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. SC01-292
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

PETITIONER INGALLS' REPLY BRIEF

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PREFACE

Petitioner, CHERYL INGALLS, etc. (hereafter INGALLS), and Petitioner, CHARLES B. HIGGINS (hereafter HIGGINS) were Appellees/Cross-Appellants/Defendants below and Respondent, STATE FARM FIRE AND CASUALTY COMPANY (hereafter STATE FARM) was Appellant/Cross-Appellee/Plaintiff below. The parties will be referred to as they appeared in the trial court and/or by their names. References to the record on appeal appear as (R. Vol. __ p. ___), to the trial transcript as (T. Vol. ___, p. __), to the trial exhibits as party and number (e.g. Defendant's trial exhibit No. ___), to the Initial Briefs as (IB, p. __), and the Answer Brief as (AB, p. ___) . References to the Fourth District's opinion are to its reported opinion page or to the appendix as (A. p.__). All emphasis in this brief is supplied by Petitioner, unless otherwise indicated.

To the extent not inconsistent with any argument set forth herein, INGALLS adopts all points raised and all arguments and authorities cited by HIGGINS in his briefs filed herein.

REPLY ARGUMENT

POINT I

DECLARATORY JUDGMENT ACTIONS MAY BE UTILIZED

TO RESOLVE FACTUAL ISSUES REGARDING INSURANCE COVERAGE.

Petitioner agrees that some fact questions regarding coverage may be determined in a declaratory judgment action, because Petitioner believes that the law should emphasis fairness and justice rather than form or procedure. For these reasons, Petitioner has no further argument on this point. However, it is essential that the rules of law provide a framework for fair and just resolution of conflicts. Petitioner submits for the reasons detailed in the argument on Point II and others that the trial of the declaratory action in this case was premature and did not provide for fair and just resolution of the insurance coverages issues.

POINT II

UNDER THE CIRCUMSTANCES OF THIS CASE, IT WAS AN ABUSE OF DISCRETION TO TRY THE DECLARATORY COVERAGE ACTION IN ADVANCE OF THE UNDERLYING ACTION.

A. Factual issues regarding insurance coverage should not be tried in advance of the underlying action when the factual issues regarding coverage are intertwined with the factual issues in the underlying claim.

STATE FARM argues that if the "factual issues" in the coverage case are not an issue in the underlying case it is proper for the declaratory action to be tried first. STATE FARM has misconstrued this point. The question is not whether the

coverage issues are "fact issues to be determined" in the underlying case, but rather whether the "fact issues to be determined" in the coverage case involve consideration of the same testimony and evidence as the issues to be determined in the underlying case. Petitioner submits this is a crucial distinction.

STATE FARM argues that *Britamco Underwriters, Inc. v. Central Jersey Investments, Inc.*, 632 So. 2d 138 (Fla. 4th DCA 1994) supports its position and quotes portions of Justice Pariente's opinion written for the Fourth District. But the "factual issues to be determined" regarding the policy exclusions asserted by the insurance company in *Britamco* did not involve the question of intent which was inherent in the underlying action. Justice Pariente stated that it was proper to allow the carrier to litigate coverage issues in a separate declaratory action prior to resolution of the underlying action "...under the circumstances of this case where the insurer seeks to determine issues of coverage not dependant on the resolution of fact issues common to the underlying litigation..." *Id.*, at 139. As detailed in Petitioner's Initial Brief (INGALLS IB 29) Justice Pariente specifically noted that "... *neither basis for determining coverage requires the resolution of the issue of whether the insured's conduct was intentional, which* (the insurer) *concedes is a fact common to the underlying litigation*. (FN1)" *Id.* at 140 (Emphasis added)

It is also important to note how the "factual issues to be determined" determined

regarding the coverage issue in *Canal Insurance Company vs. Reed*, 666 So.2d 888 (Fla 1996), were likewise " not dependant on the resolution of fact issues common to the underlying litigation". In *Canal*, the underlying claim was a bodily injury automobile negligence claim and the factual issue to be determined regarding coverage was whether at the time of the accident sued upon, the plaintiff was an employee of the insured, thereby precluding coverage under the policy involved. *Canal*, at 890. That issue did not require any consideration of the injuries claimed or the wrongful acts sued upon in the underlying action and therefore it was not inappropriate for that issue to be considered separately and prior to the underlying claims.

Petitioner submits that under the rule and rationale of *Britamco* and *Canal*, factual issues regarding coverage should be tried prior to the underlying action only when they are not intertwined with the factual issues in the underlying claim. While Petitioner acknowledges that the issue regarding which policies were in effect are sufficiently distinct from the issues in the underlying action that they could be tried separately prior to trial of the underlying action, the issues regarding the application of the policy exclusions are completely intertwined with the factual issues in the underlying claim and should not have been tried prior to the underlying action.

