

In the Supreme Court of Florida

CASE NO. SC01-291
CONSOLIDATED: SC01-292

CHARLES B. HIGGINS and CHERYL INGALLS,

Petitioners,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

A. Preliminary statement

Respondent State Farm Fire and Casualty Company ("State Farm") files this one answer brief in response to the two separate initial briefs filed by Petitioners Higgins and Ingalls. On the two main issues certified by the Fourth District, the Petitioners' arguments duplicate each other to a large extent, so we address those arguments together. Petitioner Ingalls also re-raises certain arguments about claimed trial errors as to which she already received adverse rulings from the trial court and the Fourth District. We address those arguments briefly after discussing the certified issues.

Petitioners' briefs recite only the facts favorable to their arguments, although no applicable standard of review affords them the right to do so. Accordingly, after setting out an overview of the questions presented for review, we submit a more comprehensive statement of the case and facts

B. Overview of the questions presented for review

The subject Florida Fourth District Court of Appeal opinion certifies a question to this Court on one issue, and certifies inter-district conflict on a second issue. *State Farm Fire and Casualty Company v. Higgins*, 26 Fla. L. Weekly D111, 2001 WL 6187 (Fla. 4th DCA 2001). A copy of the Fourth District's opinion is attached hereto as an appendix for ease of reference, and is cited herein as (A._).

The opinion was issued in response to an appeal from a declaratory decree

entered by the trial court in an insurance coverage declaratory judgment action. The opinion certified the following question on one issue presented in the case:

MAY [AN] 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?

2001 WL 6187 *8. (A. 7). The same question had also previously been certified by the Florida Fifth District Court of Appeal in *Allstate Insurance Company v. Conde*, 595 So. 2d 1005 (Fla. 5th DCA 1992), but has not yet been answered directly by this Court.

The Fourth District's opinion also certifies inter-district conflict as to a second issue which was raised by the Fourth District's holding that a trial court has discretion to allow an insurance coverage declaratory action to be tried before the underlying third party tort suit. In reaching that holding, the Fourth District receded from its own prior decision in *Marr Investments, Inc. v. Greco*, 621 So. 2d 447 (Fla. 4th DCA 1993), and certified conflict with *Irvine v. Prudential Property & Casualty Insurance Co.*, 630 So.2d 579 (Fla. 3d DCA 1993) and *Burns v. Hartford Accident & Indemnity Co.*, 157 So.2d 84 (Fla. 3d DCA 1963).

Thus, the questions presented to this Court in these discretionary review proceedings are: (1) whether declaratory judgment actions may be utilized to determine insurance coverage obligations in cases where coverage depends on the resolution of a fact issue, rather than the resolution of a legal issue as to the proper construction of a policy provision; and (2) whether trial courts should be given

discretion to allow declaratory actions in cases involving third-party coverage issues to be tried or determined before the underlying third-party tort suits.

We set out the statements of the case and facts pertinent to these questions next. In the argument section below, we submit that - just as the Fourth District has concluded - both questions should be answered by this Court in the affirmative, and, in fact, already have been by so answered by implication in this Court's 1996 decision in *Canal Insurance Company v. Reed*, 666 So. 2d 888 (Fla. 1996).

C. Statement of the case

Respondent State Farm filed this declaratory judgment action in the trial court seeking a declaration as to its obligations under certain homeowners' policies to defend or indemnify its insured, Petitioner Charles Higgins, in an assault and battery suit that had been filed against him by Petitioner Cheryl Ingalls. (R. 1, pp. 1-17).¹

State Farm sought the declaration as to its rights and obligations because the State Farm homeowners policies only provide coverage for bodily injuries if they are caused by an accident, and specifically exclude coverage for bodily injury "which is either expected or intended by an insured . . . or . . . which is the result of willful and malicious acts of an insured[.]" (E.g., R 8, pp. 1206-1207, 1233-1234, 1263-1264; R 11, pp. 1730-1731).

Ms. Ingalls' initial complaint sued Mr. Higgins only for assault and battery. (R1,

¹ References to the record on appeal appear with record volume and page number (R1, p. __), to the trial transcript as (T. Vol. ____, p. ____), and to the trial exhibits by party and number (e.g., Plaintiff's Trial Exhibit No. __). All emphasis in this brief is supplied by undersigned counsel unless otherwise indicated.

pp. 3-4). Ingalls thereafter amended her suit to include a negligence claim against Mr. Higgins ex-wife Maureen Bradley, who co-owned the house where Ingalls' described the assault and battery as having taken place. (R8, pp. 1284-1287). At that point, State Farm provided a defense under reservation of rights, and instituted this declaratory judgment action as to the assault and battery claim. (R1, pp. 1-17). State Farm thereafter settled Ingalls' negligence claim against Ms. Bradley, whereupon Ingalls amended her complaint again - this time to delete all reference to assault and battery and to allege only that Higgins had *negligently injured* her. (R1, pp. 1-17; R8, pp. 1180-1290).

