

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 vs. STATE FARM FIRE AND
CHERYL L. STEELE, 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'
INITIAL BRIEF ON THE MERITS

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-and-

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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. __), and to the trial exhibits as party and number (e.g. Defendant's trial exhibit No. __). 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.

STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE

This appeal seeks reversal of *State Farm Fire & Casualty Company v. Higgins, et.al.*, 24 Fla. L. Weekly D111 (Fla. Jan. 3, 2001) in which The Fourth District Court of Appeal affirmed the trial court's order granting a new trial, and affirmed in part, reversed in part, or declined to rule as to other points on appeal

raised by INGALLS and HIGGINS in their cross-appeal. In its *en banc* opinion, the Full Court certified that its decision passes upon a question of great public importance and is in direct conflict with decisions of other District Courts of Appeal.

STATE FARM sought reversal of an Order granting Defendants HIGGINS' and INGALLS' Motions for New Trial in a declaratory judgment action filed by STATE FARM, in which STATE FARM sought a determination that it did not have a duty to provide a defense or indemnification to HIGGINS for claims brought against HIGGINS by INGALLS. HIGGINS and INGALLS cross-appealed raising other errors of the trial court regarding evidentiary and law rulings before and throughout the trial. (R. Vol. 12, pp. 1951-1956).

INGALLS initially filed a complaint asserting a cause of action for assault and battery against HIGGINS arising out of an incident occurring on June 3, 1995, styled

~~CHRYLL~~

(Plaintiff's trial exhibit No. 18). Thereafter, INGALLS filed an Amended Complaint¹ amending the allegations against HIGGINS to allege claims of negligence and adding a negligence claim against another Defendant, Maureen Bradley (R. Vol. 1, pp 1-17,

¹ Both the Amended Complaint and Second Amended Complaint in the underlying action referred erroneously to the incident occurring on June 4, 1995. By agreement, this typographical error was corrected and the Complaints were deemed amended by interlineation to reflect the correct date of June 3, 1995. (T. Vol. 4, pp. 426)

Exhibit “E”). STATE FARM then filed its first Complaint for Declaratory Relief (R. Vol. 1 pp 1-17) seeking a determination that it did not have a duty to provide a defense or indemnification to HIGGINS for claims brought against HIGGINS by INGALLS and attaching as Exhibit “D” a copy of INGALLS' original complaint against HIGGINS, and Exhibit “E” a copy of INGALLS Amended Complaint against HIGGINS and Bradley (R. Vol. 1 pp 1-17). The two actions were consolidated, discovery was pursued, including the deposition of HIGGINS (R. Vol.1, pp. 177-262), and a settlement was reached on the claim against Bradley. INGALLS then filed a Second Amended Complaint against HIGGINS, alleging a single cause of action against HIGGINS for negligent bodily injury (R. Vol. 8, pp. 1180-1290, Exhibit “F”). STATE FARM in turn amended its Declaratory Complaint, which ultimately became STATE FARM's Second Corrected Amended Complaint and still alleged that STATE FARM had no duty to indemnify or defend HIGGINS with regard to the claim alleged by INGALLS against HIGGINS in the underlying action (R. Vol. 8, pp. 1180-1290). Answers to the Second Corrected Amended Complaint were filed by INGALLS (R. Vol 8, pp. 1313-1318) and HIGGINS (R. Vol. 8, pp. 1319-1328). HIGGINS and INGALLS both filed Counter-Claims Against STATE FARM, but these Counter-Claims were voluntarily dismissed at trial (T. Vol. 5 pp. 557-558). Prior to trial, the Court also entered Orders striking from STATE FARM's Second Corrected Amended

Complaint all references to INGALLS' original Complaint and Amended Complaint (R. Vol. 9, pp. 1471-1482 and 1490-1492). The case came on for jury trial on May 10 - 13, 1999, and the jury returned a verdict in favor of STATE FARM (R. Vol. 11, pp. 1809-1810).

HIGGINS and INGALLS filed post-trial motions as follows: INGALLS' Motion to Vacate Verdict and to Enter Judgment in Accordance with Defendant's Motion and Renewed Motion for Directed Verdict, or in the Alternative, Motion for New Trial (R. Vol. 11, pp. 1851-1855); HIGGINS' Motion to Vacate Verdict and to Enter Judgment and Renewed Motion for Directed Verdict (R. Vol. 11, pp. 1858-1861) and HIGGINS' Motion for New Trial (R. Vol. 11, pp. 1862-1904). STATE FARM also filed a Motion for Final Judgment (R. Vol. 11, pp. 1905-1911). After hearing, the trial court granted INGALLS' and HIGGINS' Motions for New Trial, finding that "inflammatory remarks" by STATE FARM's counsel during opening statements violated §768.041(3), Florida Statutes, and were "fatally prejudicial" to INGALLS' and HIGGINS' case, but otherwise denied the post-trial motions of INGALLS and HIGGINS (R. Vol. 12, p. 1951-1956).

STATE FARM timely appealed and HIGGINS and INGALLS timely cross-appealed. After hearing oral argument, the Fourth District rendered its *en banc* opinion in *State Farm Fire & Casualty v. Higgins*, 26 Fla. L. Weekly D111 (Fla. 4th

DCA January 3, 2000). This proceeding follows.

STATEMENT OF THE FACTS

A. Claim Against Higgins in Underlying Action

Although throughout the pretrial, trial and appellate proceedings STATE FARM has persistently mis-characterized the claim of INGALLS against HIGGINS in the underlying action as an assault and battery claim, the only claim made by INGALLS against HIGGINS as of the trial of this declaratory action was a simple bodily injury negligence claim for compensatory damages as set forth in the Second Amended Complaint in the underlying action. Although STATE FARM's Corrected Second Amended Complaint for Declaratory Relief contained lengthy quotations and allegations regarding prior complaints filed by INGALLS against HIGGINS, those allegations were correctly stricken by the trial court upon Defendants' motions. (R. Vol. 9, pp. 1471-1482 and 1490-1492). The Second Amended Complaint in the underlying action contains a single count, the pertinent portions of which are following:

7
came upon the above described property while the Plaintiff,
were there
the course of this altercation,
Plaintiff, INGALLS.

8

Plaintiff, INGALLS, suffered bodily injury ... (R. Vol. 8, pp. 1180-1290, Exhibit "F").

B. Insurance Policies

In the Joint Pretrial Stipulation, the parties agreed:

6. The parties agree that STATE FARM issued HIGGINS three Homeowners insurance policies as follows:

a. Policy no. _____, issued on _____, was in force and effect at the time of the incident, that insured the premises where the incident sued upon occurred and was located at 14 Shady Lane, Wales, Maryland. This policy provided personal liability insurance coverage to Defendant, HIGGINS.

b. Policy no. _____, issued on _____, that was located at 49 Northwest 36th Ave, Beach, Maryland, was issued prior to the date of the occurrence sued upon and said policy would be in force and effect on the date in question but STATE FARM contends that said policy was canceled. This policy provided personal liability insurance coverage to Defendant, HIGGINS.

c. Policy no. _____, issued on _____, Beach residence referenced above and was issued on June 23, 1995, after the incident sued upon occurred.

