SUPREME COURT OF FLORIDA

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Reciprocal Interinsurance Exchange,

Petitioner,

vs.

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

Respondents.

CASE NO: 92,776

District Court of Appeal, 1st District - No. 97-2668

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# PETITIONER'S INITIAL BRIEF

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## INTRODUCTION

This case is before this Court pursuant to Rule 9.030(a)(2)(A)(V), Fla.R.App.P., the District Court of Appeal, First District, having 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?

Respondents 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 is being filed with this Brief and will be referred to as (A-1), (A-2), etc.; any reference to any other document will be by appropriate identification.

## I.

## STATEMENT OF THE CASE AND OF THE FACTS

This case is what is commonly referred to as a "third-party bad faith" action, wherein the RESPONDENTS (Plaintiffs in the trial court), sued USAA for USAA's alleged bad faith in refusing to settle the JENNINGS' claims raised in an earlier lawsuit filed against BOBBY J. BROXTON (hereinafter "BROXTON"), USAA's insured. This action involves a liability policy, with a limit of

$100,000.00, issued by USAA to BROXTON. On December 20, 1993, JENNINGS was injured in a collision with a vehicle owned by BROXTON, and driven by his son.

Prior to the JENNINGS filing the earlier lawsuit against BROXTON, the JENNINGS and USAA reached an agreement to settle the JENNINGS claims against BROXTON for the amount of $100,000.00, USAA's policy limits. However, a dispute arose as to whether USAA could include the name of University Medical Center on the settlement check as an additional payee.[1]

On March 25, 1994, Fred M. Abbott, Esquire (hereinafter "ABBOTT"), attorney for the JENNINGS in the earlier lawsuit, wrote to USAA and demanded that USAA pay its policy limits to settle all of the JENNINGS' claims against BROXTON (see A-4). USAA agreed, and by letter of April 4, 1994 (see A-5), tendered USAA's check in the amount of $100,000.00. In addition to placing the JENNINGS' and their attorney's names on the check, USAA included University Medical Center as a payee on the check because it had notified USAA of a lien against the settlement imposed by Chapter 482 of the Jacksonville Ordinance Code.

By letter of April 11, 1994 (see A-6), ABBOTT, on behalf of the JENNINGS, returned the check to USAA; ABBOTT requested instead that USAA forward a check without University Medical Center's name

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[1] Pursuant to Chapter 482 of the Jacksonville Ordinance Code (see A-2, Section 482.107), University Medical Center recorded, on January 21, 1994, its Notice of Lien Claim (see A-3), perfecting its lien on <u>any settlement or settlement agreement</u> entered into by JENNINGS as a result of the injuries sustained in the above automobile accident.

as an additional payee, stating that he wanted to negotiate the amount of its lien, and stated he could not do so with University Medical Center's name on the check. ABBOTT also requested a change in the language of the proposed Release.

USAA complied with the requested change in the language of the Release and forwarded the revised Release and the earlier requested executed Affidavit from its insured, BROXTON, but by letter of April 21, 1994 (see A-7) notified ABBOTT that USAA insisted that the check contain University Medical Center's name as an additional payee. Alternatively, USAA offered to issue separate checks, one payable to University Medical Center in the lesser amount of University Medical Center's lien that ABBOTT was able to negotiate, and one payable to the JENNINGS' and their attorneys, for the remainder of the policy limits.

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.

On May 9, 1994, USAA wrote to ABBOTT, (see A-9), forwarding two checks, as described in the letter. USAA informed Abbott, that, on advice of counsel, it was USAA's opinion that its insured could face additional liability under Chapter 482 of the Jacksonville Ordinance Code if the University Medical Center lien was not satisfied. 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.

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.

