SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

BARRY L. BERGES,

Petitioner,

vs.

INFINITY INSURANCE COMPANY formerly known as Dixie Insurance Company,

Respondent.

CASE NO.: SC01-2846

On Appeal from:
District Court of Appeal,
Second District
Case Nos. 2D99-5014
and 2D00-1972

AMIUS CURIAE NATIONAL ASSOCIATION OF INDEPENDENT INSURER'S BRIEF IN SUPPORT OF RESPONDENT, INFINITY INSURANCE COMPANY

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PRELIMINARY STATEMENT

Petitioner, Barry L. Berges, was the plaintiff below and will be referred to as "Berges" in this brief.

Respondent, Infinity Insurance Company, formerly known as Dixie Insurance Company, was the defendant below. It will be referred to as "Infinity" in this brief.

Amicus Curiae, National Association of Independent Insurers' will be referred to as "NAII." NAII is an insurance industry trade association whose members are both foreign and domestic insurance companies. NAII's representation of its members requires it to advance their interests in legislative, regulatory and judicial fora. NAII counts among its members many of the largest property and casualty insurance writers in the State of Florida.

References to the record on appeal will be designated by the symbols V and R followed by the appropriate volume and page numbers. Legal citations contained in this brief are intended to conform to Florida Rule of Appellant Procedure 9.800 and THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Rev., et al., 16th Ed. 1996), and emphasis has been supplied by counsel unless otherwise noted.

STATEMENT OF CASE AND FACTS

Amicus Curiae NAII hereby adopt the statement of case and facts in the initial brief of Respondent Infinity.

SUMMARY OF ARGUMENT

In Cunningham v. Standard Guaranty Insurance Co., 630 So. 2d 179 (Fla. 1994), the Supreme Court approved the concept of the parties to a tort claim voluntarily agreeing to try a bad faith claim prior to determination of the underlying tort liability. The decision did not purport to establish an extra-contractual obligation on insurers that would undercut the insurer's contractual rights. Pursuant to the insurance contract, insurers have the right and duty to defend their insured in a tort action. A cause of action against such insurer for failure to settle only arises once an excess judgment has been entered against the insured and is based exclusively on the insurer's failure to meet its contractual obligations. An insurer's decision to not enter into a Cunningham stipulation, and thereby agree to litigate the bad faith claim in advance of trial of the underlying action, cannot serve as an independent basis for a bad faith claim. Such a choice by an insurer merely exercises its clear rights under the insurance contract.

In addition, contrary to petitioner's position, a Cunningham stipulation is not the equivalent of a policy limits demand. Instead, asking an insurer to enter into a Cunningham stipulation is no different than requesting that an insurer pay monies in excess of the policy limits. The contract of insurance requires neither. To require an insurer to enter into a Cunningham stipulation to avoid

charges of bad faith not only imposes duties outside of the insurance contract, but would result in increased litigation and coercive settlements. This Court should affirm the trial Court's grant of summary judgment on the Cunningham issue, and affirmatively state that this Court's prior decision in Cunningham cannot form an independent basis for a bad faith action against an insurer.

ARGUMENT

Initially, before addressing the issues presented in the Petitioner's Brief, Amicus Curiae NAII would note that those issues are appropriate for resolution by the Court only in the event the Court agrees with the position of Respondent, Infinity Insurance Company, and reverses the judgment below. In the event the judgment is affirmed, then the issues presented on the Petitioner's Brief regarding the Cunningham issue are moot and inappropriate for consideration by this Court. See Craig v. State, 685 So. 2d 1224 (Fla. 1996); Bellville v. Bellville, 763 So. 2d 1076 (Fla. 4th DCA 1999); Bradshaw v. State Farm Auto. Ins. Co., 714 So. 2d 620 (Fla. 5th DCA 1998); First Nat'l Bank of Lake Park v. Gay, 694 So. 2d 784 (Fla. 4th DCA 1997); O'Hara v. State, 642 So. 2d 592 (Fla. 4th DCA 1994).