On the strength of some deposition testimony from Higgins that he had not intended any injury or acted maliciously (contradicted totally by Ingalls' testimony, as detailed in the fact section below), and the amendment of Ingalls' underlying tort complaint to contain only allegations of 'negligence' on the part of Higgins in injuring her (Ingalls never saw that complaint, drafted by her new lawyer, as also detailed in the fact section below), Petitioner Higgins filed a summary judgment motion in the declaratory judgment action contending that judgment should be entered against State Farm as a matter of law on its duties to defend and indemnify Higgins because Ingalls was only suing Higgins for negligence. (R9, pp. 1463-1468). Petitioner argued that the provisions and exclusions in the State Farm policies were facially inapplicable to the negligence claims pled in Ingalls' operative complaint, and accordingly judgment should be entered against State Farm as a matter of law. (R9, pp. 1463-1468). Petitioners' motions on that subject were denied. (R10, pp. 1543-1546).

State Farm sought, and obtained, a ruling from the trial court (the Petitioners had successfully had the declaratory judgment action transferred in front of the same trial judge who had the underlying tort suit - R. Vol 1, pp. 66-67; R 1, pp. 72-73) that the declaratory judgment suit would be tried before the underlying suit. (R 10, pp. 1530-1532). The trial court's order stated:

This Court agrees that the declaratory judgment action should be tried before the underlying action. As stated in the Florida Supreme Court in *Canal Insurance Co. v. Reed*, 666 So. 2d 888 (Fla. 1996), it is in the best interest of all parties to have coverage issues resolved as soon as possible. See, e.g., *Scheer v. State Farm Fire and Casualty Company*, 708 So. 2d 312 (Fla. 4th DCA 1998); *Allstate v. Conde*, 595 So. 2d 1005 (Fla. 5th DCA 1992). State Farm Fire and Casualty Company is currently defending Charles Higgins in the underlying action under a reservations of rights. State Farm Fire and Casualty Company will be unduly prejudiced if it forced to defend Charles Higgins through trial of the underlying action even though there may ultimately be a determination in this declaratory judgment action that Charles Higgins is not entitled to insurance coverage for the claims brought against him in the underlying action.

(R 10, pp. 1530-1532).

The case thereafter came on for a jury trial of the disputed fact issues which needed resolution in order for the trial court to issue declaratory relief. (T Vol. 1 - T Vol. 6). The jury found that Charles Higgins expected or intended to cause the injuries for which Cheryl Ingalls was seeking damages in the underlying action, and that Higgins willfully and maliciously caused those injuries. (R11, pp. 1809-1810).

Petitioners Higgins and Ingalls filed various post-trial motions, including renewed motions for judgment in their favor as a matter of law since Ingalls' then-operative complaint alleged only 'negligence' claims against Higgins, and motions for new trial based on an allegedly prejudicial remark made during opening statement and a variety of other asserted trial errors. (R11, pp. 1858-1861, 1862-1904, 1937-1941, 1942-1950). The trial judge denied all of the post-trial motions, except that a new trial was ordered *solely* on the basis of the allegedly prejudicial remark made by State Farm's counsel during opening statement to the effect that the claim brought by Petitioner Ingalls against Maureen Bradley, Petitioner Higgins' ex-wife, was not a part of the trial and had been settled. (R12, pp. 1951-1956).

State Farm timely appealed the order granting a new trial contending that the complained-of remark in opening statement was neither significant nor prejudicial enough to warrant a new trial. The Petitioners cross-appealed raising a variety of issues, including their contentions that they were entitled to judgment as a matter of law and that the declaratory judgment action should not have been allowed to go to trial before the 'negligence' suit between them had resulted in a jury finding of 'negligence' which could be enforced in a judgment against State Farm. (R12, pp. 1981-1996, 2003-2004, 2005-2006, 2007-2008).