JENNINGS and BROXTON ultimately settled their earlier personal injury action at mediation and therefore, no verdict or judgment was entered against BROXTON. As a result of the mediation settlement of the earlier case, on November 2, 1994, the JENNINGS, BROXTON, their respective attorneys, and the Mediator (but not USAA) all executed a Mediation Settlement Agreement (see A-11). Additionally, pursuant to the Mediation Settlement Agreement, on November 6, 1994, the JENNINGS executed a Complete Release (see A-12) in favor of BROXTON, and on July 18, 1995, BROXTON, the JENNINGS, and USAA executed a STIPULATION AND AGREEMENT (the CUNNINGHAM STIPULATION) (see A-13). The JENNINGS dismissed, without prejudice, their Complaint against BROXTON on August 21, 1995.

Subsequently, pursuant to the CUNNINGHAM STIPULATION, on the authority of *Cunningham v. Standard Guar. Ins. Co.*, 630 So.2d 179 (Fla. 1994), JENNINGS filed their alleged bad faith case against USAA (the instant case).

In the instant case, the JENNINGS sought, through several paragraphs in their First and Third Requests to Produce (see A-14), production of USAA's claim file. USAA objected to each of

these paragraphs on the basis that the requested information is protected by BROXTON's[2] and USAA's respective attorney-client and work product privileges, and that, with respect to the work product privilege, the JENNINGS had not made the showing required by Rule 1.280(b)(3), Fla.R.Civ.P. (see A-16).

In the instant case, the JENNINGS subsequently served Motions to Compel Discovery, directed to USAA's objections to the JENNINGS' First and Third Requests to Produce to Defendant (see A-17). The first of two hearings on these Motions occurred on May 23, 1997; at that hearing, the lower court verbally granted the JENNINGS' Motions to Compel with respect to USAA's claim file. 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 59-66).

At a second hearing, on June 9, 1997, the lower court ruled that USAA must produce its complete claims file up to November 2, 1994, the date that the Mediation Settlement Agreement was signed (see A-19, page 12-13). The lower court then entered the June 9, 1997 Order (see A-20) which was the subject of USAA's Petition for Writ of Certiorari filed with the District Court of Appeal, First District.

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[2] On November 21, 1995, BROXTON wrote to Robert C. Gobelman, Esquire (hereinafter "GOBELMAN"), his attorney in the earlier lawsuit brought by the JENNINGS, and instructed that he wished to maintain the attorney-client privilege discussed during BROXTON'S initial meeting with GOBELMAN after JENNINGS filed their earlier suit against BROXTON on or about May 3, 1994 (see A-15).

The First District Court of Appeal filed its opinion on February 23, 1998, denying USAA's Petition but certifying the above-quoted question (see page 2) to this Court as being one of great public importance (see A-1).

USAA timely filed a Motion For Rehearing Or Clarification (see A-21) which the First District Court of Appeal denied by Order dated March 24, 1998 (see A-1).

USAA then filed its Notice to Invoke Discretionary Jurisdiction of this Court on April 13, 1998.

## II.

## SUMMARY OF ARGUMENT

As to jurisdiction, there is no distinction between a third party bad-faith case based on an excess verdict and a third party bad faith case based on a CUNNINGHAM STIPULATION. However, as to the scope of discovery, i.e., production of the insurer's claim file, there is a definite distinction.

An excess verdict, by operation of law, converts the injured third party into a third party beneficiary of the insured's insurance contract with the insurer, i.e., he stands in the shoes of the insured and reaps the benefit of the fiduciary duty owed to the insured by the insurer. Thus, the injured third party, standing in the shoes of the insured, prevents the insurer from successfully raising the attorney-client privilege to prevent disclosure of the insurer's claim file since the attorney-client privilege belongs to the insured.

By contrast, when there is no excess verdict, but the injured third party, the insured and the insurer enter into a CUNNINGHAM STIPULATION, the injured third party is not automatically converted by operation of law into a third party beneficiary to the insurance contract or to standing in the shoes of the insured; the insurer (USAA), the insured (BROXTON) and the injured third party (JENNINGS) have entered into a contract (CUNNINGHAM STIPULATION) and the terms of the contract determine the scope of discovery, otherwise the contract becomes a nullity unless its terms are enforced by the courts.

