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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

PETITIONER'S AMENDED REPLY BRIEF

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INTRODUCTION

In this Reply Brief, 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. USAA's Initial Brief will be referred to as (IB-1), etc.; USAA's Appendix filed with its Initial Brief will be referred to as (A-1), etc.; JENNINGS' Answer Brief will be referred to as (JENNINGS' AB-1), etc.; the Appendix filed with the JENNINGS' Answer Brief will be referred to as (JENNINGS' App-1), etc.; any reference to any other document will be by appropriate identification.

I.

STATEMENT OF THE CASE AND OF THE FACTS

RESPONDENTS, in their Answer Brief, make the statement that "...there are certain facts which were inaccurately presented by Petitioner. ...Respondent will correct certain misstatements made by Petitioner. ..." (JENNINGS' AB-1,2). RESPONDENTS contend that one of the "misstatements made by Petitioner" was the following:

> 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, USAA's policy limits. (JENNINGS AB-2).

The above-quoted statement is not inaccurate since the very next sentence in USAA's Initial Brief states:

> However, a dispute arose as to whether USAA could include the name of University Medical Center on the settlement check as an additional payee. (IB-3).

The above-quoted statement is not "inaccurate" or a "misstatement" since prior to JENNINGS filing the earlier lawsuit

against BROXTON, all terms of the settlement had been agreed to except whether the name of University Medical Center should be on the settlement check as an additional payee. (A-8).

Again, on page 2 of the Answer Brief, the JENNINGS criticized USAA's statement that University Medical Center recorded its Notice of Lien Claim "perfecting its lien on any settlement or settlement agreement...". JENNINGS' criticism of USAA's use of the above-quoted language is based on their contention that "[t]here 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 ...." (JENNINGS' AB-2).

Although this particular issue has absolutely no relevance to the certified question which is the subject matter of this appeal, there is no substantial question in this case concerning the lien of University Medical Center. By letter dated July 21, 1994, the JENNINGS' attorney of record in the underlying case against USAA's insured wrote to University Medical Center's in-house counsel and stated:

> We are aware that University Medical Center has a lien of $46,157.01 against our client, Dale Jennings.[1]

On pages 3 and 4 of their Answer Brief, the JENNINGS criticized USAA for stating that in the letter of May 3, 1994, JENNINGS' attorney "...threatened that the Jennings would seek an excess judgment against Broxton, thereby exposing USAA to potential

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[1] *See*, Exhibit "A" attached to this Reply Brief which is an Exhibit to the deposition of Queen E. King taken on March 9, 1998 in this case.

liability for bad-faith refusal to settle." It is true that the JENNINGS' attorney did not specifically use the word "threaten" but any knowledgeable person reading the May 3, 1994 letter would understand that there was an implied threat of exposing USAA to potential liability for bad-faith refusal to settle by use of the language "certainty of an excess judgment that would be for an amount far greater than your liability insurance policy limits." (A-8). In his May 13, 1994 letter to USAA, the JENNINGS' attorney stated:

> Now, the only question remains is why USAA did not settle this case and who will pay the significant excess judgment that is going to result?! (A-10).

In Section I.B. on pages 4 through 8 of their Answer Brief, the JENNINGS set forth a Statement of Facts which they contend are supplemental to those set forth in USAA's Initial Brief.

In this section of the Answer Brief, the JENNINGS make reference to the Mediation Settlement Agreement (A-11) and mistakenly describe it as the "Cunningham Agreement". *See*, the last paragraph on page 5, ending on page 6, of JENNINGS' Answer Brief; the "Cunningham Agreement" is actually entitled "STIPULATION AND AGREEMENT" and appears at A-13 of USAA's Appendix to its Initial Brief.

The document entitled **"SETTLEMENT AGREEMENT"** appearing at A-11 of USAA's Appendix to its Initial Brief, was entered into at the mediation between the parties on November 2, 1994 and was signed by the Mediator, the JENNINGS, USAA's Insured BROXTON and their respective attorneys. The Mediation Settlement Agreement, in

paragraph numbered 3, provided that the Jennings and USAA shall enter into a "Cunningham Agreement". The Mediation Settlement Agreement was negotiated between the parties at the mediation and ultimately agreed to by the parties at mediation. This occurred on November 2, 1994.