On January 3, 2001, the Fourth District issued an *en banc* opinion ruling on the parties' appeal and cross-appeal. (A. 1-13). The decision affirmed the grant of a new

trial in this particular case because of the claimed prejudicial remark², but focused substantively on the points raised in the Petitioners' cross-appeal about the propriety of allowing the fact issues pertinent to coverage to be determined in State Farm's declaratory judgment action, and the propriety of allowing the declaratory judgment action to proceed to trial before the trial in the underlying tort suit. (A. 1-13).

We further detail the Fourth District's opinion below, but first set out a statement of the record facts presented by this case that led to the Fourth District's conclusion that the wording placed by the legislature in Florida's Declaratory Judgment Act allows for - and *should* be construed by the courts to allow for - resolution of fact issues on which coverage issues turn, regardless of whether legal issues as to insurance contract construction are also presented. Specifically, and as the facts of this case illustrate, there are instances in which the fact issues on which coverage turns *do not overlap* with liability issues in the underlying third-party tort suit. In such instances, the Fourth District concluded (as have other Florida appellate courts), the insurance coverage fact issues *should* be allowed to proceed for determination in a separate declaratory decree action, as there is the potential for mischief if the issues are left to be subsumed within the underlying tort suit where the two, and only, parties involved may have a common interest in having the coverage issues resolved in a certain way.

² While State Farm does not agree with the Fourth District that the remark was prejudicial or warranted a new trial, we do not here contest that ruling and State Farm is prepared to re-try the case. That issue is not the focus of the proceedings before this Court, and is not further mentioned in this brief.

D. Statement of the facts

1. The assault and battery incident and lawsuit

The incident that began all this occurred on June 3, 1995 at a vacation house in Lake Wales, Florida owned by Petitioner Charles Higgins and his former wife, Maureen Bradley. (R1, pp. 1-17). Ms. Bradley was spending the weekend there with a friend, Petitioner Cheryl Ingalls, and the incident arose during one of several visits Mr. Higgins made to the house on the night in question. (E.g., T. Vol. 2, pp. 148-160).

By his own testimony, relations between Higgins and his ex-wife were not good at the time, and he was embittered that he had to give up the house in their divorce proceedings as he had planned on retiring there. (T. Vol. 3, pp. 311-318). His version of the facts was that he went over to the house that night to try to drop some papers off, and was angry to find himself deflected at the door by Cheryl Ingalls. (T. Vol. 3 pp. 309-310). Higgins did not know Ingalls, and felt she had no business interfering with his entrance into a house he had bought. (T. Vol. 3, pp. 318-816; T 4, pp. 360-361).

The altercation that ensued has been described differently by the participants on various occasions as purposes shifted. But, the first recorded description of the event was by Ms. Ingalls herself when she filed a complaint and affidavit with the police that night charging Higgins with battery. (Plaintiff's Trial Exhibit No. 7). She went to her doctor the next day, and gave the following description of how her injuries occurred:

On 6-3-95 I was at a friend's home when her ex-husband came

onto the property 3-4 times and was quite drunk. *The last time he came on to the porch and pushed me, forcefully, into the front door. As I tried to get up he threw me back onto the deck while grasping my wrist. He then threw me into the stairs and twisted my arms behind my back.*

(Plaintiff's Trial Exhibit No. 11A).

Within a month, Ingalls filed suit against Higgins. (T. Vol. 3, pp. 259). She had been a legal secretary for twenty years, and the lawyer for whom she was working represented her in her lawsuit against Higgins. (T Vol. 2, pp. 226). Ingalls typed the complaint herself (T Vol. 3, pp. 293), and in it were the following allegations describing the incident in question:

6. At approximately 2:00 a.m., the Defendant [Higgins] came to the home of his estranged wife. *The Plaintiff [Ingalls] who did not know the Defendant attempted to speak to the Defendant to persuade him to leave as he threatened to do physical harm to the Plaintiff and to his wife. At that time the Defendant went into a drunken rage.*
7. As the Plaintiff was standing before the front door of the home, the Defendant, CHARLES B. HIGGINS, without provocation or reason *pushed the Plaintiff into the front door on the porch of the home and then upon her managing to get up the Defendant grabbed her, threw her into a pile of wood on the porch, and again threw her down onto the porch. He then stuck his fist in her face, told her "I could kill you right now and get you out of my way now." He then slapped her in the face.*
8. The Defendant then went into the home and lunged after his estranged wife, Maureen Higgins. The Plaintiff again tried to talk with the Defendant and calm him down. *Without*

warning, provocation, or reason, the Defendant grabbed the Plaintiff's wrist and threw her against the stairs in the home. As the Plaintiff came up from the stairs he grabbed her wrist again and threw her across the room where she struck a couch and fell on the floor.