These policies of insurance provided personal liability insurance coverage to Defendant, HIGGINS.

effect at the time of this incident sued upon.

Plaintiff,

~~was~~ were in force and effect at the time of this incident.

Plaintiff further denies that any policies that may have been in effect at the time of the incident sued upon provide coverage for the claims made against HCGNS by NCAIS in the underlying action,

conditions of these policies set forth hereafter (the key language of which is italicized):

SECTION II - LIABILITY COVERAGES

COVERAGE L - PERSONAL LIABILITY

If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage 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...

SECTION II - EXCLUSIONS

1. Coverage L and Coverage M do not apply to:
 - a. bodily injury or property damage;

- (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...

DEFINITIONS

* * *

- 2. 'bodily injury' means bodily harm ~~required~~ care resulting therefrom.

* * *

- 7. 'occurrence,' when used in Section II of this policy, means an accident, including exposure to conditions, which results in:
 - a. bodily injury; or
 - b. property damage;

during the policy period. Repeated or continuous exposure to the same general conditions is considered to be one

o c c u r r e n c e .

7. The parties agree that all three policies contain the above cited provisions; these provisions preclude coverage for the claims asserted by INGALLS against HIGGINS in the underlying action. (1726-1735)

C. Issues

The Defendants contended that the trial court had no jurisdiction in this matter once the complaint in the underlying action was amended to include only the simple negligence claim against HIGGINS. Besides the jurisdictional issues, however, the formulation and presentation of the issues to the jury in this case is one of the principal errors raised by INGALLS and HIGGINS as will be detailed in the argument portion of the brief.

Substantively, the basic issues in the declaratory action were whether or not the underlying claim of INGALLS against HIGGINS was covered under the identical language of these three policies and whether or not either of the policies issued on the Deerfield Beach property was in effect at the time of the incident. Despite the fact that STATE FARM's policy does not contain any "Intentional Acts" exclusion, STATE FARM asserted throughout the declaratory action that the claim in the underlying action was not covered because the actions of HIGGINS at the time of the incident were "Intentional Acts" and the incident from which INGALLS claims arose was not

an accident but an "Assault and Battery". (See i.e. STATE FARM's Motion To Determine Intentional Act; R. Vol. 6, pp. 787-792)

As the Joint Pre-trial Stipulation reflects, the parties disagreed on how the legal issues should be stated and how the fact issues should be presented to the jury. It was, and still is, INGALLS and HIGGINS position that at most only issues 1 and 2 should have been presented to the jury as follows:

1. Whether the alleged incident at issue in the underlying action constitutes an "occurrence" as that term is defined by the subject insurance policies;
2. Whether the alleged injuries claimed in the underlying action were "expected or intended" by HIGGINS" (R. Vol. 11, pp. 1732-1733).

It was, and still is, INGALLS and HIGGINS position that issue 3 was not a relevant issue in this action and should not have been presented to the jury, but if presented, should have been presented as follows:

3. Whether the alleged injuries claimed in the underlying action were the result of "willful and malicious acts" of HIGGINS."(R. Vol. 11, pp. 1733).

After extensive argument, the trial court ruled that the issues would be presented to the jury in the Verdict Form as follows:

1. Did STATE FARM's insured, CHARLES B. HIGGINS, intend or expect to cause the injuries for which CHERYL B. INGALLS is seeking damages in

the underlying negligence action?

2. Did STATE FARM's insured, CHARLES B. HIGGINS, willfully and maliciously cause the injuries for which CHERYL B. INGALLS is seeking damages in the underlying negligence action?
3. Did STATE FARM cancel policy number 59-BK-6031-7 in strict compliance with its policy requirements? (R. Vol. 11, pp. 1809-1810).

The jury answered each of these questions "yes" (R. Vol. 11, pp. 1809-1810). INGALLS and HIGGINS contend this verdict was erroneous and a result of numerous errors as detailed hereafter in this brief.

D. Testimony

Although the question and conflict certified address the propriety and timing of the declaratory judgment action, this appeal also involves rulings of the trial court regarding the issues and certain evidentiary matters. Only three witnesses testified. The material and relevant testimony was straightforward and relates to three basic areas, as follows.

1. Injuries Claimed

The only testimony regarding the injuries for which damages are being sought in the underlying action was that of Petitioner INGALLS. INGALLS counsel stipulated (R. Vol.10, pp. 1585-1588 and T. Vol. 1, p. 18) and Ms. Ingalls testified that

she was not claiming any injury or damages in the underlying case due to any slapping, neck grabbing, beating, threats or other such alleged violent acts on the part of HIGGINS, which HIGGINS denied committing. The only injuries for which Ms. INGALLS is claiming damages in the underlying action are injuries to her back, neck, arm & shoulder. The pertinent testimony was as follows:

BY MR. DECKERT:

Q. Now, with regard to the amended complaint, it will be in evidence, we will not take the time to have you read it, but at the time you're not making any claim of assault and battery against Charlie Higgins, are you?

A. No, sir.

Q. You are not making any claim of any type against Charles Higgins except that you sustained injuries as a result of his negligence; isn't that right?

A. That is correct.

Q. And {the negligence of}² the injuries for which you are seeking damages in the underlying action are your back and {income}³ and arm injuries?

A. And my shoulder.

² INGALLS believes these words were a "false start" or a transcription error and do not belong in this sentence.

³ INGALLS believes this word is a transcription error and should be "neck" in this sentence.

Q. Your shoulder. Now, the incident out of which those injuries arose, arose according to your claim at the time when he pushed and pulled and tugged you, is that right?

A. That is correct.

MR. SAX: I believe he's required to ask.

THE COURT: Sustained.

Q. Let me ask you this, ma'am: There was some testimony about the, your being slapped. Are you making any claim because of any injuries because you were slapped?

A. No, sir.

Q. There was some testimony about how you jumped up on to the fence when Mr. Higgins was driving out of the driveway. Are you making any claim because of any injuries related to your jumping up on the fence?

A. No, sir.

Q. There was some testimony that Mr. Higgins at some point grabbed your neck. Are you making any claim because of any injuries that you say were caused because he grabbed your neck?

A. No, sir. (T. Vol. 3, pp. 283-284)

Despite STATE FARM's counsel's lengthy examination of INGALLS regarding other claims or statements she may have made regarding claims that are not being made in the underlying action, the only evidence regarding the claims being made in the underlying action at this time is the above testimony or repetitions thereof.

2. The Incident vs. Cause - Intentional, Willful and Wanton

There is a conflict between the witness testimony about their recollections of the details of what took place the night of the incident between INGALLS and HIGGINS.