BROXTON had the protection of the attorney-client privilege from the inception of JENNINGS' claim against him. BROXTON retains the attorney-client privilege until he waives it, either expressly or impliedly. There is no evidence of any waiver of the privilege by BROXTON.

USAA had the protection of the attorney-client privilege since at least May 5, 1994; there is no evidence of any waiver of the privilege by USAA.

The qualified work product privilege was raised by both USAA and BROXTON; JENNINGS had the burden to and failed to make the "showing" required by Rule 1.280(b)(3), Fla.R.Civ.P.; the trial court erred in ordering production of USAA's claim file since the required "showing" had not been made.

## III.

## ARGUMENT

The question certified by the First District Court of Appeal is:

> 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?

Defendant submits that in regard to the scope of discovery, there is, in fact, a difference between whether a third party bad-faith claim is brought based upon an excess judgment against the insured or whether a third party bad-faith claim is brought pursuant to a CUNNINGHAM STIPULATION.

In a typical third party bad-faith case, the injured third party (JENNINGS) has recovered a judgment against the insured (BROXTON) which is in excess of the liability policy limits of the insured.

When the excess judgment occurs, as a matter of law, the injured third party becomes a third party beneficiary to the insurance contract between the insured and the insurer (USAA), i.e., the injured third party "stands in the shoes" of the insured to whom the insurer owes a fiduciary duty. This change in status occurs automatically.

In the case of *Allstate Insurance Company v. American Southern Home Insurance Company*, 680 So.2d 1112-1114 (Fla. 1st DCA 1996),

the appellate court said:

> Turning to the discovery order at issue in the instant case, it has generally been held that claims and litigation files constitute work product and are protected from production to opposing parties pursuant to section 90.502, Florida Statutes, and Rule 1.280(b)(3), Florida Rules of Civil Procedure. [citing cases] However, where there exists a fiduciary relationship between the party seeking the materials and the party who has them, the courts will compel their production. [citing cases] (emphasis added). At page 1116.

In the case of *Dunn v. National Security Fire and Casualty Company*, 631 So.2d 1103 (Fla. 5th DCA 1994), a third party bad-faith case, the appellate court said:

> Discovery of the insurer's claim file and litigation file is allowed in a bad faith case over the objections of the insurer that production of the file would violate the work product or attorney/client privilege. [citing case] The rationale (as discussed above) is because the injured third party "stands in the shoes" of the insured party in a third party bad faith case and the insurer owed a fiduciary duty to its insured. [citing cases]. (emphasis added). At page 1109.

Regardless of whether the injured third party's status is described as a third party beneficiary to the insurance contract or as standing in the shoes of the insured, the status is the same; it occurs automatically by operation of law once the third party recovers an excess judgment against the insured.

The key factor is that an injured third party who recovers an excess judgment against an insured is given the benefit of the fiduciary relationship between an insured and his insurer in order to compel production of the insurer's claim file.

In the instant case, JENNINGS did not recover an excess judgment against BROXTON. In lieu of an excess judgment, JENNINGS, BROXTON and USAA entered into a CUNNINGHAM STIPULATION which provided, inter alia:

> JENNINGS and USAA agree that this STIPULATION AND AGREEMENT is a contract and both JENNINGS and USAA agree to be bound by the terms of this STIPULATION AND AGREEMENT.... (A-13, page 4, paragraph 9).

In the case of *Cunningham v. Standard Guaranty Insurance Company*, 630 So.2d 179 (Fla. 1994), this Court said:

> 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 pubic policy. [citing cases]. (emphasis added). At page 182.

In the instant case, since JENNINGS did not recover an excess judgment against BROXTON, JENNINGS' status was not automatically converted by operation of law so as to give JENNINGS the benefit of the fiduciary duty that USAA owed to BROXTON in order to compel production of the claim file. Whatever rights that JENNINGS may have in relation to production of USAA's claim file can only arise by reason of the CUNNINGHAM STIPULATION (contract), rather than by operation of law since there was no excess judgment.