9. The Plaintiff then ran outside of the home and saw the Defendant inside on top of his wife. She yelled at the Defendant indicating that the police were coming. *The Defendant came out of the house, got into his car and attempted with his car without cause or provocation to run over the Plaintiff where she was walking in the driveway of the home.*

10. *The Defendant, CHARLES B. HIGGINS, committed the above described assault and battery willfully, intentionally, and with malice in an effort to hurt and cripple the Plaintiff.*

(R1, pp. 3-4). At trial, Ingalls confirmed that she had typed those allegations, and testified that the allegations were true when she made them. (T Vol. 3, pp. 293-294).

2. Higgins' homeowners' policies with State Farm

At the time of the June 3, 1995 fracas at the house in Lake Wales, Higgins and his ex-wife owned several properties, with coverage under three potentially applicable State Farm homeowners policies. (T Vol. 3, pp. 303-304). All of the homeowners policies, however, only provided coverage for bodily injuries caused by accidents, and specifically excluded coverage for bodily injury "which is either expected or intended by an insured" or which is "the result of willful and malicious acts of the insured." (R8, pp. 1206-1207, 1233-1234, 1263-1264; R 11, pp. 1730-1731).

Cheryl Ingalls' July 2, 1995 assault and battery complaint against Higgins specifically alleged intentional, willful, malicious acts by Higgins intended to cause her injuries, i.e., affirmatively alleged claims that were not covered by any of the State Farm homeowners' policies. (R8, pp. 1277-1280).

3. A new lawyer and new allegations in Ingalls' suit against Higgins, and State Farm's ensuing declaratory judgment action

Ms. Ingalls eventually got new counsel, and, on January 29, 1997, an amended complaint was filed still describing Higgins' intentional acts of violence but deleting the words assault and battery, and now also including a claim for negligence against Maureen Bradley. (R8, pp. 1284-1287). Because the amended complaint contained a negligence claim against Bradley, State Farm provided a defense under reservation of rights and filed the instant declaratory judgment suit. (R1, pp. 1-17; R8, pp. 1180-1290).

4. The third amendment to Ingalls' complaint and Higgins' deposition testimony - both contradicted by Ingalls' testimony

Petitioners have relied throughout these proceedings - including before this Court - on two facts as the basis for all of their legal arguments: (1) that the final version of Ingalls' complaint against Higgins contained only a negligence claim (R8, pp. 1288-1290); and (2) that Higgins testified in the declaratory judgment action that during the altercations of the infamous evening he had not intended to injure Ingalls and was not acting maliciously. (R2, pp. 239-240). The following record facts - not mentioned by Petitioners - must also be considered, however, to place Petitioners'

'pivotal' facts in context.

It is true, as Petitioners have pointed out, that during the declaratory judgment action, Ms. Ingalls' lawyer amended her complaint in the underlying action. Therefore, by the time of trial in the declaratory judgment action, Ingalls was traveling on her Second Amended Complaint, which had eliminated all descriptions of Higgins' acts in the June 3, 1995 incident and which now claimed that Ms. Ingalls was suing Higgins for "negligence" in inflicting injuries upon her. (E.g., R8, pp. 1288-1290). Notably, however, Ms. Ingalls herself said that she *never saw or read* the Second Amended Complaint. (T. Vol. 3, p. 279). More importantly, the Second Amended Complaint drafted by Ingalls' lawyer was a sham because it was *completely at odds* with Ingalls' under oath testimony.

Ingalls' testimony - throughout three separate depositions (two in the underlying case and one in the declaratory judgment action) and even, for the most part, at trial - remained consistent with her initial description of Higgins' assaults and batteries upon her. (T. Vol. 2, pp. 124-131). Ms. Ingalls testified that Higgins slapped her *at least* four or five times across the face (R. Plaintiff's Exhibits, Vol. 2, 1/1/96 Ingalls Depo., p. 101), "put his hand on the front of my chest and body-slammed me into the front door" (R. Plaintiff's Exhibits, Vol. 2, 1/1/967 Ingalls Depo., p. 81), "grabbed my wrist and threw me over to the other side of the deck by the sliding door" (R. Plaintiff's Exhibits Vol. 2, 8/19/97 Ingalls Depo., p. 116), threw her across the room where she struck a couch (T Vol. 2, pp. 173-174), and "pulled me out from the wood, then he put his hand around my neck and told me I can take you out right here, bitch, and get

you out of my way." (R. Plaintiff's Exhibits Vol. 2, 1/1/96 Ingalls Depo., p. 97).