For purposes of the declaratory judgment action, INGALLS will acknowledge that evening was not the quiet restful evening she expected and that, being an emotional person, she was very upset by what happened that night and remains so. STATE FARM spent a great amount of time at trial and on appeal addressing many details of the evening and repeatedly characterizing the “incident” as an assault and battery. Through examination of INGALLS and other evidence to which INGALLS and HIGGINS objected, STATE FARM was permitted to show the jury that INGALLS had in the past, while still upset about what transpired and suffering from the injuries she sustained in the incident, used dramatic words like “bodyslam” and “assault” to describe certain events of the evening, words she now acknowledges were a “bad choice of words” fueled by her strong emotions over what occurred. (See T. Vol. 3, pp. 267-269, 286-287)

However, the relevant issue was not how one might label particular events of the evening, but rather whether the claims being made in the underlying action were caused by an “occurrence”, were “intended or expected by an insured” or were “the result of willful and malicious acts of the insured” as those terms are defined in the subject

policies. The only properly admitted, relevant evidence at trial was the testimony of INGALLS and HIGGINS regarding the actions of HIGGINS for which INGALLS is seeking damages in the underlying action, that being HIGGINS alleged negligent pushing, pulling and tugging of INGALLS which INGALLS contends resulted in the head, neck, back and shoulder injuries for which she seeks compensation from HIGGINS. (T. Vol. 3, pp. 283-284).

HIGGINS himself testified as follows:

BY MR. DECKERT:

Q. Mr. Higgins, whatever you-- whatever happened that evening at the house at Shady Lane, did you go there with any intent to cause any harm to Cheryl Steele?

A. Definitely not.

Q. Did you at anytime intend to cause any harm to Cheryl Steele?

A. I didn't even know Cheryl Steele, definitely not.

Q. You never even met her before that evening; is that correct?

A. Correct.

* * *

Q. Do you have any malice toward her whatsoever?

A. None. (T. Vol.4, p. 345)

* * *

BY MR. WIEDERHOLD:

Q. Did you go over to the Shady Lane address to cause any type of problems?

A. None whatsoever .

Q. As far as Ms. Ingalls is concerned, you didn't even know her; is that correct?

A. Yes. (T. Vol. 4, pp. 358-359)

* * *

Q. Now, sir, when all these things that you described that were done that evening between you and Ms. Ingalls, did you intend to cause her any injury?

A. No, sir, none whatsoever.

Q. The same question, did you expect any of the things you were doing would cause any injury?

A. No, sir. (T. Vol. 4, p. 359)

Even if there may have been other actions by HIGGINS over the entire evening that arguably may have been intentional acts, the testimony was clear and uncontroverted that HIGGINS had never before met INGALLS and there was no evidence whatsoever that HIGGINS had any malice toward INGALLS or had any intent, expectation or desire to cause harm to INGALLS or to cause the injuries for which she seeks damages in the underlying action.

E. Improper Trial Exhibits & Impeachment regarding INGALLS

The Trial Court, over Defendants objection, admitted into evidence records of doctors that contained conclusions and opinion statements in histories allegedly given by INGALLS concerning the evening. (T. Vol. 2, p. 187-221; Plaintiff's Trial Exhibit Nos. 11A-D, 12A-E, 13A-C, 14A) . HIGGINS and INGALLS objected on the grounds that 1) STATE FARM did not lay any predicate for these records to establish that the treating doctors considered the alleged statements of INGALLS concerning the incident to be relevant to the diagnosis or treatment of INGALLS and 2) that the purported statements were opinions or conclusions and not statements impeaching any factual testimony of INGALLS at trial.(R. Vol. 9, pp. 1460-1462; R. Vol. 10 , pp. 1585-1588; T. Vol. 1, pp. 22-42)

The Court also admitted into evidence INGALLS' initial complaint filed in the underlying action, which alleged a claim for assault and battery only. (Plaintiffs Trial Exhibit No. 18). The original Complaint was admitted over the renewed objections of HIGGINS and INGALLS and contrary to the Court's Order Striking from State Farm's Second Corrected Amended Complaint all references to INGALLS' original Complaint in the underlying case. (T. Vol. 2, pp. 225-238; R. Vol. 9, pp. 1471-1482, 1490-1492; R. Vol. 10, pp. 1537-1542).

F. Improper Testimony & Exhibit regarding Cancellation

Petitioners contended below that the trial court improperly admitted into evidence over Defendants' objections a copy of STATE FARM'S purported notice of cancellation regarding policy number 59-BK-6031-7 concerning HIGGINS' property in Deerfield Beach and (Plaintiff's Trial Exhibit No. 5) and testimony of STATE FARM's employee witness, Willie Richard, regarding the mailing procedures of STATE FARM. The only witness to testify on behalf of STATE FARM's purported cancellation, Mr. Richard testified that he worked in the underwriting department of State Farm and that he does not work in the department that determines whether or not STATE FARM'S insureds are paying their premiums. (T. Vol. 4, pp. 374-376). Additionally, Mr. Richard testified that his department did not send out the cancellation notice for the Deerfield Beach property (Plaintiff's Trial Exhibit No. 5) and that he has no knowledge that the cancellation notice was actually mailed out. (T. Vol. 4, pp. 387-389). Mr. Richard admitted that the STATE FARM policy requires that the cancellation notice be mailed to HIGGINS at the mailing address shown in the declarations page and that the policy purportedly canceled by STATE FARM (Plaintiff's Trial Exhibit No. 3) does not contain a declarations page that corresponds to the cancellation notice purportedly sent by STATE FARM to HIGGINS. (T. Vol. 4, pp. 388-393)

State Farm did not lay any predicate through competent testimony or evidence

proving that a valid cancellation notice concerning the subject policy was ever mailed or otherwise delivered to HIGGINS, as required by STATE FARM'S policy provisions set forth below:

5. Cancellation.

* * *

b. We may cancel this policy only for the reasons stated in this condition. We will notify you in writing of the date cancellation takes effect. This cancellation notice may be delivered to you, or mailed to you at your mailing address shown in the **Declarations**. Proof of mailing shall be sufficient proof of notice.

STATE FARM never introduced into evidence or ever produced the Declarations Page for policy No. 59-BK-6031-7. Therefore, STATE FARM could not prove that the cancellation notice was mailed to the address on the declarations page of policy No. 59-BK-6031-7, as required.

G. Erroneous Jury Instructions & Verdict Form

Consistent with the trial court's incorrect acceptance of STATE FARM's mis-characterization of the issues in this case, the trial court gave erroneous jury instructions and gave the jury an erroneous verdict form, over INGALLS and HIGGINS objections. The trial court also refused to give certain jury instructions requested by Defendants and refused to use the Defendants' requested Verdict Form. The specific instructions and errors will be discussed in the argument section on this

point.

SUMMARY OF ARGUMENT

POINT I

Petitioner submits the question certified should be answered “sometimes, under certain circumstances.” Petitioner agrees that some fact questions regarding coverage may be determined in a declaratory judgment action, however, the instant case is not one of those cases. Assuming *arguendo* that the declaratory action in this case is proper, the declaratory action was premature and any fact issues regarding the insurance policy exclusion asserted in this case are such that the issues regarding liability and damages in the underlying action must be determined first .

POINT II

Petitioner submits that, assuming *arguendo* the “intentional injury” insurance policy exclusion asserted had any application to the underlying claim, it was error to try the factual issues regarding such provision separate from and prior to the trial of the underlying negligence action.

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 and to do so does not prejudice the rights of the insured and the claimant. The cases cited by the Fourth District to support its ruling are all distinguishable and the concerns

regarding “creative pleading” and “collusion” are clearly not applicable to the instant case. The amendments to the pleadings in the underlying case all occurred as developments in the case warranted them. INGALLS , and not STATE FARM, has the right to choose what claims and causes of action she wishes to pursue against HIGGINS. Trying the declaratory action prior to the underlying action allowed STATE FARM to change Petitioner’s underlying cause of action to suit it’s desire to deny coverage. This was clearly unfair to INGALLS as well as HIGGINS and improper under the law.