After extensive negotiations, on July 18, 1995, the "Cunningham Agreement" was entered into by all parties, i.e., the JENNINGS, USAA's insured BROXTON and USAA; the form of the "Cunningham Agreement" was specifically approved by the attorney for the JENNINGS. (A-13).

On page 6 of their Answer Brief, the JENNINGS, referencing the "Cunningham Agreement", make the statement:

> ...BROXTON agreed "to fully cooperate with both JENNINGS and USAA...";

this is not the complete quote and is misleading. The complete quote is:

> BROXTON agrees 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, paragraph numbered 5 on page 3).

Again, on page 8 of the Answer Brief, the JENNINGS, in referring to the "Cunningham Agreement" make the statement:

> 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...".

This quote is incomplete and thus misleading. The complete quote is:

> WHEREAS, JENNINGS, BROXTON and USAA wish to dispense with

> the necessity of JENNINGS obtaining an excess judgment against BROXTON prior to instituting the above described bad faith action against USAA and to have this Stipulation and Agreement 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 S.2d 179 (Fla. 1994);.... (emphasis added). A-13, page 2.

II.

ARGUMENT

The parties are before this Court on a question certified by the First District Court of Appeal as being one of great public importance. That question 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?

On pages 11 and 12 of the Argument Section of their Answer Brief, RESPONDENTS argue that:

> Because the privileges[2] 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. (emphasis added).

In support of their argument, the JENNINGS cite the case of *Odom v. Canal Insurance Company*, 582 So.2d 1203 (Fla. 1st DCA 1991) as being factually identical to this action. The *Odom* case had absolutely nothing to do with discovery, nor did it have anything

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[2] The privileges that USAA asserted is BROXTON'S attorney-client privilege, USAA's attorney-client privilege and the qualified work product privilege.

to do with attorney-client and work product privileges. The only issue in *Odom* was whether or not the lower court was legally correct in entering a summary judgment in favor of Canal Insurance Company and, even though the First District Court of Appeal reversed the lower court, it declined to rule on whether the lower court was correct or incorrect in its decision since the Appellate Court found there were other disputed issues. In the *Odom* opinion, the appellate court said:

> For this same reason, we conclude that even if the trial court had correctly decided the issue involving the reasonableness of Canal's conditional offer, a determination we decline to make, the court erred when it determined that the case was fully adjudicated upon a resolution of that issue.... (emphasis added). At page 1205.

Again, on pages 12 and 13 of their Answer Brief, the JENNINGS cite the case of *Boston Old Colony Insurance Company v. Gutierrez*, 386 So.2d 783 (Fla. 1980), as cited in the *Odom* case, for the proposition that USAA failed to advise BROXTON of settlement opportunities, failed to advise BROXTON as to the probable outcome of the litigation and failed to warn BROXTON of the possibility of an excess judgment. RESPONDENTS then argue that the contents of the claims file is the most compelling evidence and the only way for a jury to finally determine whether USAA is in bad faith is by seeing the claims file, and therefore "...this Court should deny USAA's Petition". This is nothing more than bootstrapping!

This argument is not relevant or material to the issue presented by the certified question. Additionally, a perusal of the JENNINGS' Amended Complaint (JENNINGS' App-1) will reveal that

the last sentence of paragraph 12, all of paragraph 14 and a portion of paragraph 15 were stricken by the lower court's Order On Defendant's Motion To Strike dated June 24, 1997 (JENNINGS' App-3). The stricken portions of the JENNINGS' Amended Complaint all relate to USAA's duty to advise its insured and to seek his advice regarding settlement, which are no longer issues in this case.

On page 15 of the Answer Brief, the JENNINGS state:

> 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.

The above statements are not factually correct.

At the mediation of the underlying case on November 2, 1994 when the Mediation Settlement Agreement was signed by the parties, the attorney for the JENNINGS was well aware of this Court's opinion in the case of *Cunningham v. Standard Guaranty Life Insurance Company*, 630 So.2d 179 (Fla. 1994). Paragraph numbered 3 of the Mediation Settlement Agreement states:

> 3. The parties agree that Plaintiffs and USAA shall enter into a contractual agreement whereby Plaintiffs shall have the right to file a lawsuit or amend the present lawsuit to pursue a "bad faith claim" against USAA on the issue of USAA's bad faith failure to settle within policy limits.[3] (A-11).

