# IN THE SUPREME COURT OF FLORIDA

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

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

**INITIAL BRIEF**
**OF PETITIONER, CHARLES B. HIGGINS**

Respectfully submitted,

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**TABLE OF CONTENTS**

**Page**

TABLE OF AUTHORITIES

**Other authorities cited:**

## 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. _____) and to the trial transcript as (T. Vol._____, 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".

## STATEMENT OF THE CASE AND OF THE FACTS

This appeal seeks reversal of ***State Farm Fire and Casualty v. Higgins***, 24 Fla. L. Weekly D111( Fla. Jan. 3, 2001), in which the Fourth District Court of Appeal held that STATE FARM may pursue a declaratory judgment action in order to have declared its obligations under an unambiguous policy even if the court must determine the existence or nonexistence of a fact, and, further held that STATE FARM can properly bring a declaratory judgment action to determine both the duty to defend and coverage before a determination of the defendant's liability in the underlying tort case, so long as the injured party plaintiff in the tort suit is made a party to the declaratory judgement action.

This appeal arises from a complaint for declaratory judgement filed by STATE FARM seeking a determination by the trial court that it did not have a duty to provide a defense nor indemnify HIGGINS in a lawsuit brought against HIGGINS by INGALLS. INGALLS' original complaint alleged assault and battery against HIGGINS. (R. Vol. 1, pp. 1-17, Exhibit "D"). INGALLS later filed an amended complaint alleging that HIGGINS, while under the influence of and impaired by alcohol, began to argue with his estranged wife, Bradley, and that HIGGINS violently threatened, touched and injured INGALLS. The amended complaint also added Bradley to the lawsuit alleging that she was negligent (R. Vol. 1, pp. 1-17, Exhibit "E").

A settlement was reached on INGALLS' claim against Bradley prior to the trial of the declaratory action.

After INGALLS amended her complaint, she took the deposition of HIGGINS (R. Vol. 2, pp. 177-262). HIGGINS testified that the incident involved a misunderstanding between himself, Bradley and INGALLS. He further testified that he did not intend to injure anyone in the incident, nor did he hold any malice towards INGALLS and further stated that he had never met INGALLS prior to the incident. (R. Vol. 2, pp. 239-240) HIGGINS' testimony refutes the allegations contained in INGALLS' original complaint and amended complaint (R. Vol. 1, pp. 1-17, Exhibit "D" and Exhibit "E"). Based upon HIGGINS' testimony, INGALLS chose to file a second amended complaint only alleging that HIGGINS was negligent. INGALLS' second amended complaint dropped her claim for assault and battery. (R. Vol. 8, pp. 1180-1290, Exhibit "F"). INGALLS' second amended complaint alleged:

> On June 4, 1995, at approximately 2:00 A.M., the Defendant, HIGGINS, came upon the above-described property while the Plaintiff, INGALLS and Bradley were there. At that time, the Defendant, HIGGINS, began to argue with Bradley. In the course of this altercation, Defendant, HIGGINS, negligently injured Plaintiff, INGALLS. (emphasis supplied)

It was upon these allegations against HIGGINS that STATE FARM filed

its second amended complaint for declaratory relief (R. Vol. 8, pp. 1180-1290). INGALLS' allegations against HIGGINS were made in good faith based upon HIGGINS' sworn deposition testimony that his actions were not intentional, nor did he expect or intend to injure INGALLS. INGALLS chose to accept HIGGINS version of what occurred on the evening of the incident and to sue HIGGINS solely for his alleged negligence and any injuries allegedly resulting from HIGGINS' negligence. HIGGINS' homeowners policies provide that:

COVERAGE L - PERSONAL LIABILITY

> If a claim is made or a suit is brought against an insured for damages because of bodily injury...to which this coverage applies caused by an occurrence, we will:
>
> 1. Pay up to our limit of liability for the damages for which the insured is legally liable; and
>
> 2. Provide a defense at our expense by counsel of our choice...

The policy further provides:

DEFINITIONS

** 7. "'Occurrence'" when used in Section 2 of this policy, means an accident, ...which results in:

a. bodily injury;...