POINT III

The Petitioners were entitled to a directed verdict that the purported cancellation of the Deerfield Beach policy was not valid and said policy was in force at the time of the incident. The District Court stated that STATE FARM had the burden of proving the cancellation and that the question of whether they met that burden was a close one, yet declined to reach this question. STATE FARM clearly did not meet its burden of proof and therefore Defendants were entitled to directed verdict on this issue.

POINT IV

Petitioner submits that both the trial court and the Fourth District failed to properly apply the law applicable to STATE FARM’s policy language and thereby improperly addressed the issues involved in this coverage dispute.

Under the holding of The Florida Supreme Court in *State Farm Fire & Casualty Co. v. CTC Development Corp.*, 720 So.2d 1072 (FLA 1998), interpreting policy language identical to the relevant policy language involved in this case, the only potential factual issue regarding the policy exclusions relied upon by STATE FARM was simply whether the damages claimed were “expected or intended by” HIGGINS. Even assuming, *arguendo*, that it was proper to have this jury determine any factual issues relating to the damages claimed in the underlying action, the only “damages” or “acts” relevant to the declaratory action were those for which INGALLS is seeking compensation under in the underlying action.

While there might arguably have been some confusion regarding the proper issues prior to the Supreme Court ruling in *State Farm v. CTC* , even after this decision came out , the trial court allowed STATE FARM to argue and try this case as though its policy contained an “intentional act” exclusion, which it did not. Whether any part of the incident involved was an “accident” or an “assault and battery” were not issues in this case. The trial court’s adoption of STATE FARM’s re-characterization of the claims and issues in this case was an error that was repeated throughout this case and resulted in the jury deciding improper questions on consideration of improper evidence and arriving at a misguided and improper verdict, as dealt with more specifically in the points hereafter. The District Court did not even

address the proper application of *State Farm v. CTC* , failed to distinguish this case from the “intentional act” cases it referred to in its opinion and thereby erred likewise as discussed under Point II and the points hereafter.

POINT V

Petitioners were entitled to Directed Verdict regarding STATE FARM’s duty to indemnify HIGGINS under the applicable policies for the claims asserted against him in the underlying action. Since there was no competent evidence whatsoever that HIGGINS intended the injuries for which INGALLS is seeking damages in the underlying case, under the ruling of *State Farm v. CTC*, Petitioners were entitled to directed verdicts ruling the exclusions relied upon by STATE FARM were inapplicable as a matter of law.

POINT VI

The Fourth District was incorrect in holding that the original assault and battery complaint and other evidence pertaining to certain conclusion or opinion statements made by or attributed to INGALLS regarding any assault and battery or other intentional acts were admissible. The so called statements were speculations, opinions or impressions beyond the competency of INGALLS to testify and were not relevant to the issues in this trial.

The complaint in the underlying action at the time of the trial of this action

alleged only a simple bodily injury negligence claim. INGALLS stipulated and testified that she was not making any claim for assault and battery in the underlying action and was not seeking any damages in the underlying action for any of the purported intentional or criminal acts of HIGGINS. The trial court correctly struck from the Second Corrected Amended Complaint for Declaratory Relief all reference to earlier complaints filed in the underlying action. The court should have likewise not permitted STATE FARM to question INGALLS and introduce other evidence of opinions and impressions purportedly expressed by INGALLS regarding any assault and battery or other intentional acts.

It was error to hold the complaint and other so called statements admissible as “admissions” of Petitioner. The original complaint was for a completely different cause of action (assault and battery) and clearly a “...tentative outline of a position which the pleader takes before the case is fully developed on the facts...” of the type ruled inadmissible in *Hines v. Trager Constr. Co.*, 188 So. 2d 826, 831 (Fla. 1st DCA 1966) The allegations of the initial complaint were not statements of INGALLS and most of the allegations in the initial complaint were opinions or conclusions regarding questions of law or intent to which INGALLS did not and would not have been competent to testify at trial. The fact that she typed or read the complaint did not make her competent to testify regarding these opinions or conclusions or otherwise

render the complaint admissible.

It was also error to admit and allow reference to various records of INGALLS. The fact that they were offered by STATE FARM as admissions by INGALLS did not alter the fact that they were hearsay documents which were not admissible without a proper predicate.

POINT VII

The jury instructions and verdict form did not correctly apply the law, as established in *State Farm v. CTC* , for the reasons discussed under Cross Appeal Point VI.

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?

The applicable standard of review on this point is *de novo* because this is a question of law. Petitioner believes the question certified should be answered “sometimes, under certain circumstances.” Petitioner agrees that some fact questions regarding coverage may be determined in a declaratory judgment action. However, for

the reasons set forth in the argument on Point II and others hereafter, Petitioner submits that the declaratory action in this case was premature and the fact issues, if any, regarding the insurance policy exclusion provision asserted by State Farm in the instant case are such that the fact issues regarding liability and damages in the underlying action must be determined first .

POINT II

THE DISTRICT COURT OF APPEAL WAS INCORRECT IN HOLDING THAT IT IS PROPER FOR THIS DECLARATORY JUDGMENT ACTION TO BE TRIED IN ADVANCE OF THE UNDERLYING ACTION.

The applicable standard of review on this point is *de novo* because this is a question of law and Petitioner submits it was error to try that portion of the declaratory judgment action asserting the policy exclusion prior to the trial of the underlying action.

STATE FARM brought this action alleging that two of its policies were not in effect at the time of the incident sued upon, and that none of its policies provided coverage by reason of an identical “intentional injury” exclusion. (Second Corrected Amended Declaratory Complaint, R. Vol 8 pp 1180-1290)

Petitioner acknowledges that the question of which policies were in effect at the time of the incident involved fact questions which may have been appropriate for declaratory action, particularly in light of the “trend” which the Fourth District noted

could be drawn from the Supreme Court's opinion in *Canal Insurance Company vs. Reed*, 666 So.2d 888 (Fla 1996). This single issue could be tried before or after the underlying action without any prejudice to the parties since it involved fact issues totally independent of any of the issues being tried in the underlying action. As to this single issue, Petitioner does not assert any error assuming the Supreme Court answers the certified question affirmatively.

However, with the filing of the Second Amended Complaint in the underlying action (R. Vol. 8, pp. 1180-1290 Exhibit "F"), there no longer was any legitimate "doubt" regarding the applicability of STATE FARM's policy exclusion to the claims asserted in the underlying action. INGALLS asserted a single cause of action against HIGGINS alleging that he was negligent and that as a result of his negligence she sustained bodily injuries. HIGGINS is sued only for negligence and there was no alternative allegation of assault and battery or any cause of action asserted other than the straightforward negligence claim. (See Statement of Facts, at p 5)

The only basis for any "doubt" regarding the applicability STATE FARM's policy exclusion was created by the trial court improperly permitting STATE FARM to argue the plaintiff's claim in the underlying action was something other than what the pleadings alleged. Although Petitioner submits this would be error whenever the applicability of the exclusion provisions may be properly tried, it clearly was error to

allow STATE FARM to proceed to trial on these provisions before the liability and damages against its insured HIGGINS had been determined in the underlying action. 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 refashion and re-characterize it to suit the carrier's desire to deny its insured a defense and coverage. This was clearly contrary to the law and prejudicial to Petitioners.