A. CUNNINGHAM V. STANDARD GUARANTY & INSURANCE CO. DOES NOT CREATE AN AFFIRMATIVE DUTY, IN DEROGATION OF THE INSURANCE CONTRACT AND LONG STANDING LAW, MANDATING BAD FAITH LITIGATION IN ADVANCE OF AN ENTRY OF AN EXCESS JUDGMENT AGAINST THE INSURED.

(1) Florida Third-party Bad Faith Law Prior to Cunningham.

In Florida, a third-party bad faith action was recognized as early as 1938. See Auto Mutual Indem. Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1938). Even though the tort of bad faith occurred between an insurer and its insured, Florida courts allowed the injured third party to bring a bad faith action directly against the first party's insurer even absent an assignment. See Thompson v. Commercial Union Ins. Co., 250 So. 2d 259 (Fla. 1971). This was permitted because the injured third party, as the beneficiary to the bad faith claim, was the real party in interest, in a position similar to that of "judgment creditor." See Id. at 264.

It has long been the law in the State of Florida that an insured's contractual claims must be resolved as a condition precedent to any bad faith action. See Vest v. Travelers Ins. Co., 753 So. 2d 1270 (Fla. 2000); Imhof v. Nationwide Mut. Ins. Co., 643 So. 2d 617 (Fla. 1994); Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So. 2d 1289 (Fla. 1991); Fidelity & Casualty Co. v. Cope, 462 So. 2d 459 (Fla. 1985). Specifically, a cause of action for bad faith failure to settle within the policy limits, whether brought by the insured or a third party, does not arise until after a judgment in excess of the policy limits. See Kelly v. Williams, 411 So. 2d 902 (Fla. 5th DCA 1982)(citing Appleman, Insurance Law and Practice, § 4712 (1979)); see also State Farm Fire & Cas. Co. v. Zebrowski, 706 So. 2d 275 (Fla. 1997)("Zebrowski"); Dunn v. National Sec. Fire & Cas. Co., 631 So. 2d 1103 (Fla. 5th DCA 1993). Absent the excess verdict there are no damages caused by an insurer's failure to settle within policy limits. Thompson, 250 So. 2d at 264; Fidelity, 462 So. 2d at 460; see also Zebrowski, 706 So. 2d at 277.

(2) The Cunningham decision.

In Cunningham v. Standard Guaranty Insurance Co., 630 So. 2d 179 (Fla. 1994), the tort Plaintiffs, the Cunninghams, were injured and sustained property damage as a result of an

automobile collision with the insured tortfeasor. The tortfeasor was covered under a policy issued by Standard Guaranty with a personal injury limit of $10,000.00 and a property damage limit of $10,000.00. The opinion does not mention the extent of the Cunninghams' damages. There also is no discussion of the claims practices engaged in by the insurer, specifically whether there had been a policy limits demand.

For whatever reason, the Cunninghams and Standard Guaranty entered into an agreement to try the bad faith action before the underlying tort case was tried. Thus, there was no excess verdict against the insured. Standard Guaranty agreed in the Stipulation not to contest the insured's liability and the Cunninghams agreed to release the insured from personal liability. The parties agreed that if Standard Guaranty were found not to have acted in bad faith, then the Cunninghams' claims would be settled for policy limits.[1]

A jury subsequently found Standard Guaranty acted in bad faith. Standard Guaranty filed motions for a new trial and to set aside the jury's verdict. At the hearing on these motions, Standard Guaranty made an *ore tenus* motion to dismiss for lack of subject matter jurisdiction based upon the recently decided case of Dixie Insurance Co. v. Gaffney, 582 So. 2d 64 (Fla. 1st DCA 1991). When the Trial Court rejected these motions, including

[1] Notably, the Cunningham decision does not address what would happen if Standard Guaranty were found in bad faith, that is, whether damages were also stipulated, whether they would be tried before the same or separate jury, etc.

the *ore tenus* motion, Standard Guaranty appealed. The First District Court of Appeals reversed and held that a verdict in excess of the policy limits is a requirement for subject-matter jurisdiction that can not be stipulated away. The First DCA, certified the following questions for review to the Supreme Court of Florida:

> **Does the Trial Court have jurisdiction to decide an insurer's liability for bad-faith handling of a claim prior to final determination of the underlying tort action for damages brought by the injured party against the insured where the parties stipulate that the bad-faith action may be tried before the underlying negligence claim?**