The coverage exclusions relied upon by STATE FARM in this case all involve the jury's consideration of the same evidence regarding the wrongful acts sued upon

and the injuries claimed by the Petitioner which the jury will consider in the underlying claim. This is exactly the type of situation referred to by Justice Pariente in the *Britamco* passage quoted above as well as in *Burns v. Hartford Accident & Indemnity Co.*, 157 So. 2d 84 (Fla. 3rd DCA 1963); *Marr Investments, Inc., v. Greco*, 621 So. 2d 447 (Fla. 4th DCA 1993); *Irvine v. Prudential,* 630 So. 2d 579 (Fla. 3rd DCA 1993); *Home Insurance Company v. Gephart*, 632 So.2d 138 (Fla. 4th DCA 1994). These other cases all held the declaratory actions premature.

The Fourth District acknowledged approvingly the holding in *Gephart*, yet then attempts to qualify or distinguish it, Petitioner submits incorrectly. (*State Farm v. Higgins* ,A. p. 9-10) STATE FARM and The Fourth District both did not even address the above-quoted limiting language in *Britamco*. Petitioner submits that this language is not only crucial to the proper application of the *Britamco* case holding, but also to fully understanding the rational and fairness of the holding. It is also the key to properly applying the rational of the Supreme Court in *Canal v. Reed*. The risks and injustice which can result from the failure to properly apply these holdings are demonstrated in the instant case.

B. Trying the coverage action in this case prior to the underlying action allowed the insurance carrier to re-characterize the claims in the underlying action, which was prejudicial to Petitioner and contrary to law.

This point is the essence of the error in this case. The proper coverage question is how the policy exclusions relied upon by STATE FARM apply to the claims asserted in the underlying action, *not to other claims that could or might have been made*. The law is very clear that the only relevant claim is the claim asserted in the Second Amended Complaint in the underlying action. *Baron Oil Co. v. Nationwide Mut. Fire Ins.,* 470 So. 2d 810 (Fla. 1st DCA 1985). The record is also very clear that whatever claims INGALL's may once have made, the only claim now being made against STATE FARM's insured HIGGINS by INGALLS in the Second Amended Complaint in the underlying action is a claim for certain bodily injuries allegedly caused by certain negligent acts of HIGGINS. (R. Vol. 8, pp. 1180-1290 Exhibit "F")

STATE FARM has misconstrued Petitioner's arguments regarding the erroneous application of the holdings in *State Farm Fire & Casualty v. CTC Development*, 720 So. 2d 1072 (Fla. 1998). Quite simply, it is Petitioner's position that STATE FARM has the burden of proving that its policy excludes coverage for the claims asserted in the underlying action (and only those claims). When the holding of *State Farm Fire & Casualty v. CTC* is properly applied, the "factual issues", if any, regarding STATE FARM's policy exclusions are still so inherently intertwined with the issues in the underlying action that they cannot be determined separately *prior to the trial of the underlying action*. The fact that the "legal issues" (i.e. the

interrogatory questions to be posed to the jury) regarding coverage are not the same is not what matters. Although Petitioner disagrees with the evidentiary and legal rulings regarding the coverage issues, as to this point, it is clear that the issues are inherently intertwined with the facts to be tried in the underlying action and therefore should not have been tried first.

Trying the declaratory action prior to the underlying action in the instant case allowed STATE FARM to take over Petitioner's underlying claim, and then re-characterize it to suit the carrier's desire to deny its insured a defense and coverage. STATE FARM has continued to misdirect the focus of this case even in its Answer Brief by repeatedly stressing testimony and evidence that was admitted (Petitioner submits erroneously for the reasons addressed under other points on appeal) regarding claims not being asserted in the underlying action. Given the way the trial was conducted, it is no surprise the jury ruled the way it did. The jury instruction requested by Petitioner referred to in the Answer Brief (STATE FARM AB p. 35) was an attempt to overcome the prejudice of the erroneous trial rulings, but Petitioner submits it was too late and the effects of the mis-direction could not be overcome .

The injustice and prejudice to Petitioner, and to HIGGINS, are obvious. Without being permitted to present their respective cases based upon the injuries and wrongful acts INGALLS chose to sue upon, HIGGINS has now been found to have

intentionally harmed INGALLS and committed wilful and wanton acts against her. Does this mean that all that remains to be tried in the underlying action is the dollar value of INGALLS damages? Despite her desire not to, is INGALLS now forced to amend her complaint again to allege a claim for assault and battery? If it is not res judicata and she now decides to bring suit for the intentional acts of HIGGINS, what is her remedy if the later jury decides HIGGINS did not intend to harm her? These are precisely the types of potential inconsistent adjudications which the court warned against in *Home Ins. Co. v. Gephart* (at 180).

C. The underlying claim does not involve alternative, mutually exclusive theories and therefore Respondent's "Conspiracy theory" arguments are not applicable.