JENNINGS may argue that, in the instant case, the CUNNINGHAM STIPULATION (A-13) provides that it shall

> ...serve as the functional equivalent of an excess judgment in the amount of $75,000.00, all in accordance with and pursuant to the Florida Supreme Court's opinion in the case of Cunningham v. Standard Guaranty Life Insurance

> Company, 630 So.2d 179 (Fla. 1994). (emphasis added).

However, in the opinion in the *Cunningham* case, this Court said:

> ...While the complaint in the instant case did not allege an excess judgment, the stipulation between the parties dispensed with the necessity of that requirement. The stipulation was the functional equivalent of an excess judgment for purposes of satisfying the principle of *Cope*. (emphasis added). At page 182.

The reference to *Cope*, was to the case of *Fidelity and Casualty Company of New York v. Cope*, 462 So.2d 459 (Fla. 1985). The *Cope* case had nothing to do with discovery of any kind; it was only concerned with a jurisdictional issue and the necessity of there being an unsatisfied excess judgment in order to maintain a third party bad faith case. Likewise, the *Cunningham* case had nothing to do with the scope of discovery in a third party bad faith case.

The "principle of *Cope*" referred to in the *Cunningham* case refers to a jurisdictional issue, not a discovery issue, in relation to an excess judgment.

There is no excess judgment that would legally entitle JENNINGS to stand in the shoes of BROXTON so as to give JENNINGS the benefit of the fiduciary duty owed to BROXTON by USAA and thereby automatically converting what normally would be an "adversarial relationship" into a "fiduciary relationship". Therefore, as far as the scope of discovery is concerned relating to USAA's claim file, the only rights that JENNINGS have can only

arise from the CUNNINGHAM STIPULATION, which is a contract between the parties.

In regard to the issue of the scope of discovery, to allow JENNINGS the benefit of an "excess judgment" to convert an "adversarial relationship" into a "fiduciary relationship" completely disregards and nullifies the CUNNINGHAM STIPULATION which was a negotiated contract between JENNINGS, BROXTON and USAA.

A. ATTORNEY-CLIENT PRIVILEGE.

1. BROXTON

In the earlier case wherein JENNINGS sued BROXTON, there is no dispute that an attorney-client privilege existed and that it belonged to BROXTON. Again, there is no dispute that USAA's claim file is protected from disclosure because of the attorney-client or work product privilege. Yet, in the instant case, when the trial court ordered the production of USAA's claim file, it was based upon the trial court's ruling that BROXTON had waived his attorney-client privilege when BROXTON signed the CUNNINGHAM STIPULATION:

> THE COURT: No, you misunderstand me. I'm saying that the practical effect of Mr. Broxton's executing that settlement agreement is a waiver of the attorney/client privilege. (emphasis added). (A-18, pages 65-66).

Section 90.507, Fla. Stat., governs the waiver of privileges. That section provides in pertinent part that a person who has a privilege against the disclosure of a confidential matter or communication waives that privilege if the person

> voluntarily discloses or makes the communication when he or she does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the

matter or communication.

Florida courts generally define waiver as "the intentional or voluntary relinquishment of a known right, or conduct which infers the relinquishment of a known right." Taylor v. Kenco Chemical & Mfg. Corp., 465 So.2d 581, 587 (Fla. 1st DCA 1985) (citing Thomas N. Carlton Estate v. Keller, 52 So.2d 131 (Fla. 1951); and Enfinger v. Order of United Commercial Travelers, 156 So.2d 38 (Fla. 1st DCA 1963)). Indeed, one necessary element of waiver is the intention to relinquish the right in question. Id.

When waiver is to be implied from conduct, "the acts, conduct, or circumstances relied upon to show waiver must make out a clear case." Taylor v. Kenco Chemical & Mfg. Corp., 465 So.2d at 587 (quoting Firemen's Fund Insurance Co. v. Vogel, 195 So.2d 20, at 24 (Fla. 2d DCA 1967)) (emphasis added).

A casual reading (as well as an intense one) of the CUNNINGHAM STIPULATION (A-13) will reveal not one word that can support the trial court's ruling that BROXTON, by signing the CUNNINGHAM STIPULATION, waived his attorney-client privilege. Likewise, a reading of the Mediation Settlement Agreement (A-11) will not offer any support to the proposition that BROXTON waived his attorney-client privilege by executing said Agreement.