STATE FARM raised the following exclusions upon which to challenge its duty to defend and provide coverage to its insured, HIGGINS:

SECTION II - EXCLUSIONS

1. Coverage L...do not apply to:

   a. bodily injury...

      (1) which is either expected or intended by an insured; or

      (2) to any person or property which is the result of willful and malicious acts of an insured...

The case proceeded to trial on the issue of whether HIGGINS expected or intended to cause injuries to INGALLS or whether the alleged injury to INGALLS was the result of willful and malicious acts of HIGGINS.

The testimony elicited from HIGGINS at trial revealed that the incident that gave rise to the lawsuit occurred at the River Ranch development in Polk County on June 3, 1995. HIGGINS was staying at the River Ranch Lodge with a friend, Joe Martin. The purpose of HIGGINS' visit to River Ranch was to attend a Board of Directors' Condominium Association meeting the next day. HIGGINS, and his friend Martin, went to the lounge located on the River Ranch property. While in the lounge, HIGGINS' estranged wife, Bradley, and another woman, INGALLS, who HIGGINS did not know, came into the lounge. HIGGINS said "hello" to Bradley. Nothing

unusual occurred during the period of time that Bradley, INGALLS and HIGGINS were in the lounge at the same time. Bradley and INGALLS departed the lounge first. HIGGINS drank another beer and then went back to his room at which time he received an urgent emergency call from his fiancé that he needed to return to Ft. Lauderdale. (T. Vol. 4, pp. 304-306, 356-357).

HIGGINS was on a River Ranch committee that had reported suggested changes to the Condominium Board of Directors. Due to the emergency, he wanted to leave the report with Bradley, because he would not be able to attend the meeting the following day. Therefore, HIGGINS drove to the Shady Lane residence that was owned jointly by HIGGINS and Bradley. No one was at home when HIGGINS arrived. At no time did he go into the Shady Lane residence. He then went back to the River Ranch Lodge to pack his belongings and returned to the Shady Lane property. When he arrived there was a vehicle parked in front of the residence. (T. Vol. 3, pp. 304-313).

HIGGINS exited his car and proceeded to walk up the stairs when a woman, who turned out to be INGALLS, came out of the residence and told HIGGINS to get off the property. HIGGINS said "Who the hell are you" and "It's my property". At that time, INGALLS pulled out a gun and turned it toward HIGGINS. HIGGINS hit the gun with his hand in an attempt to knock it out of her hand.

HIGGINS does not know if INGALLS fell to the ground. At that time, Bradley came out of the house and started yelling. INGALLS still held the gun in her hand. HIGGINS testified he might have held her wrist to keep her from pointing the gun at him. HIGGINS testified that he feared for his safety and that he voluntarily got in his car and exited the Shady Lane property. (T. Vol. 3, pp. 316-319, 326-327, 334 and Vol. 4, pp. 358, 361). HIGGINS further testified that the incident was a misunderstanding between himself, Bradley, and INGALLS. HIGGINS testified that he never expected nor intended bodily injury to result to INGALLS as a result of his actions. Likewise, HIGGINS testified that he did not know INGALLS and his actions of knocking the gun out of her hand were not willful, nor malicious. (T. Vol. 4, pp. 345, 359).

The jury returned its verdict that found:

1. That HIGGINS intended or expected to cause the injury to INGALLS; and,
2. That HIGGINS willfully and maliciously caused the injuries to INGALLS.

HIGGINS and INGALLS filed post-trial motions including a motion for new trial. The trial court granted the motion for new trial. STATE FARM appealed the trial court's order granting the motion for new trial. Both HIGGINS and INGALLS

cross-appealed on issues of whether the trial court (1) had declaratory judgment jurisdiction as the case only involved a question of fact as HIGGINS was only being sued for negligence, and there was no provision within STATE FARM's policy for the Court to interpret; and (2) whether INGALLS' second amended complaint (R. Vol. 8, pp. 1180-1290 Exhibit "F") should have been tried first to determine whether HIGGINS was negligent and whether his negligence was the proximate cause of INGALLS' injuries.

