allstate v. Swanson, 506 So.2d 497 (Fla. 5th DCA 1987). Discoverable materials include documents, memorandum, and letters contained in the insurer's file. Koken v. Am. Serv. Mut. Ins. Co., Inc., 330 So.2d 805, 806 (Fla. 3d DCA 1976). The plaintiff also is entitled to elicit testimony and files from the attorneys who had been retained by the insurer to represent it and the insured in the underlying suit. Continental Cas. Co. v. Aqua Jet Filter Sys. Inc., 620 So.2d 1141, 1142 (Fla. 3d DCA 1993); Koken, 330 So.2d at 806; and Boston Old Colony Ins. Co. v. Gutierrez, 325 So.2d 416, 417 (Fla. 3d DCA 1976), cert. denied, 336 So.2d 599 (Fla. 1976).

When the agreement was entered into, it was undisputed law that the plaintiff in a third-party bad-faith action stands in the shoes of the insured and has the same right of discovery as the

insured. Aqua Jet, 620 So.2d 1142 (entitled to discover attorney's files); Dunn v. Nat'l Sec. Fire & Cas. Co., 631 So.2d 1103 (Fla. 5th DCA 1993). Broxton was represented by counsel who knew or should have known the status of the law and who knew or should have known that barring discovery of Broxton's claims file would be improper under existing law and would gut the Jennings's bad-faith claim against USAA. It is untenable for USAA to now take the position that Broxton never waived his attorney-client or work-product privileges, when he contracted to confer the right to a bad-faith claim to the Jennings. This automatically conferred his discovery rights upon the Jennings.

USAA also contends that Broxton's claims file is not discoverable because Broxton stated that he wished to preserve his privileges in a letter dated November 21, 1995, (after execution of the Cunningham Agreement) that he sent to the attorney assigned by the insurer to defend him. This position is untenable in light of the legal significance of the Cunningham Agreement, because once he entered into the agreement, Broxton had no privileges to assert.[5] It also violates Broxton's agreement "to fully cooperate with both

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[5] The execution of the settlement agreement constituted a waiver of any privileges that Broxton might have had. If Broxton waived his privileges, the letter can do nothing to restore them to him. A privilege is not absolute; it may be waived by the holder. §90.507, Fla. Stat.; Delap v. State, 440 So.2d 1242, 1247 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984)("[W]hen a party himself ceases to treat the matter as confidential, it loses its confidential character."). Once it has been waived, it cannot be restored. Hamilton v. Hamilton Steel Corp., 409 So.2d 1111, 1114 (Fla. 4th DCA 1982)("It is black letter law that once the privilege is waived, and the horse out of the barn, it cannot be reinvoked.").

Jennings and USAA ..." USAA's (A-13) (Stipulation and Agreement at ¶5).

USAA places great emphasis on the fact that this action arises from a Cunningham Agreement rather than an excess judgment. The Jennings agree that this is significant; because Broxton conferred his bad-faith claim against USAA on the Jennings by contract, there can be no doubt that Broxton himself conferred his right to discovery on the Jennings. Therefore, the Jennings are entitled to discovery of the claims file.

USAA also places great emphasis on the fact that Broxton did not assign his claims to the Jennings. The Cunningham Agreement provides that the Jennings need not have an assignment from Broxton in order to pursue their claims against USAA. USAA's (A-11) (Cunningham Agreement at ¶4). The Jennings are frankly bewildered at USAA's contention that the Jennings are not entitled to the discovery they seek because Broxton did not assign his claims to them. The effect of the Cunningham Agreement is equivalent to that of an excess judgment and, therefore, the Jennings stand in the shoes of USAA's insured. No additional agreement is needed, and the Jennings are entitled to the discovery they seek.

When Broxton entered into the Cunningham Agreement with the Jennings and USAA, he contracted with the Jennings to give them the same rights of discovery that he had against USAA. Therefore, as to the Jennings, he has no privileges to assert, and his post-agreement letter asserting privileges is a nullity. Because Broxton has no privileges to assert against the Jennings' discovery

of Broxton's claims file, it goes without saying that the instant order could not violate any privileges that Broxton might have had. Therefore, the instant order does not constitute a departure from the fundamental requirements of law.

D. Because USAA Had No Privilege Until the Date of the Cunningham Agreement, Broxton's Claims File is Discoverable Up to the Date of Execution of This Agreement.