In the CUNNINGHAM STIPULATION (A-13), BROXTON did agree

> ...to fully cooperate with both JENNINGS and USAA, in the USAA Action insofar as testifying either by deposition and/or at trial as may be reasonably requested by either JENNINGS or USAA. (A-13, page 3, paragraph 5).

There is no agreement to waive his attorney-client or work product

privileges; nor is there any waiver, express or implied.

The First District Court of Appeal in its opinion dated February 23, 1998 (A-1) ignored the issue of waiver in denying USAA's Petition for Writ of Certiorari. As the First District stated in its opinion:

> Generally, the third party in a third party bad-faith action stands in the shoes of the insured and is entitled, therefore, to discovery of the insurer's entire claims file on the underlying tort claim up to the date of an excess judgment, notwithstanding any objections from the insurer based on the attorney-client or work product privileges. See, e.g., Dunn v. Nat'l Sec. Fire & Cas. Co., 631 So.2d 1103, 1109 (Fla. 5th DCA 1993); Continental Cas. Co. v. Aqua Jet Filter Sys., Inc., 620 So.2d 1141, 1142 (Fla. 3d DCA 1993). While there is no case law discussing whether this broad scope of discovery is available in a case involving a Cunningham stipulation rather than an excess judgment, we see no reason why the two circumstances should be treated differently. (emphasis added). (A-1, page 3).

Both cases cited by the First District in the portion of the opinion quoted above were third party bad faith cases in which an excess judgment had been recovered against the insured.

The "two circumstances" referred to above must be treated differently, otherwise the contractual terms and conditions of the CUNNINGHAM STIPULATION are completely disregarded and it is treated as a nullity.

2. USAA

In the earlier case wherein JENNINGS sued BROXTON, USAA was also entitled to the protection of the attorney-client privilege from at least May 5, 1994 when it received the May 3, 1994 letter

from JENNINGS' attorney (ABBOTT) threatening that JENNINGS would seek an excess judgment against BROXTON, thereby exposing USAA to potential liability for its bad faith refusal to settle (A-8).

Indeed, on May 9, 1994, USAA wrote ABBOTT, informing him that USAA had sought "advice of counsel" (A-9).

The issue of USAA's right to claim the protection of the attorney-client privilege was presented to the First District Court of Appeal in USAA's Petition for Writ of Certiorari but was overlooked or misapprehended since it was not mentioned or alluded to in the opinion of February 23, 1998 (A-1).

USAA filed a Motion for Rehearing or Clarification calling the First District's attention to the fact that this issue had been overlooked (A-21) but said Motion was denied (A-1).

There is no question that USAA did not waive any privilege, either attorney-client or work product, when USAA signed the CUNNINGHAM STIPULATION (A-13).

Therefore, USAA should be entitled to the same protection of the attorney-client privilege as JENNINGS or BROXTON or any other person or entity once USAA has been threatened with a lawsuit.

B. WORK PRODUCT PRIVILEGE.

Both BROXTON and USAA are entitled to the qualified protection of the work product privilege; BROXTON from the inception of the JENNINGS' claim and USAA from at least May 5, 1994.

Applicable case law and Rule 1.280(b)(3), Florida Rules of Civil Procedure, control the legal determination of which documents are conditionally protected from disclosure because of work product

immunity. Rule 1.280(b)(3) provides for the discovery of documents:

> ...prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.... (emphasis added).

It should be noted that documents protected by work product immunity are not limited to only those documents prepared by or for a party's attorney; indeed, work product documents include documents prepared by or for the party or by or for the party's agent (employee). It should also be noted that the documents are protected by work product immunity even if they are only prepared "in anticipation of litigation".

As discussed above, ABBOTT'S May 3, 1994 letter (A-8) put USAA on notice that a bad faith lawsuit could result from USAA's decision that it was required to place University Medical Center's name on the settlement check as an additional payee. Accordingly, the claims file contains documents prepared by USAA or its attorneys, from at least May 5, 1994, in anticipation of litigation on the issue of bad faith.