The Fourth District Court of Appeal issued an En Banc opinion affirming the order granting HIGGINS' motion for new trial and certified the following question to this Court:

> 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 NONEXISTENCE OF A FACT IN ORDER TO DETERMINE THE INSURER'S RESPONSIBILITY?

In the same opinion the court also certified conflict between ***Higgins*** and the Third District Court of Appeals decisions in ***Burns v. Hartford Accident & Indemnity Co.***, 157 So.2d 84 (Fla.3rd DCA 1963) and ***Irvine v. Prudential Property & Casualty Insurance Co.,*** 630 So.2d 579 (Fla. 3rd DCA 1993) regarding the question of whether the declaratory judgment action or the underlying negligence lawsuit should

be tried first.

## SUMMARY OF THE ARGUMENT

The trial court did not have declaratory judgment jurisdiction in this matter, as there was no provision within STATE FARM's policy for the trial court to interpret. HIGGINS was sued solely for negligence. INGALLS' second amended complaint contained no alternative allegations of assault and battery. Questions of fact should only be resolved in INGALLS' underlying lawsuit against HIGGINS.

STATE FARM's second amended complaint states that its policies will provide coverage and a defense to HIGGINS caused by an "occurrence". "Occurrence" is defined as an "accident". STATE FARM's policy does not define "accident". In ***State Farm Fire & Casualty Co. v. CTC Development Corp.***, 720 So.2d 1072 (Fla. 1998) this Court stated:

> We hold that where the term "accident" in a liability policy is not defined, the term being susceptible to varying interpretations, encompasses not only "accidental events", but also injuries or damages neither expected nor intended from the standpoint of the insured. This definition comports with the language used in standard comprehensive general liability policies and with the definition of the term

> "accidental" as set forth in ***Dimmitt*** as "unexpected or unintended." 636 So.2d at 704.
>
> In many cases the question of whether the injury or damages were unintended or unexpected will be a question of fact.

In ***Columbia Casualty Co. v. Zimmerman***, 62 So.2d 338 (Fla. 1953) this Court interpreting Section 86.011, Fla. Stat. held that a declaratory judgment action is not available where the object of the proceedings is to try disputed questions of fact rather than to seek a construction of rights, status, or other relations.

STATE FARM's second amended complaint for declaratory judgment does not seek construction of a policy provision but seeks only to resolve questions of fact. The purpose of Section 86.011, Fla. Stat. is to determine construction of policy provisions and not to resolve questions of fact.

Assuming, arguendo, that STATE FARM's second amended complaint for declaratory judgment states a valid cause of action under Section 86.011, Fla. Stat., INGALLS' underlying second amended complaint should be tried in advance of the declaratory judgment case. INGALLS' second amended complaint only alleges negligence against HIGGINS. STATE FARM's policy issued to HIGGINS provides a duty to defend HIGGINS when he is sued for negligence. STATE FARM is obligated to provide a defense to HIGGINS until the jury in the underlying case

determines whether HIGGINS was or was not negligent. HIGGINS paid premiums not only for coverage but also a defense. Allowing STATE FARM to try the declaratory judgment case in advance of INGALLS' underlying seconded amended complaint for negligence requires HIGGINS to provide his own defense to resolve a question of fact which can only be resolved in the underlying case.

## JURISDICTIONAL STATEMENT

The Florida supreme court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with the decision of another district court of appeal on the same point of law. Art. V, Sec. 3 (b)(4) Fla. Const. (1998); Fla. R. App. P. 9.030 (a)(2)(A)(iv)(vi).

## POINTS ON APPEAL

### 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 NONEXISTENCE OF A FACT IN ORDER TO DETERMINE THE INSURER'S RESPONSIBILITY?

The applicable standard of review of the certified question is a de novo review.