The Supreme Court of Florida answered the certified question in the affirmative and reversed, finding that the trial court did have subject-matter jurisdiction. In doing so, it reconfirmed that, under ordinary circumstances, a third party must obtain a judgment against an insured in excess of the policy limits before prosecuting a bad faith claim against the insured's liability carrier. Id. at 181 (citing Blanchard, 575 So. 2d at 1289). The Court held that an excess judgment is indeed an element of the bad faith cause of action, but does not rise to the level of a jurisdictional defect, and therefore, the parties are free to stipulate to its existence. The Cunningham Court noted that stipulations are to be encouraged where they are "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." Cunningham, 630 So. 2d

at 182.

The Supreme Court in Cunningham addressed only the certified subject matter jurisdiction question presented, upholding the rights of the parties to stipulate to a procedure that both parties considered to be in their best interest at the time. Cunningham in no way held or even implied that an insurer, as part of its duty to act in good faith, must stipulate to try the bad faith case first, or that its failure to do so could be considered an additional act of bad faith.

(3) The decision of United Services Automobile Association v. Jennings, 731 So. 2d 1258 (Fla. 1999).

Cunningham has been cited on numerous occasions for the proposition that an excess verdict is a condition precedent to a third-party bad faith claim against an insurer; however, the legal effect of a Cunningham stipulation has only been addressed in detail once, in United Services Automobile Association v. Jennings, 731 So. 2d 1258 (Fla. 1999) ("Jennings").

In Jennings, the tort Plaintiff was seriously injured in an automobile accident. During mediation of the tort claim litigation, the insurer agreed with the tort Plaintiff to enter into a stipulation which by its terms would “serve as the functional equivalent of an excess judgment in the amount of $75,000.00,” as had been authorized by the Florida Supreme Court in its Cunningham opinion. The stipulation in Jennings, however, produced consequences not contemplated by the insurer. Specifically, during the bad faith litigation, the plaintiff requested production of the insurer’s claims file, including all

otherwise privileged documents. The insurer objected, and an interlocutory appeal from an Order compelling production followed.

The longstanding Florida rule in third-party bad faith actions is that once the bad faith action commences, the Plaintiff is entitled to the insurer's entire claim file for the underlying tort up to the date of the excess judgment, notwithstanding objections based on attorney-client or work-product privileges. In <u>Jennings</u>, the Supreme Court held that, unless the parties provided otherwise in their <u>Cunningham</u> stipulation[2], this rule applied equally to bad faith actions brought pursuant to such a stipulation.[3]

Of particular significance, the Supreme Court in <u>Jennings</u> noted that the parties would have been free to have included any

[2] The term "<u>Cunningham</u> stipulation" is loosely bandied about as though it has some specific meaning. In fact, as can be seen from <u>Cunningham</u> itself and from <u>Jennings</u>, there is no set formula or series of provisions which constitute a "<u>Cunningham"</u> stipulation, but rather it is a **concept,** the specific terms of which are, as in any other stipulation, subject to negotiation between the parties.

[3] Note that in <u>Jennings</u> the stipulation contained a provision for liquidated damages in the event of a finding of bad faith. This is particularly important regarding the discovery issue in that, since there would never be a subsequent trial needed to prove the amount of damages sustained in the accident, production of work-product material from the insurer's claim file would have less potential detrimental effect.

provisions in their stipulation as they saw fit.

> By this holding we do not restrict the terms that the parties to such a stipulation may put into their agreement. The parties may expressly limit discovery. However, the parties did not do so in Cunningham or in this case.

Id. at 1260.

In holding that the parties were free to modify a Cunningham stipulation, the Supreme Court reinforced that such an agreement, like any stipulation, is simply a means by which the parties, by mutual agreement, attempt to streamline the litigation between them. By confirming that the agreement could be freely negotiated, the Court implicitly rejected the concept that such a stipulation could be forced upon an unwilling participant under the coercion of potential bad faith allegation.

B. The well established common law of contracts mandates that an insurer can not be obligated to enter into a Cunningham stipulation.