Paragraph numbered 7 of the Mediation Settlement Agreement states:

> 7. In the event jurisdiction of the subject matter is denied for the "bad faith claim", the Plaintiffs shall be allowed to proceed on the original claim and Defendant

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[3] The only Florida case that would authorize such an agreement was the Cunningham case.

shall receive set-off in the amount of $100,000.[4] (emphasis added). (A-11).

Obviously, the attorney for the JENNINGS was fully aware that this Court's opinion in the *Cunningham* case concerned the question of "jurisdiction", not the scope of discovery in a bad faith case.[5]

Later, when the JENNINGS executed the Cunningham Stipulation and Agreement on July 18, 1995 (A-13), it was only after the form of the Agreement had been negotiated and approved by the JENNINGS' own attorney.

The Cunningham Stipulation and Agreement, on page 2, contained the following language:

> WHEREAS, JENNINGS, BROXTON and USAA wish to dispense with the necessity of JENNINGS obtaining an excess judgment against BROXTON prior to instituting the above described bad faith action against USAA and to have this Stipulation and Agreement 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 S.2d 179 (Fla. 1994);.... (emphasis added). (A-13).

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*

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[4] This paragraph was included for the JENNINGS' protection in case the Cunningham case had been misinterpreted by the parties.

[5] Indeed, this Court, in Cunningham, answered a certified question which began:

> DOES THE TRIAL COURT HAVE JURISDICTION TO DECIDE... ."

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.

The attorney for the JENNINGS in the underlying case clearly understood that the *Cunningham* case related to a jurisdictional issue, otherwise there was no reason to include paragraph number 7 in the Mediation Settlement Agreement (A-11).

On page 16 of their Answer Brief, in argument, the JENNINGS make the statement that:

> ...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.[6] Absent that, the parties should enjoy the same rights they would have under an excess judgment. (emphasis added).

The insured BROXTON is a party to the Cunningham Stipulation and Agreement in the instant case. (A-13). BROXTON has an attorney-client privilege that belongs to him and only he can waive that privilege. USAA had no authority, nor did it have any right, to waive the attorney-client privilege enjoyed by BROXTON.

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[6] As to USAA's attorney-client privilege and the work product privilege, must USA "insert limiting language" in order to preserve these privileges?

On November 21, 1995, BROXTON wrote a letter to his former attorney advising that "I wish to maintain the attorney-client privilege we discussed during our initial meeting which requires that any information or communication between me and my attorneys remain confidential and is not subject to disclosure." (emphasis added). (A-15). Obviously, the "initial meeting" between BROXTON and his former attorney occurred shortly after the JENNINGS filed their lawsuit against BROXTON on or about May 3, 1994.

The attorney who represented the JENNINGS in the underlying case against BROXTON and who also represented the JENNINGS when they signed the Cunningham Stipulation and Agreement on July 18, 1995 and who negotiated and approved the form of said Agreement, was fully aware during the course of the underlying litigation that BROXTON was entitled to rely on the attorney-client privilege and still had the benefit of that privilege when the Cunningham Stipulation and Agreement was executed on July 18, 1995. JENNINGS, through their former attorney, could have insisted that BROXTON waive his attorney-client privilege in the Cunningham Stipulation and Agreement; however, paragraph numbered 5 on page 3 of the Agreement (A-13) reveals that BROXTON only agreed "...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."

Section 90.502, Florida Evidence Code, establishes an attorney-client privilege for the protection of any "client" who consults a lawyer with the purpose of obtaining legal services. The

statutory definition of "client" includes both BROXTON and USAA. Section 90.507, Florida Evidence Code, defines what constitutes a "waiver" of the attorney-client privilege.

At the time the Mediation Settlement Agreement (A-11) was executed by the JENNINGS and at the time the Cunningham Stipulation and Agreement (A-13) was executed by the JENNINGS, their former attorney certainly was aware of BROXTON'S attorney-client privilege as well as USAA's attorney-client privilege since by letter dated May 9, 1994, USAA advised the JENNINGS' former attorney that USAA sought "advice of counsel". (A-9).

Yet, there is absolutely no language in the Mediation Settlement Agreement (A-11) or in the Cunningham Stipulation and Agreement (A-13) that could possibly be considered either an express or an implied waiver of BROXTON's attorney-client privilege. Nor is there any language in either of the above-described Agreements that could be considered an express or an implied waiver of USAA's attorney-client privilege. Nor is there any language to indicate any waiver of the work product privilege.