Further, even Higgins' own testimony - notwithstanding his many motivations for characterizing his actions in as whitewashed and benevolent a manner as possible - was not as exculpatory as Petitioners' briefs suggest. Mr. Higgins admitted that he was cursing and angry with Ingalls for interfering with him on his own property, and that he had pushed and shoved her:

Q. Do you have strong feelings about what Ms. Ingalls told you about getting off your property?

A. I had strong feelings about that.

Q. Did you use any vulgarity, any obscenities while you are standing outside with Ms. Ingalls?

A. Yeah.

(T Vol. 3, pp. 314-316).

Q. Did you see her hit the door?

A. *She hit something. I did push her back.*

(T Vol. 3, p. 321).

Q. *Okay. Do you recall having any physical altercations at all with Ms. Ingalls inside the house?*

A. *I remember there was again screaming and yelling and probably was shoving or pushing with*

Maureen in the house to continue from outside to inside.

Q. *Was that more than one shove on the outside?*

A. I don't recall. *Probably.*

(T 3, pp. 325-326).

Q. *Did you push Ms. Ingalls into the stairway?*

A. *I don't recall specifically pushing her, but there was a lot of shoving going around. My ex-wife and there was Ms. Ingalls. It is very possible that I shoved.*

Q. *Ms. Ingalls?*

A. *Yes.*

Q. *Do you recall whether during any of these shoves Ms. Ingalls went over a couch?*

A. *I think she fell once. I think she fell once.*

Q. So how did she fall over the couch? *What made her fall over the couch? * * **

A. *Probably the shoving.*

(T 3, p. 129).

Q. *Were you angry at Ms. Ingalls for interfering with your attempt to get to your wife with the piece of*

paper?

A. *I'd say I was angry, yes.*

(T 3, pp. 333-334). Higgins also admitted that he drank six or seven beers that night, which was far more alcohol than he was accustomed to consuming. (T 4, p. 346).

Petitioner Higgins' brief recites, as if it were undisputed, a version of the events in which he claimed that Ms. Ingalls pulled a gun on him as soon as he arrived and saw her for the first time, such that during the entire course of his physical altercations with Ms. Ingalls, he was merely acting in self defense. The brief states:

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.

(See Petitioner Higgins' Initial Brief at page 6). Ms. Ingalls' testimony, however, was that it was only *after* Higgins' repeated acts of violence to her and to Ms. Bradley that she went and got a handgun she had in her bag:

Q. What happened when that happened?

A. I went to the bedroom and got the gun.

Q. What did you do with the gun?

A. Held it down by my side.

Q. And did you then approach Mr. Higgins?

A. I just stood in the hallway, I didn't want to get close

to him and I stayed back and I just, cursed at him,
the police were coming.

(T 2, pp.173-175).

5. Fact issues submitted to the jury

Ingalls and Higgins were the only two witnesses who testified at the declaratory judgment trial as to the events that occurred between them on the evening of June 3, 1995. (T. Vol. 1-6). The factual issues pertinent to the coverage determination were submitted to the jury so that the trial court could thereafter enter a declaratory decree as to State Farm's obligations under the homeowners policies. The interrogatory verdict read as follows:

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

Yes _____ No _____

Please answer question #2.

2. Did STATE FARM'S insured, CHARLES B. HIGGINS, willfully and maliciously cause the injuries for which CHERYL L. INGALLS is seeking damages in the underlying action?

Yes _____ No _____

(R11, pp. 1809-1810).

As there has been a new trial ordered, we mention this jury's verdict only as a

matter of the history of the case. We document the interrogatory verdict form, however, for the substantive purpose of showing what verdict questions would be posed to the jury in the coverage declaratory decree action which would *not* be posed to the jury in the underlying tort suit for 'negligence.'

6. The Fourth District's opinion

Based on this record, the Fourth District issued its *en banc* opinion which, as indicated above, focused on the proper use and timing of declaratory decree actions for resolution of insurance coverage issues:

The main issues in this case concern the viability of a declaratory judgment action on the issue of insurance coverage when the underlying negligence lawsuit remains pending. We hold in this case that a declaratory judgment is proper to determine the existence of insurance coverage, a ruling that is consistent with the modern trend according broad scope to the Declaratory Judgments Act, Chapter 86, Florida Statutes (2000).

(A. 3).