It should be remembered that INGALLS , and not the defendant's insurance carrier, has the right to choose what claims and causes of action to pursue against the Defendant. The fact that a Plaintiff may have more than one cause of action doesn't mean she must pursue all of them. Trying the coverage issues first under the circumstances of this case allowed the carrier to turn the case into an assault and battery case, despite the fact that the underlying claim was not for assault and battery. For numerous good faith reasons supported by the evidence, INGALLS chose not to pursue that potential claim. There is no public policy or other reason to allow the insurance carrier to choose the plaintiff's cause of action, yet that is precisely the result of allowing the coverage to be tried separately under the circumstances of this case.

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 and to do so does not prejudice the rights of the insured and the claimant. When Justice

Pariente wrote the opinion for the Fourth District in *Britamco Underwriters, Inc. v. Central Jersey Investments, Inc.*, 632 So. 2d 138 (Fla. 4th DCA 1994), she 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.

In *Britamco*, the carrier was asserting “Liquor Liability” and “Assault and Battery” exclusions and the question of intent was not even an issue in the coverage case. *Id.*, at 140. In fact, as later noted in footnote 1, the claim in the underlying action in *Britamco* involved an alleged negligent shooting and evidence that the shooting was intentional, which would have been an alternative basis for denying coverage. *Id.* at 140, n. 1. This was a significant point, as Justice Pariente stated:

We do not have to reach the issue of whether abatement would be inappropriate even if common factual issues must be determined, because the insurer takes the position that based on its Liquor Liability Exclusion Endorsement, coverage is excluded in this case, even if its insured is found only to be negligent and the actions of its employee unintentional. 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 the issue of whether the insured's conduct was*

intentional, which it concedes is a fact common to the underlying litigation. (FN1) *Id.* at 140 (Emphasis added)

The clear inference is that, had the carrier in *Britamco* been relying upon the “intentional” nature of the shooting to deny coverage, the declaratory action would and should have been abated.

Petitioner submits that all of the other cases cited by the Fourth District to support its ruling on this point are distinguishable. In particular *Allstate Ins. Co. v. Conde*, 595 So. 2d 1005 (Fla. 5th DCA 1992), involved alternatively pled claims, an “intentional act” (not intentional injury) exclusion and no conflict in the testimony that the acts sued upon were intentional. *Conde*, at 1006. Likewise the concerns regarding “creative pleading” and “collusion” discussed in those cases are clearly not applicable to the instant case. The amendments to the pleadings in the underlying case all occurred as discovery and developments in the case warranted and clearly there is evidence to support the plaintiff’s negligence claim.

The opinion of the Fourth District addresses extensively how the interests of the insurance company are served by trying coverage issues before the underlying case, but fails to address the various reasons why the coverage case should not be tried before the underlying case. Petitioner submits that the rationale and holdings of *Burns v. Hartford Accident & Indemnity Co.*, 157 So. 2d 84 (Fla. 3rd DCA 1963);

International Surplus Lines Ins. Co. v. Markham, 580 So.2d 251 (Fla. 2d DCA 1991); *Marr Investments, Inc. v. Greco*, 621 So.2d 447 (Fla. 4th DCA 1993) and *Irvine v. Prudential*, 630 So. 2d 579 (Fla. 3rd DCA 1993) are the more sound and fair approach.

Assuming *arguendo*, that there were any factual issues regarding the application of the policy exclusions asserted by STATE FARM in the declaratory action, petitioner submits it was error to try the policy exclusion issues of the declaratory action before the fact issues regarding liability and damages in the underlying action have been tried.

POINT III

DEFENDANTS' WERE ENTITLED TO DIRECTED VERDICT THAT THE DEERFIELD BEACH POLICY WAS NOT CANCELED AND WAS IN FORCE AT THE TIME OF THE INCIDENT SUED UPON IN THE UNDERLYING ACTION

The applicable standard of review on this point is *de novo* because this is a question of law. Defendants moved for a directed verdict that policy # 59-BK-6031-7 on the Deerfield Beach property was not properly canceled. (T. Vol. 4, pp. 409-411). In its opinion, the District Court stated that STATE FARM had the burden of proving the cancellation and that the question of whether they met that burden was a close one, yet declined to reach this question. (*State Farm v. Higgins*, at 116) Petitioner submits

STATE FARM clearly did not meet its burden of proof and Defendants motion for directed verdict on this issue should have been granted.

STATE FARM'S policy provisions require that cancellation notice be mailed to HIGGINS' mailing address shown in the declarations. (See Statement of Facts at p. 18) An insurer has the burden of proving cancellation in strict compliance with its policy provision and in order for a notice of cancellation of an insurance policy to be effective, it must be in compliance with the appropriate notice provision of the policy. *Fidelity and Deposit Co. of Maryland v. First State Ins. Co.*, 677 So. 2d 266. 268-269 (Fla. 1996); *Cat 'N Fiddle, Inc. v. Century Ins. Co.*, 213 So. 2d 701, 704 (Fla. 1968).

STATE FARM did not produce a declarations page for the policy in question and, therefore, was unable to meet its burden of proving that the cancellation notice was mailed to the address listed on the declarations page. As detailed in the Statement of Facts, STATE FARM's only witness on this issue was Mr. Willie Richard, and Petitioner submits he was not competent to testify regarding the policy information or STATE FARM's procedures regarding mailing and cancellation. The trial court should have directed a verdict in favor of Defendants on the question of cancellation of Policy No. 59-BK-6031-7.

POINT IV

THE TRIAL COURT ERRED IN ITS APPLICATION OF THE FLORIDA SUPREME COURT DECISION IN *State Farm Fire & Casualty Co. v. CTC Development Corp.*, 720 So.2d 1072 (FLA 1998) IN FORMULATING THE ISSUES AND RULING UPON THE EVIDENCE.

The applicable standard of review on this point is *de novo* because this is a question of law. The trial court erroneously allowed STATE FARM to argue and try this case as though its policy contained an “intentional act” exclusion, which it did not, and to present its case and argue to the jury upon evidence and claims that were not relevant to the proper issues under the applicable policy language. Whether any part of the incident involved was an “accident” or an “assault and battery” were not issues to be decided by this jury. Under the holding of The Florida Supreme Court in *State Farm Fire & Casualty Co. v. CTC Development Corp.*, 720 So.2d 1072 (FLA 1998), interpreting policy language identical to the relevant policy language involved in this case, the only potential factual issue regarding coverage was simply whether the damages claimed were “expected or intended by” HIGGINS. Even assuming, *arguendo*, that it was proper to have this jury determine any factual issues relating to the damages claimed in the underlying action, the only “damages” or “acts” relevant to the declaratory action were those for which INGALLS is seeking compensation under the Second Amended Complaint. Whether or not certain other acts of HIGGINS may have been intentional or even wilful and wonton, or INGALLS may

have had other causes of action or remedies she could pursue against HIGGINS, were not relevant to the proper issues in determining the applicability of STATE FARM's policy language to the claims asserted in the underlying action.