The Trial Court correctly held that an insurer's decision not to enter into a Cunningham stipulation can not be evidence of bad faith because an insurer has no contractual duty to enter into such an agreement. Because no contractual duty exists, any evidence of an insurer's rejection of a Cunningham is irrelevant and therefore inadmissible. This Court should take this opportunity to specifically adopt the ruling of the Trial Court as the law in the State of Florida.

In Florida, the cause of action for bad faith failure to settle within the policy limits is one arising out of the contract between the insurer and the insured. See Nationwide

Mutual Ins. Co. v. McNulty, 229 So. 2d 585, 586 (Fla. 1969). This is to say that the duty of good faith and fair dealing is one implied in contract and does not sound independently in tort. Id. The duty of good faith must relate to the performance of an express term of the contract. No abstract or independent term, external to the contract, may be asserted as a source of breach when all contract terms have been performed. See Hospital Corp. of America v. Florida Medical Centers, Inc., 710 So. 2d 573 (Fla. 4th DCA 1998). Thus, a cause of action for breach of the implied covenant cannot be maintained (a) in derogation of the express terms of the underlying contract or (b) in the absence of a breach of the express terms of the contract. Id.

The express terms of every liability insurance policy, including the Infinity policy at issue, provide that the insurer has the right and duty to defend the underlying tort action, that no action will lie against it until the obligation of the insured has been determined by final judgment or agreement signed by the insurer, and that the insured must cooperate in the defense of the claim. (PE 1 at 2, 13 & 15). First American Title Ins. Co. v. National Union Fire Ins. Co., 695 So. 2d 475 (Fla. 3d DCA 1997); American Reliance Ins. Co. v. Perez, 712 So. 2d 1211 (Fla. 3d DCA 1998); Shuster v. South Broward Hosp. Dist., 591 So. 2d 174 (Fla. 1992). While the contract gives rise to the insurer's obligation to handle the defense using the same degree and care of as a person of ordinary care and prudence would exercise in the management of his own business, the insured has the

reciprocal obligation to allow the insurer to control the defense and to cooperate with the insurer. Doe v. Allstate Ins. Co., 653 So. 2d 371, 374 (Fla. 1995).

The decision on the part of Infinity Insurance Company not to enter into a Cunningham stipulation and thereby agree to litigate the bad faith claim in advance of trial of the underlying action cannot serve as an independent basis for a bad faith claim because Infinity did nothing more than exercise its clear rights under the contract of insurance as supported by the longstanding common law in Florida. See Shuster, 570 So. 2d at 177 (noting that where a party to a contract is merely exercising its clear right under the contract, whether it acts in good faith or bad faith is irrelevant). Petitioner Berges attempts to argue that because it ostensibly releases the insured from liability, a Cunningham stipulation is the equivalent of a simple policy limits demand. This is not the case, however, and this Court should not credit this deceptively simple argument.[4] A Cunningham agreement fundamentally differs from a simple policy limits demand because the good faith duty to consider a policy limits demand imposes no duties beyond, and indeed reinforces,

[4] Petitioner Berges relies loosely on the language, taken out of context, of the Supreme Court in Imhof. In Imhof, the Supreme Court, in addressing the standard for evaluating alleged bad faith in the context of a coverage dispute, confirmed that the so-called "totality of the circumstances" standard, not the "fairly debatable" standard, would be used. The Court said nothing to extend the language of its holding to issues and circumstances such as presented herein which have nothing to do with coverage disputes.

the express terms of the policy. As the Supreme Court has clearly enunciated which word is most appropriate at its most basic definition, the Cunningham stipulation is the "functional equivalent of an excess verdict" and exposes the insurer to extra-contractual liability. By analogy, the request to an insurer to enter into a Cunningham stipulation is no different than the request that it expend monies greater than its policy limits in an effort to settle the tort claim in the face of allegations of bad faith.[5] Although both actions clearly would benefit the insured, in neither instance can it be argued that a provision within the insurance policy gives rise to such an obligation, nor that the company's decision not to meet such a demand could be asserted as additional independent acts of bad faith.

C. Grafting upon the decision whether to enter into a Cunningham stipulation considerations involving bad faith would confound the very purposes enunciated by the Supreme Court in support of its Cunningham decision.