USAA also asserts that the materials in Broxton's claims file accumulated after May 5, 1994, are privileged because USAA sought advice of counsel. USAA opines that it did not waive any such privilege when it entered into the Cunningham Agreement. Both arguments are erroneous, because any privileges as to the Broxton claims file belonged to Broxton, not USAA, until the date of the agreement, and therefore USAA had no privileges to waive.

Unless coverage is disputed, an insurer and its insured are not adversaries when a claim has been brought against the insured by an injured party, and all materials in the claims file are discoverable by the insured.[6] When an excess judgment is entered or a Cunningham Agreement is reached in an action by the injured party against the insured, the injured party is subrogated to the insured's position and steps into the shoes of the insured with rights against the insurer. §627.4136, Fla. Stat.; Cunningham, 630

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[6] The only exception to the right of a plaintiff in a third-party bad-faith claim to have access to a claims file is when coverage is disputed, because such an instance makes adversaries of the insurer and its insured. United States Fire Ins. Co. v. Clearwater Oaks Bank, 421 So.2d 783 (Fla. 2d DCA 1982). USAA never disputed coverage. Therefore, the basis for a defense to discovery of the claims file is not available.

So.2d 179. The claims file and the file maintained by the attorney retained by the insurer to provide a defense for the insured are discoverable by the insured. Stone, 326 So.2d at 243; Gutierrez, 325 So.2d at 417. Therefore, when a Cunningham Agreement is executed, any and all materials in the claims file up to the date of the agreement become discoverable by the plaintiff in the third-party bad-faith action.

Moreover, materials in Broxton's claims file after May 5, 1994, are the most critical materials to the bad-faith claim. The Jennings believed that after May 5, 1994, USAA failed to advise Broxton of any of the counter offers, negotiations or correspondence between the plaintiffs' attorney and USAA. Moreover, upon information and belief, the Jennings believe the file will reflect that Broxton subsequently obtained an attorney who demanded that the insurance carrier acquiesce in the plaintiffs' attorney's requests for settlement as a result of Broxton's interests.

The essence of a bad-faith claim is whether the insurer acted in bad faith in failing to settle a claim against its insured, within its policy limits when, under all of the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests. Boston Old Colony, 386 So.2d at 785. Therefore, the issue in this case is whether, once USAA learned that its insured could be exposed to a judgment in excess of the policy limits, it should have settled

with the Jennings after consideration of its insured's best interests (as opposed to its own best interests).

The Jennings allege that USAA failed to advise Broxton of USAA's intention to reject their offers to settle for the policy limits, or to advise him of any negotiations, counteroffers or proposed counteroffers. Jennings (A-1) (Amended Complaint and Demand for Jury Trial at ¶13). In addition, the Jennings allege that USAA failed to advise Broxton or to seek his input as to any liability that he might incur when USAA failed to accept their offer. Jennings (A-1) (Amended Complaint and Demand for Jury Trial at ¶14). Finally, the Jennings allege that USAA breached its duty to Broxton to settle the claim within the policy limits when, under all of the circumstances, it could and should have done so had it considered Broxton's interests. Jennings (A-1) (Amended Complaint and Demand for Jury Trial at ¶13). All of these events must be factored into an assessment of whether USAA acted in bad faith.

The portion of Broxton's claims file accumulated after May 5, 1994, is critical to the bad faith claim, precisely because the insured faced the possibility of an excess judgment. USAA was actively engaged in the business decision of how to resolve its insured's claim after May 5, 1994. Merely because USAA asserts that it would not be able to settle on the terms proposed by the Jennings on advice of counsel does not make Broxton's claims files privileged. Were this the case, then no claims files would be discoverable; insurance companies would simply consult attorneys on

all of their open claims files, thereby immunizing all claims files from ever being discoverable.

USAA has no privileges that can bar the Jennings's discovery of Broxton's claims file up to the date of the Cunningham Agreement among the parties. Because USAA has no such privilege in this instance, the order does not constitute a departure from the fundamental requirements of law.

E. Denying USAA the Relief That It Seeks Will Not Cause It Material Harm, Because USAA Bargained on the Jennings Pursuing a Bad Faith Claim Against It, Which Entails Discovering Broxton's Claims File.

USAA is not entitled to the relief that it seeks unless it can show that enforcement of the order from which it appeals will cause it material harm. Adelman Steel Corp., 610 So.2d at 496. Not only is the order consistent with existing law, but enforcement of same will not cause USAA material harm. Therefore, USAA is not entitled to the relief that it seeks.