In reaching its conclusion that declaratory judgment actions may properly be utilized to resolve fact issues that will determine whether or not insurance coverage is available, the Fourth District's opinion included a detailed history of the Declaratory Judgment Act and the Florida appellate decisions interpreting it over the past fifty years - including the early decisions of this Court relied upon by Petitioners, like *Columbia Casualty Co. v. Zimmerman*, 62 So.2d 338 (Fla.1952), which indicates that the Act may not be used to resolve purely factual issues where no legal issue of

insurance policy construction is also presented.

The Fourth District concluded that Florida law does allow declaratory relief actions to resolve insurance coverage questions even where only fact issues are involved, recognizing and citing recent district court decisions that have permitted - and even encouraged - such actions and recognizing that the language of the Act itself provides for such actions. The Fourth District also found *sub silentio* support for its conclusion in this Court's decision in *Canal Insurance Co. v. Reed*, 666 So.2d 888 (Fla.1996), summing up its review of the case law as follows:

In sum, case law in the last twenty years has moved in the direction of more freely allowing declaratory judgment suits as a vehicle for resolving fact issues deciding the existence of insurance coverage. These cases appear to have expanded the holding of *Columbia Casualty*.

We have found no case where the supreme court has answered the question certified in [*Allstate Insurance Co. v. Conde*, 595 So. 2d 1005 (Fla. 5th DCA 1992)]. However, we detect in *Canal Insurance Co. v. Reed*, 666 So.2d 888 (Fla.1996), a shift in policy that cannot be reconciled with the narrow language in *Columbia Casualty*.

In *Canal Insurance*, Richard Reed was involved in an automobile accident. See *Id.* at 890. Michael York was a passenger in Reed's car. See *Id.* York sued Reed, "alleging injuries caused by Reed's negligence during the vehicle's operation." *Id.* Reed brought a third-party complaint for liability coverage from his insurer, Canal Insurance Company. See *Id.* By a counterclaim, Canal filed a complaint for declaratory judgment to determine whether its policy with Reed covered York's injuries. See *Id.* The company asserted "that passenger York was specifically excluded from coverage under Reed's policy because York was Reed's employee at the

time of the accident and was thus specifically excluded from coverage under Reed's policy." *Id.* (footnote omitted). The opinion sets forth the policy exclusion in footnote one; it is not ambiguous. *Id.*

The trial court severed the case into three distinct actions, one being Canal's third-party counterclaim for declaratory judgment against Reed and another being the underlying personal injury action between York and Reed. In the former case, the "trial court entered a declaratory judgment finding that Canal was required to provide liability coverage to York for the accident." *Id.*

The precise issue before the supreme court in *Canal Insurance* was whether the declaratory judgment was appealable as a final order. *At two points in the opinion, the supreme court emphasized that the "coverage issue could have been addressed in a separate declaratory judgment action rather than as a counterclaim in a third-party proceeding in the original action."* *Id.* at 890; see *Id.* at 891. The court held that "a declaratory judgment is appealable as a final order regardless of whether the judgment is rendered in a separate declaratory judgment action or as part of a third-party action...." *Id.* at 891.

The supreme court also recognized that a declaratory action properly proceeded apart from the underlying tort action. The court observed that a trial judge "has the discretion to stay the underlying action between the parties pending resolution of the appeal" of the declaratory judgment in the coverage dispute. Id. at 892. The court acknowledged that resolution of coverage disputes impacted settlement of the underlying action and that "it would be in the best interests of all the parties for coverage issues to be resolved as soon as possible." Id.

Underlying the holding in Canal Insurance, is the assumption that the declaratory relief judgment at issue sprang from a valid cause of action. The case involved application of an

unambiguous policy exclusion to determine a purely factual issue--whether York was Reed's employee at the time of the accident. Under Columbia Casualty 's limited view of what constitutes "construction" of a policy under the Declaratory Judgments Act, there was no basis for a declaratory action. However, the cause of action would be proper under the broader view of the act exemplified by the more recent district court of appeal cases, which would allow litigation directed at the legal effects and consequences of policy language, when applied to the facts of the case.

(A. 8).

Recognizing that this Court has not explicitly ruled on the issue, however, the Fourth District decided the case in accordance with its belief as to modern trend and proper result, but also certified the question to this Court:

We hold that this case was proper for declaratory relief, since it involved the construction of policy language under the facts of the case, consistent with *Effort Enterprises*, *Britamco*, *Conde*, *All Phase*, *Emery*, and *Cronk*. The supreme court shifted in the direction of these cases in *Canal Insurance*. Recognizing that the supreme court has not definitively ruled, we certify the question certified by the Fifth District in *Conde*.

(A. 8).