It is disturbing, though not surprising, how STATE FARM has persisted throughout this case in shifting the focus from the law and facts applicable to the case away to other issues. STATE FARM even goes so far as to argue that the Second Amended Complaint in the underlying action is a sham (AB p. 12) and that insurance carriers like STATE FARM are poor defenseless victims of creative pleading and a "perfect conspiracy between a plaintiff and the insured and the insurer has no remedy" (AB29, quoting Jg. Griffiths' language in her concurring opinion in (*Allstate Ins. Co.v. Conde*, 595 So. 2d 1005(Fla. 5th DCA 1992) at 1009). Unfortunately,

STATE FARM's strategy has worked so far at both the trial and appellate levels, but it is wrong.

Discovery in the underlying case revealed that there was a conflict in the evidence about what transpired the night INGALLS was injured. It was not until after that discovery that the underlying complaint was amended to plead a simple negligence bodily injury claim. There is no evidence of any "conspiracy".

The claimant, *not the insurance carrier*, is entitled to chose her claim. Clearly the law recognizes that multiple claims and causes of action can arise out of a single set of facts and a party is not required to pursue any possible claim. INGALL's is not required to give any reason for her choice. There are many valid good faith reasons why a plaintiff may chose to pursue a negligence claim rather that an intentional tort claim, not the least of which is what the plaintiff must prove to prevail on the cause of action. There is no rule of law, principle of justice or public policy that says a person must pursue an intentional tort claim even if one might be brought, *especially when there are conflicts in the evidence*. The only interest served is that of the liability insurance industry, since most liability policies attempt to exclude coverage for such claims.

All of the cases cited by STATE FARM and The Fourth District in its opinion which discuss these "conspiracy" fears and "creative pleading" involve alternatively

plead "mutually exclusive" theories of recovery (*i.e. Allstate Ins. Co.v. Conde, id.)* Unlike these other cases, INGALL's did not try to "have it both ways". The Fourth District noted this distinction in the instant case, but stated it is not significant. (*State Farm v. Higgins*, A. p. 11) Petitioner respectfully but strongly disagrees. Petitioner submits the distinction is very significant.

in *Conde*, Jg. Griffith stressed that the "*undisputed facts*" (all parties agreed was wrongful death by intentional shooting) would not support the alternatively pled negligence claim, and distinguished *Conde* from *Prudential Property & Cas. Ins. Co. v. Castellano*, 571 So. 2d 598 (Fla 2d DCA 1990). *Conde* at 1009. The *Castellano* case is more analogous to the instant case and involved a declaratory action filed by the carrier *after the underlying case had been settled* and involved alleged injuries arising out of an allegedly negligent shooting. *Castellano* at 599.

D. The fair and practical approach.

Petitioner submits that the rationale and holdings of *Burns, Gephart, Marr,* and *Irvine* are the more sound and fair approach. These decisions are also not inconsistent with the holdings or rational of *Britamco* and *Canal*.

Contrary to STATE FARM's argument, the carrier is not without a means to have its position fairly heard. Assuming *arguendo*, that there are any factual issues

regarding the application of the policy exclusions asserted by STATE FARM to the wrongful acts and injuries sued upon in the underlying action, petitioner submits a fair and practical approach would be for the coverage issues to be tried and presented by special interrogatory to the same jury subsequent to the initial verdict in the underlying case as was recommended in *Employers Ins. Co. of Wausau v. Lavender*, 506 So. 2d 1166 (Fla 3d DCA 1987).

This procedure assures that the coverage decision is *based on the claims actually asserted and proven in the underlying action*. It preserves and protects the claimant's right to chose and prove the claims being made against the insured, without giving the insurance carrier the opportunity to re-characterize the underlying claim to suit its desire to deny coverage. Petitioner submits the need to provide for a fair and just resolution of the insurance coverage issues far outweighs any potential harm to the insurance company's regulated profits if it ultimately turns out the carrier provided its insured a defense for a claim that was not covered under the policy. This procedure is particularly fair since the insured paid the company a premium for "protection" under the policy and it is well established under Florida law that the duty to defend is broader than the duty to indemnify. *See: Irving,* at 580 and the concurring opinions in *Conde* of Judge Sharp at 1010 and Judge Diamantis at 1011.

CONCLUSION

Based on the foregoing, argument, INGALLS respectfully requests the court affirm in part and reverse in part the decision of the Fourth District, as set forth more particularly in the conclusion to Petitioners Initial Brief (INGALLS IB p. 49).

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 12th day of June, 2001, via U.S. Mail to: Joseph K. Still, Jr., Esq., 500 Australian Avenue South, Suite 600, West Palm Beach, FL 33401, fax (561) 655-6092; Howard W. Holden, Esq., 1550 Southern Blvd., Suite 300, West Palm Beach, FL

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I FURTHER CERTIFY that this brief complies with the font requirements of Fla R. App. P. 9.210.

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