The trial court's adoption of STATE FARM's mis-characterization of the issues in this case was an error that was repeated throughout this case and resulted in the jury deciding improper questions on consideration of improper evidence and arriving at a misguided and improper verdict. Likewise, the District Court referred to "intentional act" cases in its discussion of the declaratory judgment timing and procedural issues addressed under Points I and II. Petitioner respectfully submits that both the trial court and now the Fourth District have failed to properly apply the law applicable to STATE FARM's policy language and thereby improperly addressed the issues involved in the coverage dispute involved herein.

From the filing of this declaratory judgment action through to the end of trial, STATE FARM asserted that it provided no coverage for the claims of INGALLS against HIGGINS because STATE FARM characterized INGALLS' claims as "Assault and Battery" claims and STATE FARM asserted that INGALLS claims arose out of "intentional acts" of STATE FARM's insured, HIGGINS. Despite the straightforward negligence allegations of the underlying Second Amended Complaint, and the fact that the policies involved clearly contain no "Assault and Battery" or

“Intentional Act” exclusion, the trial court permitted STATE FARM to repeat this assertion at every possible opportunity, even to the point of filing and arguing a “Motion to Determine Intentional Act”. (R. Vol.5 pp. 765-781).

Even if it could be argued that initially there was some valid reason for seeking a determination from the court regarding the construction of STATE FARM’S policy language, and in particular the meaning of the terms “occurrence” and “accident” contained in the policies or the application of the “exclusions” asserted by STATE FARM, any confusion or doubt regarding such construction was resolved when the Florida Supreme Court rendered its decision in *State Farm Fire & Casualty Co. v. CTC Development Corp.*, 720 So.2d 1072 (FLA 1998) affirming, *State Farm Fire & Casualty Co. v. CTC Development Corp.*, 704 So.2d 579 (FLA 3d DCA 1997). In *State Farm v. CTC*, the Florida Supreme Court cleared up once and for all any possible confusion regarding the proper construction and application of STATE FARM’s policy language in this case.

Although the facts in *State Farm v. CTC*, involved claims against an architect/builder under a contractors policy, the pertinent policy provisions are identical to those relied upon by STATE FARM in the instant case. STATE FARM'S Second Corrected Amended Complaint for Declaratory Relief in this action states that its policies will provide coverage and a defense to HIGGINS caused by an

"occurrence". "Occurrence" is defined as an "accident." However, STATE FARM'S policies do not define "accident." (Plaintiffs Trial Exhibits No. 1, 2 & 3 and *State Farm v. CTC*, 720 So.2d at 1074)

In *State Farm v. CTC*, the Supreme Court receded from its prior decision in *Hardware Mutual Casualty Company v. Garrits*, 65 So.2d 69 (Fla 1953) and reversed the trial courts summary judgment in favor of State Farm. Justice Pariente, writing for a unanimous court, stated:

“... for the reasons stated below, we recede from our earlier decision in *Garrits*, and hold that when the term ‘accident’ is undefined in a liability policy, the term includes not only ‘accidental events,’ but also damages or injuries that are neither expected nor intended from the viewpoint of the insured.” 720 So.2d at 1072

Justice Pariente went on to explain the court’s reasoning for receding from the previous rule of the *Garrits* decision and then stated:

“In many cases, the question of whether the injury or damages were unintended or unexpected will be a question of fact; in some cases, the question will be decided as a matter of law ...” 720 So.2d at 1076

Justice Pariente then wrote:

“As Justice Souter stated while a member of the New Hampshire Supreme Court, ‘If the insured did not intend to inflict the injury on the victim by his intentional act, and the act was not so inherently injurious that the injury was certain to follow from it, the act as a contributing cause of injury

would be regarded as accidental and an ‘occurrence’.
Vermont Mutual Ins. Co. v. Malcolm, 128 N.H. 521, 517
A.2d 800, 803 (N.H. 1986)” 720 So.2d 1076

Following the decision in *State Farm v. CTC*, INGALLS submits that it became very clear that whether or not any acts allegedly committed by HIGGINS were intentional and whether or not there was an “accident” or an “assault and battery” on the night in question were not issues to be decided by this jury or otherwise relevant to this case. Likewise, whether certain acts of HIGGINS for which INGALLS was not seeking damages in the underlying action may have been intentional or even wilful and wonton, and whether INGALLS may have had other causes of action or remedies she could pursue against HIGGINS, were not relevant.

If there were any issues of fact, they related only to those acts by which INGALLS contended HIGGINS negligently caused “the injuries” for which she was claiming damages in the underlying action. Despite this simple concept, the trial court erroneously continued to permit STATE FARM to focus upon the prior “Assault and Battery” allegations and other evidence in no way relevant to the acts which INGALLS alleged caused her injuries or HIGGINS intent to cause those injuries. The court erred in this regard in its rulings on the issues, the evidence, the jury instructions and the verdict form as will be addressed more particularly in the other Appeal Points.

POINT V

DEFENDANTS' WERE ENTITLED TO DIRECTED VERDICT REGARDING COVERAGE AND STATE FARM'S DUTY TO INDEMNIFY HIGGINS FOR THE CLAIM ASSERTED AGAINST HIM IN THE UNDERLYING ACTION.

The applicable standard of review on this point is *de novo* because this is a question of law. While the District Court correctly ruled that the trial court should have granted Defendants' motions for directed verdict regarding the duty to defend, the District Court erred in not ruling that Petitioners' were also entitled to directed verdicts regarding coverage and STATE FARM's duty to indemnify HIGGINS. Had the trial court not misapplied the holdings and law of *State Farm v. CTC* repeatedly throughout this case and not allowed inadmissible evidence and argument to be presented by STATE FARM, the Defendants would have been entitled to a directed verdict on the indemnity issue as well as the duty to defend.

INGALLS submits that the injuries she alleges she sustained as a result of the pushing and shoving acts of HIGGINS do not fall within the exclusionary language of the policies. In *Sherwood v. Sepulveda*, 362 So. 2d 1161 (La. App. 1978), cited by INGALLS' repeatedly throughout this case, the Louisiana appellate court interpreted the *identical* STATE FARM policy language under facts strikingly similar to those involved herein. The appellate court reversed the trial court and ruled that claims arising out of back injuries sustained when the plaintiff was pushed by the insured and

stumbled backwards during an argument were not excluded, stating “When the act is intentional, but the injury is not, the exclusionary clause is not applicable.” *Sherwood v. Sepulveda*, at 1163. Although not a Florida case, this decision is in complete accord with the ruling of the Florida Supreme Court in *State Farm Fire & Casualty Co. v. CTC Development Corp.*, *supra*. See also *McCreary v. Fla. Residential Prop. & Casualty Joint Underwriting Assn.*, 758 So.2d 692 (Fla. 4th DCA 2000).