When USAA entered into the Cunningham Agreement providing that the Jennings could pursue a bad-faith claim against it, USAA bargained for discovery to be conducted against it by the Jennings. As noted above, it was well settled at the time of this agreement that a plaintiff in a third-party bad-faith action was entitled to discover the claims file up to the date of the excess judgment. The Cunningham Agreement expressly provides that it is the "equivalent of an excess judgment." Indeed, the very heart of a bad faith claim is the assessment of the materials that were available to the insurer prior to the date of the final judgment or the Cunningham Agreement. Therefore, USAA submitted itself to

discovery of Broxton's claims file when it executed the agreement. USAA cannot now show material harm in being ordered to cooperate in an event that it bargained for.

By contrast, reversing the order would cause the Jennings material harm because this would pose an enormous obstacle to their proving that USAA acted in bad faith. Broxton's claims file accumulated after May 5, 1994, addresses the merits of settling with the Jennings with the specter of entry of an excess judgment against Broxton and will shed light on the extent of communications between USAA and its insured. This is the only evidence of USAA's consideration of its insured's interests. Therefore, nothing could be more essential to the Jennings' claim. Denying the Jennings access to these materials would make it impossible for them (and any other future plaintiff) to ever prove a bad faith claim against the insurer. In sum, the whole purpose of the Cunningham Agreement is gutted.

F. Amicus Issues

The amicus brief submitted by the Florida Defense Lawyers Association needs no response independent of the responses already provided in the text of this brief. However, the issues raised by State Farm bear some additional response.

State Farm initially sought leave to address the issue

> Whether communications and documents between insurers and their separate counsel representing the insurer and not the insured, and not otherwise involved in the defense of the insured, are privileged from discovery in the third-party bad faith action.

However, in State Farm's brief, it further narrowed this question to the question of:

> Whether an insurer may seek and obtain advice and services of its own separate counsel as to whether to enter into a "Cunningham Agreement" without subjecting such communications and documents to discovery in the resulting third-party bad faith suit?

First, it should be noted that the issues presented to the Courts below deal with the recovery of the claims file and not the recovery of communications relating to USAA's own separate counsel as to whether to enter into a "Cunningham Agreement". The claims adjusters and claims attorneys had a fiduciary responsibility to Broxton. Those materials are clearly discoverable.

Although the underlying Courts were not asked to address it, the sole issue raised by State Farm relates to communications with an attorney who is not purportedly playing any role in the adjusting or evaluation process. However, this Court must analyze the responsibilities that the insurance carrier has to its insured in determining whether or not, and to what extent, these type communications should be privileged.

First, State Farm can make no meaningful differentiation between an insurance carrier who is asked to enter into a Cunningham Agreement as opposed to an insurance carrier who is asked to settle a case within policy limits when there is an excess exposure. In each circumstance, the insurance carrier is being offered an avenue by which to protect its insured from any excess liability. In the event the insurer choses not to protect the

insured, in each case, the insurance carrier has potential liability through a bad faith action.

The ultimate issue for a jury to consider in a bad faith action is whether the insurance carrier properly considered and protected its insured's interests as opposed to placing its own interests first, ahead of its insured's interests. State Farm now asks that with an offer of a Cunningham Agreement, the insurance carrier should be able to conceal the consideration that it gives to its own personal interest as contrasted against the insured's interests. It is exactly that issue that a bad faith jury is called upon to address.

In the case of Southern Bell Telephone and Telegraph Company v. Deason, 632 So.2d 1377 (Fla. 1994), this Court addressed corporate responsibility in relation to the attorney-client privilege. You recognized that a corporation can only act through its agents. You further recognized that a corporation relies upon its attorneys both for legal and for business advice. In fact, "a corporation relies on its attorney for business advice more than the natural person." Southern Bell at 1383.

As a result, Southern Bell recognizes that the "zone of silence" is enlarged by virtue of a corporation's continual contact with legal counsel. In order to prevent corporate attorneys from being used as a shield to thwart discovery, it was this Court's view that claims of privilege in the corporate context must be subjected to a heightened level of scrutiny. Id. Likewise, State Farm's proposal to permit concealing of attorney advice on whether

or not to enter into a Cunningham Agreement warrants "a heightened level of scrutiny."