STATE FARM's second amended complaint sought a declaration by the court as to whether STATE FARM had a duty to defend and indemnify HIGGINS for those allegations contained in INGALLS' second amended complaint. INGALLS did not allege mutually exclusive theories of negligence and intentional tort but rather, based on HIGGINS' deposition testimony made the good faith allegation that HIGGINS was negligent and that as a result of his negligence she sustained bodily injuries. The operative portions of INGALLS' second amended complaint are:

> On June 4, 1995, at approximately 2:00 A.M., the Defendant, HIGGINS, came upon the above-described property while Plaintiff, INGALLS and Bradley were there. At that time, the Defendant, HIGGINS, began to argue with Bradley. In the course of this altercation, Defendant, HIGGINS, negligently injured the Plaintiff, INGALLS. (R. Vol. 8, pp. 1180-1290, Exhibit "F"). (emphasis supplied)

STATE FARM's second amended complaint requested that the court determine: (1) whether HIGGINS' alleged conduct (negligence) constituted an

"occurrence" within the meaning of its policies issued to HIGGINS; (2) whether the acts alleged by INGALLS against HIGGINS (negligence) were intentional in nature, and whether those alleged acts (negligence) caused injury to INGALLS which were expected or intended by HIGGINS; and (3) whether the acts alleged against HIGGINS (negligence) by INGALLS were willful and malicious. (R. Vol. 8 p. 1180-1290). STATE FARM did not allege it was in "doubt" about the rights under its insurance contract with HIGGINS but merely requested a factual determination by the trial court regarding whether the single allegation of negligence against HIGGINS was in reality an intentional act, and, if so, whether HIGGINS expected or intended to injure INGALLS.

STATE FARM's second amended complaint states that its policies will provide coverage and a defense to HIGGINS caused by an "occurrence". "Occurrence" is defined as an "accident". STATE FARM's policy does not define "accident". In ***State Farm Fire & Casualty Co. v. CTC Development Corp.***, 720 So.2d 1072 (Fla. 1998) this Court stated:

> We hold that where the term "accident" in a liability policy is not defined, the term being susceptible to varying interpretations, encompasses not only "accidental events", but also injuries or damages neither expected nor intended from the standpoint of the insured. This definition comports with the language

> used in standard comprehensive general liability policies and with the definition of the term "accidental" as set forth in ***Dimmitt*** as "unexpected or unintended." 636 So.2d at 704.
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> In many cases the question of whether the injury or damages were unintended or unexpected will be a question of fact.

In ***Columbia Casualty Co. v. Zimmerman***, 62 So.2d 338 (Fla. 1953) this Court interpreting Section 86.011, Fla. Stat. held that a declaratory judgment action is not available where the object of the proceedings is to try disputed questions of fact rather than to seek a construction of rights, status, or other relations. This Court has adhered to this opinion in ***Travelers Indemnity Co. v. Johnson***, 201 So.2d 705 (Fla. 1967) and ***Bergh v. Canadian Universal Insurance Co.***, 216 So.2d 436 (Fla. 1968) wherein this Court held that a declaratory judgment action will not lie when judicial determinations involve factual questions and issues and not contract interpretations or construction.

The Fourth District Court of Appeal has certified to this Court the certified question set forth in ***Allstate Insurance Co. v. Conde***, 595 So.2d 1005 (Fla. 5th DCA 1992):

> 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 NONEXISTENCE OF A FACT IN ORDER TO DETERMINE THE INSURER'S RESPONSIBILITY?

***Conde*** involved the undisputed testimony of two survivors of an incident wherein the Allstate insured, Conde, violently attacked his family with a gun. There were no facts alleged which could support a cause of action for negligence. Nonetheless, suit was filed on behalf of the injured parties against Conde claiming alternatively intentional wrongdoing and negligent conduct. The ***Conde*** court held that where mutually exclusive theories are plead, it is appropriate that the insurer be permitted to participate in the coverage issue. However, ***Conde*** at 1007, noted that where a complaint does not involve mutually exclusive theories, "the duty to defend should first be determined from the facts pleaded in the complaint against the insured and that the duty to indemnify issue, if the duty to defend exists, should be deferred until liability of the insured is established."

INGALLS' second amended complaint alleged the single issue of negligence on the part of HIGGINS. INGALLS did not allege a mutually exclusive alternative theory of intentional tort against HIGGINS. The single negligence allegation by INGALLS against HIGGINS was based on HIGGINS' deposition testimony (R. Vol. 2, pp. 177-262). HIGGINS' testimony described negligence, at best, and further

indicates that he did not expect nor intend to injure INGALLS, nor did he hold any malice toward INGALLS as he had never met her before the incident (R. Vol. 2, pp. 239-240).