The Supreme Court in Cunningham specifically noted with favor the concept that stipulations under appropriate circumstances could simplify, shorten or settle litigation and save costs to the parties. Holding an insurer to a duty to enter into a Cunningham stipulation would not only impose upon an insurer duties outside and beyond its contract, but it would create a legal principle that would be unworkable, unpredictable

[5] Infinity's policy expressly provided that Infinity would not defend or settle after its limit of liability for such coverage had been reached. (P.E. 1 at 5)

and result in increased complexity and multiplicity of litigation.

Initially, as is confirmed in Jennings, 731 So. 2d at 1258, there is no single formula or set of provisions that constitute a Cunningham stipulation. Virtually any combination of considerations could unilaterally be proposed to "set up" the argument. Thus, in each instance the specific provisions of the unilaterally proffered agreement would need to evaluated by the Court to determine whether it was sufficiently in compliance with the concept so as to give rise to the duty Cross-Appellant Berges asks this Court to impose. Further, and more importantly, if an entirely new cause of action for bad faith refusal to enter into a Cunningham agreement becomes the law of this state, such agreements would be proffered in virtually every circumstance where a policy limits demand had been refused. Indeed, it would be an imprudent plaintiff's attorney who neglected to propose such a procedure where doing so created no risk and the failure to do so might result in the absence of a cause of action for bad faith that might be pursued later. Thus, rather than being used in unique circumstances appropriately selected to serve the ends identified by the Supreme Court in Cunningham, the procedure would arise and create additional issues impeding settlement in virtually every liability lawsuit.

Additionally, any insurance carrier that had exercised best efforts to fully meet all obligations to its insured under its policy, when confronted with such an offer, would have no choice

but to agree to enter into such a stipulation on pain of its refusal later being argued as an independent act of bad faith. Thus, rather than encouraging the simplification of litigation and the settlement of valid issues and claims, the imposition of such an extra-contractual duty would serve to unnecessarily burden the state's tort system.

Finally, plaintiffs would be further encouraged to unnecessarily propose <u>Cunningham</u> agreements knowing in advance that they would gain full access to the insurance company's claims file containing all of its work-product material, possession of which would be invaluable in the later litigation of the tort claim. This prospect alone would mitigate in favor of a <u>Cunningham</u> agreement being offered by the plaintiff in virtually every liability lawsuit.

The creation of a new extra-contractual duty as suggested by Cross-Appellant Berges by imposing a coercive element upon the procedure contemplated as voluntary by the Supreme Court would result in undesirable sociable and economic effects, multiple litigation, unwarranted bad faith claims, coercive settlements, excessive jury awards and escalating insurance, and legal and other transaction costs, which are exactly what the Supreme Court has consistently sought to avoid. <u>See</u> <u>Zebrowski</u>, 706 So. 2d at 277.

CONCLUSION

The Supreme Court of Florida in the decision Cunningham v. Standard Guaranty Insurance Co., 630 So. 2d 179 (Fla. 1994), created a procedural mechanism as an exception to the longstanding rule that a third-party bad faith action may only be brought after an excess verdict is entered. This case did not contemplate that such a discretionary procedure would be argued to be mandatory, or that failure to agree to such a stipulation could be evidence of bad faith. The common law of contracts dictates otherwise as well. To obligate an insurer to accept a Cunningham stipulation to avoid bad faith creates severe legal and procedural inequities and is contrary to public policy as enunciated by the Court in its Cunningham opinion. For these reasons, NAII as Amicus Curiae urges this Court to expressly uphold the lower court's grant of summary judgment on this issue in favor of Infinity and against Berges, thereby denying Berges' Petition to this Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing AMICUS CURIAE NATIONAL ASSOCIATION OF INDEPENDENT INSURER'S BRIEF IN RESPONSE OF RESPONDENT, INFINITY INSURANCE COMPANY has been furnished to the following individuals, via U.S. Mail, this 4th of November, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Amius Curiae National Association of Independent Insurer's Brief in Support of Respondent, Infinity Insurance Company complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2), which became effective on January 1, 2001. This Amius Curiae Brief has been prepared using Courier New 12-point font.

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