On the second, and related issue of whether the declaratory decree action should be allowed to precede the underlying tort action to trial, the Fourth District again found support for its conclusion in the trend of Florida appellate decisions and in this Court's decision in *Canal*:

Over the forty-eight years since *Columbia Casualty* was decided, courts have grown more adept at handling declaratory judgments.

More recent cases reflect the evolution of the declaratory judgment remedy, where the mechanism can be used to achieve a just result in a given case. *Canal Insurance* demonstrates the use of a declaratory judgment in 1996 that would have been unavailable in 1952. This evolution is part of a "deliberate reconsideration" of the scope of the declaratory judgment, a process that Justice Holmes described as central to the development of the law. O.W. Holmes, *The Path of the Law*, 10 HARV.L.REV. 457, 469 (1897).

For these reasons, we hold that it was proper for the declaratory judgment case to be tried in advance of the underlying tort action. As the supreme court stated in *Canal Insurance*, this is a discretionary decision of the trial court.

(A. 11). Again, recognizing that this Court has not definitively ruled on the issue, the Fourth District receded from language in one of its own prior decisions, and certified conflict with certain Third District cases which could be read as reaching an opposite conclusion:

We recede from that portion of Marr inconsistent with this opinion. We certify conflict with *Burns v. Hartford Accident & Indemnity Co.*, 157 So. 2d 84 (Fla. 3d DCA 1963)] and *Irvine v. Prudential Property & Casualty Insurance Co.*, 630 So.2d 579 (Fla. 3d DCA 1993). *Irvine* declined to follow *Conde*. See 630 So.2d at 580. The third district ruled that "the better process is to require the insurer to defend the action under a reservation of rights[,] and thereby place the risk of the "uncertainty of the ultimate outcome" on the insurance company. *Id.* *Irvine's* approach to this type of case places more emphasis on the pleadings, which can arise through creative lawyering, rather than the actual mechanism causing injury, which is the subject of the policy language pertaining to the existence of coverage.

(A. 11).

7. Discretionary review proceedings before this Court

After issuance of the Fourth District's *en banc* opinion, Petitioners each filed separate notices to invoke this Court's discretionary jurisdiction. In each case, this Court issued an order postponing a decision on jurisdiction and directing the parties to proceed with briefing on the merits. Upon motion by Petitioner Ingalls, the Court consolidated the cases.

Pending before the Court are: (1) the issues certified by the Fourth District, which are addressed by both Petitioners - who disagree as to what the answers should be; and (2) additional issues raised by Petitioner Ingalls only about other claimed trial errors, on all of which she previously received adverse rulings from both the trial court and Fourth District.

SUMMARY OF ARGUMENT

Petitioner Cheryl Ingalls sued Petitioner Higgins in an underlying tort suit for assault and battery. A legal secretary of some twenty years, Ingalls typed the complaint herself. Her allegations included detailed factual recitations about how Higgins slapped her repeatedly across the face, threw her across a room, shoved her down into a wood pile, and slammed her up against a door. Ingalls specifically alleged that Higgins "committed the above described assault and battery willfully, intentionally, and with malice in an effort to hurt and cripple the Plaintiff." (R1, pp.3-4). Ingalls' later associated lawyer amended the complaint twice until it eventually deleted all factual descriptions and asserted that Higgins 'negligently' injured Ingalls.

Because Respondent State Farm, Higgins' homeowners insurer, has exclusions

in its policy for injuries expected or intended by an insured, or willfully or maliciously caused by an insured, State Farm brought a declaratory judgment action seeking a determination as to whether the injuries Higgins caused Ingalls were expected or intended, or willfully or maliciously caused, such that they would not be covered under the homeowners' policy. A jury verdict on these factual issues determined that Ingalls' injuries were expected or intended and willfully or maliciously caused by Higgins.

On appeal, the Fourth District affirmed an order granting new trial due to a trial error as to this specific case. The Fourth District also addressed broader issues raised by Petitioners contending that State Farm (1) had no right to file a declaratory judgment action when Higgins and Ingalls agreed that Ingalls was only suing for negligence and State Farm has only factual issues to present; and (2) that the trial of the declaratory judgment action should not have preceded the trial of the underlying tort suit.

The Fourth District determined that declaratory judgment actions may properly be utilized to resolve factual issues in third-party insurance coverage cases, and that a trial court has discretion to stay the underlying tort action pending the outcome of the coverage declaratory judgment suit because it is in the best interests of all parties to have an early resolution of questions about an insurer's duties to indemnify and defend, just as this Court has noted in *Canal Insurance Co. v. Reed*, 666 So. 2d 888 (Fla. 1996).