HIGGINS and INGALLS simply had different versions of what occurred on the evening of the incident. Based on HIGGINS' version of the facts, INGALLS abandoned all claims of intentional tort against HIGGINS and chose to sue based solely on the theory of negligence. INGALLS' allegations were made in good faith as they were based on the deposition testimony of HIGGINS and are not based on creative pleading or creative lawyering. In ***Conde***, at 1008, Judge Griffin, concurring specially noted that:

> Given the undisputed facts of this case, absent consideration of insurance (the intentional act exclusion), it would never occur to a lawyer to plead this plainly intentional tort as negligence. It is no accident (no pun intended) that this Complaint contains almost no allegations of fact. The plaintiff can't plead any facts; if he does, he pleads himself out of coverage and out of negligence. At least, in the ***Castellano*** case, because of the alleged struggle for the gun there may have been an arguable factual basis for a claim of negligence. In this case, there is none. I can see no good faith basis for asserting a claim of negligence in this case, although I recognize it is standard practice. The problem is that such a pleading creates a perfect conspiracy between a plaintiff and the

insured and the insurer has no remedy.

While the allegations in ***Conde*** might have justified Judge Griffin's criticism, HIGGINS' testimony that he was attempting to knock the gun out of INGALLS' hand at the time she allegedly was injured clearly justifies INGALLS' sole allegation of negligence against HIGGINS. INGALLS is not required to sue HIGGINS under alternative theories of liability but rather may accept HIGGINS' version of the incident as the theory under which she chooses to bring her cause of action. Clearly, INGALLS' second amended complaint is not based on creative lawyering as apparently was the case in ***Conde***. It is further submitted that in the En Banc opinion, The Fourth District Court of Appeal overlooked or failed to refer to the deposition and trial testimony of HIGGINS as the court did not refer to any of HIGGINS' deposition or trial testimony in its opinion.

Accordingly, the certified question must be answered in the negative because INGALLS' second amended complaint is not based on mutually exclusive theories of negligence and intentional tort but is based only on the single issue of negligence. Even assuming that Section 86.011, Fla. Stat. (1989) would allow a declaratory judgment case to proceed where there are no mutually exclusive theories of negligence and intentional tort plead, the rule in ***Columbia Casualty*** should be adhered to in that there must be a question of the construction of the policy and not

only fact issues for resolution.

By allowing STATE FARM to go forward with the declaratory judgment action STATE FARM is, in essence , being allowed to "amend" INGALLS' second amended complaint to include a count for intentional tort. Only INGALLS has the right to determine under what theory or theories to bring her lawsuit against HIGGINS.

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.

## **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.

The applicable standard of review of the conflict certification between the district court of appeal is a de novo review.

In ***Higgins,*** the Fourth District Court of Appeal certified conflict with

***Burns v. Hartford Accident & Indemnity Co.***, 157 So.2d 84 (Fla. 3rd DCA 1963) and ***Irvine v. Prudential Property & Casualty Insurance Co.***, 630 So.2d 579 (Fla. 3rd DCA 1993) .

In ***Burns***, the decedent was on the job at the time he was killed. The decedent's widow sued the defendant alleging that it was either a materialman or an independent contractor and, therefore, it was alleged that worker's compensation was not applicable. Therefore, the widow would not be precluded from filing suit against the defendant. The defendant denied that it was a materialman or independent contractor and further contended that it enjoyed fellow statutory immunity because all involved were statutory fellow servants under a general contractor.

Hartford Accident & Indemnity Company filed a separate suit for declaratory decree seeking a predetermination as to whether all involved were subcontractors to the general contractor or whether the defendant was a materialman or independent contractor. The widow moved to dismiss the declaratory decree suit. The motion was denied. The suit was tried which resulted in a favorable judgment for Hartford. The widow appealed and The Third District Court of Appeal reversed the trial court and stated:

> ...when a third party has brought a negligence action against an insured, and there is raised or necessarily involved therein an issue between

> those litigants which has a bearing on the applicability of the policy, the fact that the insurance company's liability to its insured may be affected by the outcome of the negligence action will not permit the insurer to remove a material issue from the negligence action where it belongs and drag it into another court under the guise of seeking a declaratory judgment, and there seek its predetermination.