To the extent that it may have been proper to try any factual issues regarding the applicability of the exclusions asserted by STATE FARM as the basis for its contention that it provided no coverage, under a proper application of the holding of *State Farm Fire & Cas. Co. v. CTC Development Corp.*, 720 So. 2d 1072, 1077 (Fla. 1998) there was no substantial competent evidence that INGALLS was claiming any injuries or damages that were excluded by any terms of STATE FARM’s policies. The only properly admissible evidence at trial regarding the injuries claimed, their cause and HIGGINS intent was the testimony of INGALLS and HIGGINS. There was no testimony whatsoever regarding the cause of INGALL’s injuries other than her own lay opinion testimony. As reflected in the statement of facts, there was no evidence whatsoever that HIGGINS had any malice toward INGALLS or had any intent, expectation or desire to cause harm to INGALLS or to cause the injuries for which she seeks damages in the underlying action. Therefore, Defendants were entitled to

Directed Verdicts ruling the exclusions inapplicable as a matter of law.

POINT VI

**THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF LAY
WITNESS OPINIONS REGARDING CONCLUSIONS OF LAW
AND INTENT**

The applicable standard of review on this point is *de novo* because this is a question of law. The complaint in the underlying action at the time of the trial of this action was a Second Amended Complaint alleging only a simple bodily injury negligence claim by INGALLS against HIGGINS. The trial court had correctly granted Defendants motions to strike from the Second Corrected Amended Complaint for Declaratory Relief all reference to earlier complaints filed in the underlying action. Despite this ruling, the trial court erroneously allowed counsel for STATE FARM to cross-examine INGALLS and introduce evidence regarding various opinions and impressions purportedly expressed by INGALLS about whether or not HIGGINS may or may not have been guilty of any assault, battery, or other intentional tort against INGALLS.

The record was uncontroverted and clear that INGALLS was making no claim for any assault, battery, or other intentional acts in the underlying action against HIGGINS. (R. Vol. 10, pp.1585-1588; T. Vol. 3, pp. 283-284). Not only were all of these statements or conclusions by plaintiff beyond her capacity to testify as a lay

person, but they were clearly irrelevant and immaterial to the proper issues and its admission served only to distract or mislead the jury from the correct issues in the case, which resulted in great prejudice to INGALLS and HIGGINS.

This improper evidence included the original assault and battery complaint in the underlying action (Plaintiffs Trial Exhibit No. 18) and various opinions and conclusory out of court statements by or attributed to INGALLS in which she purportedly used words like “assault”, “battery”, and “beat.” (T. Vol. 2, pp. 186-233).

Acceptable lay opinion testimony typically involves matters such as distance, time, size, weight, form or identity. *Fino v. Nodine*, 646 So. 2d 746 (Fla 4th DCA 1994). However, the testimony is not admissible when the witness makes a conclusion of law that should be determined by the jury. *See Mills v. Redwing Carriers*, 127 So. 2d 453 (Fla 2nd DCA 1961) (Where opinion is nothing more than speculation of an admitted non-expert on issue involved, it invades the province of the jury.) INGALLS is clearly not a legal expert and therefore any statements she may have expressed regarding the commission of a crime or assault at the time of the incident are her non-expert impressions only and cannot be offered to prove that what took place the night of the incident was an assault or any other crime. Such terms were at most legal conclusions and at least only opinions of ultimate fact, but they were not statements

of fact nor did they contradict any testimony of INGALLS at trial regarding the acts and injuries upon which the underlying claim was based. Under Florida Evidence Code, Section 90.701, INGALLS would not have been permitted to express such opinions in support of her case and therefore these out of court statements should not have been admitted to impeach her.

The court admitted this evidence as “admissions against interest” of INGALLS, but Petitioner submits this was error. To be admissible as impeachment a statement must be clearly related to the acts involved in the case being tried. *See, Evans v. State*, 692 So. 2d 966 (Fla 5th DCA 1997). INGALLS stipulated and testified at trial that she was no longer making any claim for assault and battery in the underlying action and was not seeking any damages in the underlying action for any of the purported intentional acts of the HIGGINS. Therefore the evidence was not admissible as “admissions” and was inadmissible as irrelevant and immaterial.

Not only was the evidence inadmissible as irrelevant and immaterial lay opinion, but particular categories of the improperly admitted evidence were inadmissible for additional reasons, as follows.

A. The initial assault and battery complaint in the underlying action was a prior superseded pleading that should not have been admitted or referred to.

The Second Amended Complaint alleged *negligence only* against HIGGINS.

The original complaint was for assault and battery, a completely different cause of action than that asserted in the underlying action at the time of trial. It clearly was a “...tentative outline of a position which the pleader takes before the case is fully developed on the facts...” and as such was the type of pleading ruled inadmissible in *Hines v. Trager Constr. Co.*, 188 So. 2d 826, 831 (Fla. 1st DCA 1966), which was even cited by the District (*See State Farm v. Higgins*, at 116). Further, most of the “statements” in the initial complaint were opinions or conclusions regarding questions of law or intent to which INGALLS did not testify at trial and would not have been competent to testify and they addressed facts and issues that were no longer relevant to the underlying action. The Florida Supreme Court has held that an allegation in a pleading did not constitute an admission when the allegation in the pleading related to other claims which were abandoned prior to trial. *See Davidow v. Seyfarth*, 58 So. 2d 865 (Fla 1952).

The Forth District and the trial court stressed that INGALLS typed and read the initial assault and battery complaint. However, this fact didn’t change it’s character as a “tentative outline of a position which the pleader takes before the case is fully developed on the facts” and therefore the complaint should not have been admitted under the rule and reasoning set forth in *Hines* and *Harrold v. Schulep*, 264 So. 2d 431 (Fla. 4th DCA 1972). Admission of the complaint only served to further STATE

FARM's effort to focus the jury and court's attention on facts and claims that were not a part of the underlying claim and was highly prejudicial to Petitioners.

B. Various medical records and other documents were hearsay and should not have been admitted or referred to without proper predicate.

The trial court admitted into evidence and allowed STATE FARM's counsel to question INGALLS extensively about portions of medical records that contained statements or history purportedly given by INGALLS concerning the alleged factual scenario on the evening in question.(T. Vol. 2 pp. 186-233, Plaintiff Trial Exhibits Nos.11A-D, 12A-E, 13A-C, & 15). HIGGINS and INGALLS both objected to the admission of these records and the questions to INGALLS regarding these records as inadmissible hearsay for lack of proper predicate under §90.803(4) Fla. Stat. (R. Vol. 10 pp. 1585-1593). The Fourth District held that these records were admissible "admissions" under §90.803(18)(a) Fla. Stat.. Petitioner submits this was error.

The fact that the documents made reference to statements attributed to INGALLS did not alter the fact that they were hearsay documents which were not admissible without a proper predicate. Except for those documents acknowledged as written or signed by INGALLS or her deposition testimony, the "admission" exhibits were documents prepared by others and thus not admissible without the proper evidentiary predicate and no such predicates were ever established by STATE FARM.

Section 90.805, Fla. Stat., provides that hearsay within hearsay is not admissible unless both parts are admissible. Therefore, assuming, *arguendo*, that some statements attributed in the records to INGALLS fell under the “admissions” exception to the Hearsay rule, the proper predicate for the record itself must first be established in order to assure the reliability of the documentary evidence. Further, even if certain statements in a document might be properly used to impeach a witness or party, it was error to admit the entire document into evidence because all of the documents contained information that was not related to the witnesses testimony and not in any way relevant or material to the issues in the declaratory action.

