IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-291
Lower Tribunal No. 4D99-2989
CONSOLIDATED: SC01-292

CHARLES B. HIGGINS	vs.	STATE FARM FIRE AND CASUALTY COMPANY Case No. SC01-291
and		
CHERYL L. INGALLS, f/k/a CHERYL L. STEELE,	vs.	STATE FARM FIRE AND CASUALTY COMPANY Case No. SC01-291

Petitioners — Respondent

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL
CASE NO. 4D99-2989
RULING ON APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NO. CL 97-3309 AB

AMENDED REPLY BRIEF
OF PETITIONER, CHARLES B. HIGGINS

Respectfully submitted,

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INTRODUCTION

Petitioner, CHARLES B. HIGGINS, (HIGGINS) respectfully sets out this statement of the case and facts. References to the Record on Appeal appear as (R. Vol. ___, p. ____), the trial transcript as (T. Vol.____, p. ___) and the Respondent's Answer Brief as A.B. p.____). The Petitioner, CHARLES B. HIGGINS, will be referred to as "HIGGINS". The Petitioner, CHERYL L. INGALLS, f/k/a CHERYL L. STEELE, will be referred to as "INGALLS". The Respondent, STATE FARM FIRE AND CASUALTY COMPANY, will be referred to as "STATE FARM". Maureen Bradley will be referred to as "Bradley".

SUMMARY OF THE ARGUMENT

STATE FARM may not pursue a declaratory action where its policy is unambiguous and the fact issues are common both to the underlying litigation and the declaratory action. STATE FARM has a duty protect its insured's contract right to a defense because STATE FARM has sold to its insured and been paid a premium beyond a contract to indemnify, i.e., a duty to defend its insured. If there are factual issues which are common to the underlying action and the declaratory action, the underlying action must be tried first. Only in those circumstances where the factual issues in the declaratory judgment action are not common to the underlying action can

the declaratory action be tried first.

REPLY ARGUMENT

POINT I

MAY THE INSURER PURSUE A DECLARATORY ACTION IN ORDER TO HAVE DECLARED ITS OBLIGATION UNDER AN UNAMBIGUOUS POLICY EVEN IF THE COURT MUST DETERMINE THE EXISTENCE OR NON-EXISTENCE OF FACT IN ORDER TO DETERMINE THE INSURER'S RESPONSIBILITY?

STATE FARM's argument relies almost entirely upon Allstate Ins. Co. v. Conde, 595 So2d 1005 (Fla. 5th DCA 1992). However, the Conde decision is inapplicable to the instant case because:

(1) The Conde court noted that it was the undisputed testimony of the two survivors that Conde, the Allstate insured, violently attacked his family with a gun; whereas, the facts in this case are in dispute, and Higgins' deposition and trial testimony support a cause of action for negligence by INGALLS against HIGGINS; and

(2) The underlying lawsuit in Conde asserted claims that were mutually exclusive, i.e. that the acts of Conde were either intentional or in the alternative constituted negligent conduct; whereas, in this case INGALLS sued HIGGINS only for injuries resulting from

HIGGINS' negligent acts.

STATE FARM further attempts to equate the instant case to the situation in Conde by stating that:

> "The insured and claimant have reasons for joining together in characterizing claims that are involving negligently inflicted injuries, when evidence in the case suggests (or more than suggests) that in fact the injuries were expected or intended." (A. B. p. 29)

Unfortunately, STATE FARM fails to cite to anything in the record that even suggests that the insured (HIGGINS) and the claimant (INGALLS) have joined together in an attempt to mischaracterize the facts. STATE FARM fails to acknowledge HIGGINS' deposition testimony (R. Vol. 2, pp. 177-262) in which HIGGINS testified that the incident involved a misunderstanding between Bradley, INGALLS and himself and that there was no intent on his part to injure INGALLS nor did he hold any malice towards INGALLS. (R. Vol. 2, pp. 239-240) STATE FARM retained attorney, Dennis A. Vandenberg to represent HIGGINS at his deposition in the underlying case. HIGGINS' attorney in the declaratory judgment action was not present at the deposition. (R. Vol. 2, pp. 177-178). Nevertheless, STATE FARM continues to maintain its unsubstantiated position that HIGGINS and his attorney joined forces with INGALLS and her attorney to mischaracterize the deposition

testimony.

HIGGINS did not aim a gun and shoot INGALLS as was the case in Conde but rather INGALLS pointed the gun at HIGGINS who attempted to knock it out of her hand.[1] Somehow INGALLS fell to the ground as a result of HIGGINS' action. INGALLS claims that her injuries resulted from and occurred at the time she fell to the ground during that portion of the incident. (R. Vol. 8, pp. 1180-1290, Exhibit "F"). HIGGINS, as a defendant in the underlying case, had no control over the allegations made by INGALLS nor did HIGGINS have any control over the testimony of INGALLS' treating physicians (who presumably will testify that her injuries resulted from her fall as a result of HIGGINS attempt to knock the gun out of her hand).

HIGGINS has steadfastly maintained throughout the course of litigation that he never intended to injure INGALLS nor were his actions willful or malicious. (R. Vol. 2, pp. 239-240; T. Vol. 4, pp. 345-359) STATE FARM would have this

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[1] STATE FARM alludes to HIGGINS' actions as being excluded on the basis of "self defense". (A.B. p.31 fn. 4) "Self-defense" was never raised in STATE FARM's second amended complaint (R. Vol. 8, pp.1180-1290) nor was it an issue at trial. Additionally, the cases cited by STATE FARM were decided prior to State Farm Fire & Cas. Co. v. CTC Development Corp., 720 So.2d 1072 (Fla. 1998).