In paragraph 9 on page 4 of the Cunningham Stipulation and Agreement in this case, the JENNINGS and USAA agreed 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).

In paragraph 10 on page 4 and 5 of said Agreement, JENNINGS and USAA agreed that "...the STIPULATION AND AGREEMENT is entered into in good faith and it was not obtained by fraud,

misrepresentation or deceit." (A-13).

This Court, in its opinion in the *Cunningham* case, 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 public policy. (emphasis added). At page 182.

USAA asks only that this Court "enforce" the Cunningham Stipulation and Agreement in the instant case as it would any other contract.

There is no language in the Agreement waiving either BROXTON'S or USAA's attorney-client privilege or the work product privilege; nor is there any language that the Agreement should be considered the functional equivalent of an excess judgment for purposes of determining the scope of discovery. Obviously, if the Cunningham Stipulation and Agreement in the instant case is silent as to the scope of discovery, the attorneys who negotiated and approved the form of the Agreement on behalf of all parties understood that the scope of discovery would be controlled by the Florida Rules of Civil Procedure, as in all other civil litigation.

In the instant case, the lower court, in ordering production of USAA's claim file, explained the basis for the court's ruling by stating:

> 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. (A-18, page 65, line 23 through line 1 on page 66).

As stated above, Section 90.507, Florida Evidence Code,

specifies what is required to constitute a waiver of the attorney-client privilege. There is no evidence in this record that would establish that either Mr. Broxton or USAA expressly or impliedly waived their attorney-client privilege.

In Section III.C., on page 19, of their Answer Brief, the JENNINGS make the statement:

> **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.**

Making this bold statement in bold type does not change the fact that there is absolutely no language in the Cunningham Stipulation and Agreement (A-13) that gave the JENNINGS the right to discover USAA's claims file.

In the same vein, the JENNINGS, on page 20 of their Answer Brief, make the statement that:

> 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. (emphasis added).

The JENNINGS, immediately following the above quote, cite six different cases in support of their statement. Every case cited is prior in point of time to this Court's 1994 opinion in the case of *Cunningham v. Standard Guaranty Insurance Company*, 630 So.2d 179 (Fla. 1994), and therefore could not be any authority for RESPONDENTS' proposition.

The truth of the matter is that there is no case law deciding

the scope of discovery in a case involving a Cunningham Stipulation, such as in the instant case. That is why the District Court of Appeal, First District, certified the question at issue in this case as being one of great public importance.

On page 22 of their Answer Brief, Respondents make the statement that:

> 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. (emphasis added).

There is absolutely no language in the Cunningham Stipulation and Agreement (A-13) that either expressly or impliedly gave to the JENNINGS the same rights of discovery that BROXTON had against USAA.

On page 23 of the Answer Brief, RESPONDENTS make the bold statement that **"USAA Had No Privilege Until the Date of the Cunningham Agreement..."**; RESPONDENTS then argue that even though USAA sought advice of counsel on or after May 5, 1994, USAA is not entitled to the attorney-client privilege. Clearly, under Florida law, USAA is entitled to seek advice of counsel and such communication is protected by the attorney-client privilege. RESPONDENTS do not argue that USAA waived the attorney-client privilege, the JENNINGS contend that USAA has none.

For brevity, USAA relies on the argument set forth in the Amicus Curiae Brief of State Farm Mutual Automobile Insurance Company on this point.

In regard to the issue of work product privilege, RESPONDENTS, in their Answer Brief, do not argue this issue. USAA will rely on

its argument at pages 16 through 19 of its Initial Brief.

III.

CONCLUSION

This Court should answer the certified question in the affirmative, quash the decision below, and remand for further proceedings consistent with the opinion.

Respectfully,

GOBELMAN AND LOVE

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CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to The Honorable Bernard Nachman, Room 202, Duval County Courthouse, Jacksonville, FL 32202, and to Thomas S. Edwards, Jr., Esquire, Peek, Cobb, Edwards & Ashton, Ste. 1609, 1301 Riverplace Blvd., Jacksonville, FL 32207, via U.S. Mail, this 26 day of August, 1998.

Robert C. Gobelman
ATTORNEY