A party is entitled to production of documents protected by

the work-product privilege:

> only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Rule 1.280(b)(3), Fla.R.Civ.P. (emphasis added). Because USAA has raised the work product privilege, the burden shifts to the JENNINGS, as the requesting party, to show a need for the materials requested and undue hardship in obtaining the substantial equivalent of the materials requested. Dade County School Board v. Soler, 534 So.2d 884, 885 (Fla. 3d DCA 1988).

Indeed, a trial court's order requiring production of documents in the face of a work product objection without the proper showing of need and undue hardship is a departure from the essential requirements of law. Landrum v. Tallahassee Mem. R.M. Ctr., 525 So.2d 994 (Fla. 1st DCA 1988) (trial court order compelling production of witness statements without showing of need and undue hardship quashed by appellate court).

The required showing of need and undue hardship must be made in either the request for production or in a motion to compel production of the documents. Cf., Inapro, Inc. v. Alex Hofrichter, P.A., 665 So.2d 279 (Fla. 3d DCA 1995) (showing may be made in the motion to compel); and Hartford Accident & Indem. Co. v. U.S.C.P. Co., 515 So.2d 998 (Fla. 4th DCA 1987) (allegations of need and undue hardship must be included in the request to produce). A simple reading of the First and Third Requests to Produce, and the Motions to Compel, will demonstrate conclusively that the required showing was not made. (A-14 and A-17).

Moreover, many, if not all, of the documents at issue would probably contain the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation", and, therefore, are protected from disclosure, regardless of whether the JENNINGS made a showing of need and undue hardship. Rule 1.280(b)(3), Fla.R.Civ.P.

In the instant case, the trial court's order compelling production of USAA's claim file completely overlooked the qualified work product privilege of both BROXTON and USAA and the "showing" that JENNINGS were required to make in order to comply with Rule 1.280(b)(3), Fla.R.Civ.P., in order to overcome the privilege. Likewise, an in camera inspection was not even considered.

The First District Court of Appeal also overlooked the work product privilege and the "showing" that the JENNINGS were required to make.

## CONCLUSION

This Court should answer the certified question by holding that, as to discovery of an insurer's claim file in a third party bad-faith case, there is a difference between a third party bad-faith case based on an excess judgment and one based on a CUNNINGHAM STIPULATION.

This Court should hold that BROXTON's attorney-client privilege is still operative and, until waived, prevents disclosure of USAA's claim file.

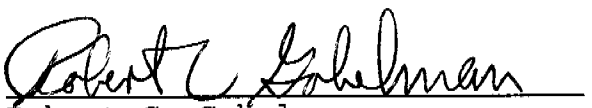
This Court should hold that USAA has a separate attorney-

client privilege from at least May 5, 1994, and, until waived, prevents disclosure of that portion of USAA's claim file.

This Court should hold that JENNINGS have not made the "showing" required by Rule 1.280(b)(3), Fla.R.Civ.P., and, until made, are not entitled to discovery of any work product documents contained in the claim file.

Respectfully submitted,

GOBELMAN AND LOVE



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**CERTIFICATE OF SERVICE**

I CERTIFY that a copy hereof has been furnished by U.S. Mail to Thomas S. Edwards, Jr., Esquire, Peek, Cobb, Edwards & Ashton, Ste. 1609, 1301 Riverplace Blvd., Jacksonville, FL 32207; The Honorable Bernard Nachman, Room 202, Duval County Courthouse, Jacksonville, FL 32202; Tracy Raffles Gunn, Attorney, Suite 1700, 501 East Kennedy Boulevard, Post Office Box 1438, Tampa, FL 33601; and, to Stephen E. Day, Esquire, and Rhonda B. Boggess, Barnett

Tower, Ste. 3500, 50 North Laura Street, Jacksonville, FL 32216, this 22nd day of May, 1998.

Robert C. Gobelman
ATTORNEY