***Burns*** also cited ***Columbia Casualty*** for the proposition that:

> The declaratory judgment statute is not available to settle factual issues bearing on liability under a contract which is clear and unambiguous and which presents no need for its construction.

Finally, the ***Burns*** court held that the declaratory decree suit was in conflict with its contract to defend the underlying wrongful death action against its own insured.

In ***Irvine,*** the Irvines were sued for an incident when the Irvines' son struck the Plaintiff in the eye. The complaint against the Irvines alleged both negligent and intentional acts by Irvines' son and further alleged negligent supervision by the Irvines. Prudential filed a separate declaratory action against the Irvines alleging that the Irvines' son's actions were intentional within the meaning of the policy's exclusionary language, so that there was no coverage for, nor a duty to defend the Irvines or their son for the incident. The trial court granted summary judgment to Prudential. The

Third District Court of Appeal reversed the trial court stating:

> Here, the insurance company sold a homeowner's policy to its insured. In the policy the insurer promised to defend the homeowners if they were sued for negligence. The plaintiff brought suit for negligence as well as intentional acts. The insurer is therefore obliged to provide a defense so long as the negligence claims are in the case. That is so because the insureds are at risk on the negligence claims until the negligence claims are disposed of.
>
> The insurer complains that the proof will ultimately show the defendants' son's acts to have been intentional, not negligent. That may be so, but at present the suit has been plead alternatively on negligent or intentional acts, and is pending on that basis. The uncertainty of the ultimate outcome is inherent in the risk assumed by the insurance company when it included in the insurance policy the duty to defend.

The ***Irvine*** Court declined to follow ***Conde*** and stated that "...the better process is to require the insurer to defend the action under a reservation of rights." The ***Irvine*** Court went on to state:

> We agree with Judge Sharp's separate opinion in ***Conde*** that "if one must be [inconvenienced by defending a lawsuit], 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."

In the instant case, HIGGINS was sued only for negligence. There was no alternative allegation of assault and battery. Even assuming arguendo that STATE FARM can sue HIGGINS to settle a purely factual issue, the underlying liability case brought by HIGGINS against INGALLS should be tried first. INGALLS sued HIGGINS for negligence only. INGALLS' complaint for negligence against HIGGINS is based on HIGGINS' deposition testimony. HIGGINS' deposition testimony describes, in part, a negligent act or acts in trying to knock the gun out of INGALLS' hand. HIGGINS has no control over the allegations contained in INGALLS' complaint in the underlying action. Nonetheless, STATE FARM, by filing the complaint for declaratory judgement, has taken control of the pleadings in the underlying action by alleging that HIGGINS committed an intentional tort and, therefore, is not entitled to the coverage under his policy.

If STATE FARM is allowed to control INGALLS' theory of the case an absurd result could follow. The jury in the declaratory action could find that HIGGINS either expected or intended INGALLS' injuries. The jury in the underlying case in which HIGGINS has been sued for negligence by INGALLS could find that HIGGINS was negligent. Under the circumstances, HIGGINS would be left with no coverage even though he was found to have been negligent.

The conflict between ***Higgins*** and The Third District Court of Appeal's decisions in ***Burns*** and ***Irvine*** should be resolved in favor of HIGGINS and this court should adopt the holdings in ***Burns*** and ***Irvine***.

A better solution for STATE FARM would be to file a Motion to Intervene as was the case in ***Employers Insurance of Wausau v. Lavender***, 506 So. 2d 1166 (3rd DCA Fla. 1987) wherein The Third District Court of Appeal allowed Wausau to intervene in the underlying case after the return of the verdict for the purpose of submitting special verdict interrogatories to the jury.

## 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.

Respectfully submitted,
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By_____
John P. Wiederhold
Fla. Bar No. 125670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy has been furnished this ____ day of March, 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 Rule 9.210.

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