POINT VII

THE TRIAL COURT ERRED IN NOT GIVING DEFENDANTS' PROPOSED JURY INSTRUCTIONS AND UTILIZING DEFENDANTS' PROPOSED VERDICT FORM AND THE JURY INSTRUCTIONS AND VERDICT FORM UTILIZED BY THE COURT DID NOT CORRECTLY APPLY THE LAW.

The applicable standard of review on this point is *de novo* because this is a question of law. The jury instructions and verdict form utilized by the court did not correctly apply the law, particularly the ruling of *State Farm v. CTC.*, 720 So.2d 1072 (Fla 1998), for the reasons discussed under Cross Appeal Point IV. The specifics are discussed hereafter.

Assuming, *arguendo*, that it was proper to have this jury determine any factual issues relating to the policy exclusion asserted by STATE FARM, the only issue relevant would be whether the alleged injuries were expected or intended by HIGGINS. Nonetheless, the trial court gave the following instruction requested by STATE FARM, over HIGGINS' objections:

You may determine that the conduct of CHARLES B. HIGGINS on June 3, 1995 was not accidental even if CHARLES B. HIGGINS did not intend or expect to harm CHERYL L. INGALLS if you find that his acts were such that harm to CHERYL L. INGALLS was certain to follow from his acts. (T. Vol. 6, p. 648)

This was not a correct expression of the law under the applicable policy

provisions and case law. The question of “accident” was not an issue. *The issue is not whether the act or conduct of HIGGINS was intentional but, rather, whether HIGGINS expected or intended the bodily injury that resulted from his act*, in accordance with the ruling in *State Farm v. CTC*, in which the Supreme Court held that an act or event can be intentional but if the injuries resulting from the intentional act are unintended or unexpected, coverage still applies, *Id.* This instruction misled the jury to believe that they had to consider whether the conduct or act of HIGGINS was intentional or accidental.

The correct statement of STATE FARM'S exclusion is contained in DEFENDANTS requested jury instructions numbers 3, 10, 11 and 12 and the correct statement of the issues, assuming there were any issues and wilful and wonton was an issue (which Defendants contended was not so) was as set forth in Defendants requested Verdict Form.

Those requested instructions are set out in full as follows:

HIGGINS requested Jury Instruction #3

The issues for your determination on the claim of STATE FARM FIRE & CASUALTY COMPANY against CHARLES B. HIGGINS and CHERYL L. INGALLS is:

- 1) Whether STATE FARM's insured, CHARLES B. HIGGINS, specifically intended to cause the injuries for which CHERYL L. INGALLS is seeking damages in the underlying negligence action;

- 2) Whether one of the policies STATE FARM issued to CHARLES B. HIGGINS, that being policy number 59-BE-6031-7, was effectively canceled by STATE FARM prior to June 3, 1995?

HIGGINS' Requested Jury Instruction No. 10

The terms "intended," "expected," "willful" or "malicious" are not defined in STATE FARM's policies.

State Farm v. CTC id.; Prudential Property & Caves. Co. v. Swindle, 622 So. 2d 467 (Fla. 1993)

HIGGINS' Requested Jury Instruction No. 11

Upon reading the coverage provision, together with the intentional injury exclusionary clause I have just read to you, the Court has determined and now instructs you as a matter of law that coverage is provided in the STATE FARM policies for not only "accidental events," but also for injuries or damages from the insured's intentional acts that are neither expected nor intended from the standpoint of the insured and for acts by the insured which are not willfully and maliciously designed for the purpose of causing injuries or damage.

Prudential Property & Caves. Co. v. Swindle, 622 So. 2d 467 (Fla. 1993); *United States Fidelity & Guaranty Co. v. Perez*, 384 So. 2d 904, 905, (Fla. 3rd DCA), *rev. denied* 392 So. 2d 1381 (Fla. 1980).

Defendant Higgins' Requested Jury Instruction No. 12

STATE FARM's exclusion will bar coverage only if the insured, CHARLES B. HIGGINS, intended both the act and the resulting injuries for which CHERYL L. INGALLS seeks damages.

State Farm v. CTC, id.; Swindle, id.

DEFENDANTS' Requested Verdict Form

Verdict

We, the jury, return the following verdict:

1. Did STATE FARM's insured, CHARLES B. HIGGINS, specifically intend to cause the injuries for which CHERYL B. INGALLS is seeking damages in the underlying negligence action?

Yes _____ No _____

Please answer Question No. 2.

2. Did STATE FARM's insured, CHARLES B. HIGGINS, act willfully and maliciously for the purpose of causing the injuries for which CHERYL B. INGALLS is seeking damages in the underlying negligence action?

Yes _____ No _____

Please answer Question No. 3.

3. Did STATE FARM cancel policy number 59-BE-6031-7 in accordance with its policy requirements?

Yes _____ No _____

SO SAY WE ALL this _____ day of _____,
1999

Foreperson

Finally, the court compound its error in allowing into evidence the conclusion and impressions of INGALLS and then denying INGALLS requested instruction 3A,

as follows:

DEFENDANTS' Requested Jury Instruction No. 3A

Certain testimony and documentary evidence in this case included such words as assault, battery, beat, beating, wilfully, intentionally, malice, attack, and similar conclusory opinion or impression statements. These words or statements have no legal meaning in this case and are only impressions or opinions of the persons making them. These statements should not be considered by you in any way in your determination of the issue of intent to be decided by you.

This instruction should have been given in light of Florida Evidence Code, Section 90.701. While it was error to allow any reference to these opinions and impressions, the Defendants were further prejudiced by the refusal to give this instruction.

CONCLUSION

Based on the foregoing, argument, INGALLS respectfully requests to court affirm in part and reverse in part the decision of the Fourth District. INGALLS submits that the certified question should be answered “sometimes, under certain circumstances” and that this case should be remanded with directions that the trial judge enter a declaratory decree ruling that STATE FARM owes a duty to defend and indemnify HIGGINS under the policies in effect at the time of the actions sued upon for the claims asserted against him by INGALLS in the underlying action. In the alternative, INGALLS submits that this case is not a proper case for declaratory

judgment prior to the trial of the underlying action and INGALLS respectfully requests to court affirm the Fourth District to the extent that it affirmed the trial court Order Granting Defendants Motions for New Trial and ruled that a directed verdict should have been granted on the issue of duty to defend, reverse the Fourth District and trial court's denial of Defendants' other grounds for new trial and remand this case for new trial subsequent to the trial of the underlying action in accordance therewith.

Respectfully Submitted,

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-and-

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By: _____

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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 27th day of March, 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 33406, fax (561) 471-5603; Spencer M. Sax, Esq., Northern Trust Plaza, 301 Yamato Road, Suite 4150, Boca Raton, FL 33431, fax (561) 994-4985; Elizabeth K. Russo, Esq., 6101 S.W. 76 Street, Miami, Florida 33143, fax (305) 666-4470 and John Weiderhold, Esq., Brandywine Center II, Suite 240, 560 Village Blvd., West Palm Beach, FL 33409, fax (561) 615-7225.

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

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