Court ignore HIGGINS's sworn testimony, but yet declare that a "perfect conspiracy" exists between HIGGINS and INGALLS. (A.B. p. 32) STATE FARM has chosen to ignore its insured's sworn testimony in order to avoid providing HIGGINS with a continued defense and potentially with coverage. As Judge Sharp stated in Conde, 595 So.2d 1005, 1009 when she concurred in part and dissented in part:

> The dilemma in these cases is to protect the insured's contract right to a defense, and the insurance company's right *not* to have to defend beyond the scope of its contract duty, when there is an injured third party who has sued the insured, or *may* do so. Since all three parties cannot be forced to litigate these issues in the context of a single suit to which they will all be bound, there is necessarily some danger of multiple suits and inconsistent judgments.
>
> Either the insured or the insurer will be inconvenienced. In my view, if one must be, the proper choice ought to be the insurance company because it has sold and been paid for something beyond a contract to indemnify — a duty to defend its insured in any lawsuit, which on its face, could encompass insurance coverage.

The purpose behind STATE FARM's "conspiracy" theory is quite simple: (1) shift the burden to defend not only the declaratory judgment action but

also the underlying action to its premium paying insured; (2) withdraw the defense (if one is provided to its insured) in the underlying action after the declaratory judgment action has been concluded (presumably in favor of STATE FARM); (3) deny coverage based on the declaratory judgment verdict; and (4) continue to deny coverage to its insured even though a jury in the underlying action may subsequently return an inconsistent verdict that its insured was negligent.

Petitioner, HIGGINS, respectfully submits that the certified question should be answered in the negative and the Fourth District's decision should be reversed.

POINT II

THE DISTRICT COURT OF APPEAL WAS INCORRECT IN ITS OPINION THAT IT IS PROPER FOR A DECLARATORY JUDGMENT CASE TO BE TRIED IN ADVANCE OF THE UNDERLYING TORT ACTION.

STATE FARM relies upon Britamco Underwriters, Inc. v. Central Jersey Investments, Inc., 632 So.2d 138 (Fla. 4th DCA 1994) for the proposition that it is entitled to try the disputed issued of fact in the declaratory action prior to trial of the underlying action. In order for a valid declaratory judgment claim to lie, there must exist disputed contract interpretations or construction. The Britamco complaint alleged that the insured failed to intervene when its employee brandished a gun which

discharged, causing the death of the plaintiff. The Britamco, 632 So. 2d 138, 139, court stated:

> The insurer's position is that its Liquor Liability Exclusion Endorsement is absolute and no underlying facts have to be litigated to determine its duty to defend and duty to indemnify as a matter of law. It also contends that its Assault and Battery Exclusion not only excludes intentional conduct, but also excludes negligence on the part of the insured which could have prevented or halted the assault and battery. The insurer contends that neither basis for determining coverage requires the resolution of whether the insured's conduct was intentional, which it concedes is a fact common to the underlying litigation. (emphasis supplied)

The Britamco, 632 So. 2d 138, 141, court further stated:

> In the case before us, the underlying complaint has not alleged mutually exclusive theories as in *Conde*. On the other hand, the insurer asserts that construction of its Liquor Liability Exclusion does not involve the adjudication of facts common to the wrongful death litigation, distinguishing it from *Marr*. If there are factual issues in the declaratory judgment action which are not common to the liability action, there is no sound policy reason in this case for requiring the insurer to be precluded from litigating its coverage dispute with its insured, especially when the plaintiff is also a party the declaratory judgment action as here. (emphasis supplied)

The only question that had to be determined in the Britamco case is whether the Liquor Liability and Assault and Battery Exclusions were applicable to the allegations contained in the plaintiff's complaint and that neither the court nor a jury in the declaratory action needed to determine whether the insured's employee acted intentionally or negligently in causing the death of the plaintiff.

If there are factual issues which are common to the liability action and the declaratory judgment action, the underlying case must be tried first. Irvine v. Prudential, 630 So.2d 579 (Fla. 3rd DCA 1993) and Burns v. Hartford Accident & Indemnity Co., 157 So.2d (Fla. 3d DCA 1963). The insured would be able to participate in the underlying case by following the procedure set forth in Employers Insurance of Wausau v. Lavender, 506 So2d 1166 (Fla. 3rd DCA 1987).

The opinion of the district court of appeal that it was proper for the declaratory judgment action to be tried in advance of the underlying tort action should be reversed where, as here, there are factual issues which are common to both the declaratory judgment action and the underlying action.

CONCLUSION

The Petitioner, CHARLES B. HIGGINS, respectfully requests that the decision of the Fourth District Court of Appeal should be reversed with instructions to dismiss STATE FARM's second amended complaint for declaratory judgment for

failure to state a cause of action under Section 86.011, Fla. Stat., as it does not seek construction of a policy provision but seeks only to resolve questions of fact.

Assuming that STATE FARM's second amended complaint for declaratory judgment does state a cause of action under Section 86.011, Fla. Stat., INGALLS' underlying second amended complaint for negligence against HIGGINS should be tried in advance of the declaratory judgment case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy has been furnished this ____ day of July, 2001 to SPENCER M. SAX, ESQ., P.O. Box 810037, 301 Yamato Road, Suite 4150, Boca Raton, FL 33481; to THEODORE A. DECKERT, ESQUIRE, 250 Australian Avenue South, Suite 1400, West Palm Beach, FL 33402; ELIZABETH A. RUSSO, ESQ. Russo Appellate Firm, P.A., 601 S.W. 76th Street, Miami, FL 33143; and to JOSEPH K. STILL, JR., ESQ., 500 South Australian Avenue, Suite 600, West Palm Beach, FL 33401.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the undersigned attorney has complied with the font requirements of Florida Rules of Appellate Procedure, Rule 9.210.

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