It is of paramount importance that this Court consider that until the insurance carrier elects to provide its insured with protection from an excess judgment, it has a fiduciary duty to place its insured's interests ahead of its own in making its decisions on how to handle the insured's litigation. Dunn, 631 So. 2d at 1106. Case law already provides that once an excess judgment has been rendered against an insured, an insurance carrier may then protect its attorney-client consultations and other work product materials. Dunn, 631 So.2d at 1109. Prior to that time, all claims materials are discoverable. A Cunningham Agreement should be treated in the same manner. The Trial Court in this case provided that USAA was required to produce all claims materials up to the date of the Cunningham Agreement. This is appropriate because the Cunningham Agreement is the equivalent of an excess judgment.

At such time as the Cunningham Agreement is entered, protection is obtained for the insured. At that point, bad faith litigation comes to fruition. USAA then has the right to attorney-client privilege and work product protections after that date.

Prior to the entry of a Cunningham Agreement, USAA continues to have a fiduciary duty to put its insured's interests ahead of its own interests. Whether or not to enter into a Cunningham Agreement is a business decision relating to the handling of the insured's litigation. As a fiduciary, USAA is required to ignore

what is best for it and act "fairly and honestly towards its insured and with due regard for his interests." See Florida Standard Jury Instruction MI 3.1 and Boston Old Colony, 386 So.2d 785.

For all of the foregoing reasons, this Court should utilize the execution of a Cunningham Agreement as the "bright line" criteria for determining when an insurance carrier can begin protecting consultations with an attorney and thereby placing its own interests ahead of its insureds. However, alternatively, if this Court decides that the insurance carrier should be permitted to independently consult an attorney, in advance of execution of a Cunningham Agreement or, in advance of entry of an excess judgment, then the Court should carefully delineate the manner in which the parties should proceed.

First, any consultations with an independent attorney which address claims valuation, the insured's interests, or any other aspect of claims adjusting, should properly be discoverable. Consultations with claims personnel or the insured's insurance defense attorney should also be discoverable. The protected consultation should be limited only to issues relating to the insurance carrier's potential culpability and responsibilities in executing a Cunningham Agreement.

Moreover, at such time as the insurance carrier recognizes that it needs to consult an independent attorney regarding its own liability, it immediately has a potential conflict of interest with the beneficiary of its fiduciary duties (i.e. its insured). The

insurance carrier is continuing to completely control all aspects of the insured's litigation. As a fiduciary, it has the duty to immediately inform the insured that there is a potential conflict of interest, completely explain all of the issues in a manner which is understood by the insured, and the insured should be strongly encouraged to seek its own independent attorney regarding these issues. See generally 76 Am. Jur. 2d Trusts, §§ 387 and 388 at pp. 382 through 384; and Rule 4-1.7 and comments thereto, Rules Regulating The Florida Bar. If the insurance carrier fails to meet these responsibilities, while acknowledging that it has a potential conflict of interest by independently consulting an attorney regarding its own culpability, then a jury should be permitted to consider this failure as a factor in determining whether or not the insurance carrier breached its responsibilities to its insured in the bad faith action.

Thus, as stated above, this Court should utilize the execution of the Cunningham Agreement or the entry of an excess judgment as the bright line standard for when an insurance company can begin concealing its attorney consultations relating to the claim. Alternatively, if this Court decides to permit independent attorney consultations, the insurance carrier consultation should be subjected to the heightened level of scrutiny addressed in Southern Bell (supra). The insurance carrier should also be held to the standard of a fiduciary in fully advising the insured of the potential conflict and encouraging the insured to seek independent representation. The failure to meet those responsibilities are

factors that a subsequent jury should be permitted to consider in determining whether or not the insurance company acted in good faith.

CONCLUSION

The Order of the Court below is consistent with the fundamental requirements of law. It violates no existing privilege, and enables the Jennings to have an opportunity to prove their claim. Therefore, this Court should deny USAA's Petition for Writ of Certiorari and should answer the certified question in the negative. In addition, this Court should answer State Farm's proposed amicus question in the negative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Robert C. Gobelman, Esquire, Gobelman And Love, 1700 SunTrust Building, 200 West Forsyth Street, Jacksonville, Florida 32202, Louis K. Rosenbloum, Esquire, 125 W. Romano Street, Pensacola, Florida 32501, George A. Vaka, Esquire, Post Office Box 1438, Tampa, Florida 33601 and Stephen Day, Esquire, 50 N. Laura Street, Suite 3500, Jacksonville, Florida 32202, by U.S. Mail, this 16 day of July, 1998.

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