Because this Court has not squarely addressed the issues, the Fourth District certified them. Respondent submits that the Fourth District's thorough discussion and

conclusions result in correct rulings on both issues. The Fourth District's decision should be approved.

ARGUMENT

POINT I

THIS COURT SHOULD CONFIRM THAT DECLARATORY JUDGMENT ACTIONS MAY BE UTILIZED TO RESOLVE FACTUAL ISSUES THAT WILL DETERMINE INSURANCE COVERAGE

A. Question presented and standard of review

The first issue before the Court is the question certified by the Fourth and Fifth District, which, again, is:

MAY [AN] 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?

2001 WL 6187 *8. (A. 7). The question presented is one of law, which is accordingly reviewed *de novo*. See, e.g., *Walter v. Walter*, 464 So. 2d 538 (Fla. 1985); *Rittman v. Allstate Insurance Co.*, 727 So. 2d 391 (Fla. 1st DCA 1999). As set forth below, we respectfully submit that the question should be answered in the affirmative.

In the sections that follow, we initially address the merits of the issue and the Fourth District's decision, and thereafter respond to certain additional arguments made by Petitioners in their briefs.

B. The Fourth District's decision is the correct result and should be approved by this Court

As the Fourth District's opinion has detailed, recent Florida appellate decisions have - both directly and indirectly - condoned the use of declaratory judgment actions to resolve fact issues in insurance coverage cases despite the absence of any legal issue of policy construction. *See, e.g., Allstate Insurance Co. v. Conde*, 595 So. 2d 1005 (Fla. 5th DCA 1992); *Effort Enterprises of Fla., Inc. v. Lexington Ins. Co.*, 666 So.2d 930, 931-32 (Fla. 4th DCA 1995); *Britamco Underwriters, Inc. v. Central Jersey Investments, Inc.*, 632 So. 2d 138 (Fla. 4th DCA 1994); *Travelers Insurance Co. v. Emery*, 579 So.2d 798 (Fla. 1st DCA 1991); *State Farm Fire and Casualty Co. v. All Phase Interiors & Remodeling, Inc.*, 578 So.2d 1134, 1135 (Fla. 4th DCA 1991).

As the Fourth District also pointed out, this Court itself in issuing the decision in *Canal Insurance Co. v. Reed*, 666 So. 2d 888 (Fla. 1996) appears to have accepted the proposition that declaratory relief actions may be used to resolve factual issues in insurance coverage cases, even if unambiguous policy provisions are involved. The actual question addressed by the Court in *Canal* was whether a declaratory judgment entered in a third party insurance coverage case may be appealed as a final order, a question which this Court answered in the affirmative.

The particular coverage issue that had been resolved by the declaratory judgment in *Canal*, however, was clearly just a factual issue; specifically, whether a claimant passenger was an employee of the driver and thus excluded from coverage under an employee exclusion in the driver's automobile policy. The claim for declaratory relief in *Canal* happened to have been raised as a counterclaim. This Court did not express any concern over the fact that declaratory relief was being requested for the sole purpose of resolving a fact issue that would, in turn, determine the availability of insurance coverage. In fact, this Court specifically included the following statement in its opinion: "[W]e note that this coverage issue could have been addressed in a separate declaratory judgment action rather than as a counterclaim in a third-party proceeding in the original action." 666 So. 2d at 890.

And, as both the Fourth District in this case and the Fifth District in *Conde* have recognized, the declaratory judgment statute itself directly authorizes the use of declaratory judgment actions to obtain determinations of factual issues upon which rights, powers, or immunities may depend:

The scope of the jurisdiction of this court is jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. No action or procedure is open to objection on the ground that a declaratory judgment is demanded. The court's declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment. The court may render declaratory judgments on the existence, or nonexistence:

- (1) Of any immunity, power, privilege, or right; *or*

(2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

§86.011, Fla. Stat. The statute goes on to provide for jury trial of any fact that may be presented in a declaratory judgment action, and states: "To settle questions of fact necessary to be determined before judgment can be rendered, the court may direct their submission to a jury." §86.071, Fla. Stat.

The declaratory judgment statute thus poses no obstacle to allowing declaratory judgment actions to be utilized for resolution of fact issues; indeed, the statute specifically contemplates such a use. There is, in short, no legislative or technical obstacle to allowing declaratory judgment actions to be used to resolve in insurance coverage cases. The decision is accordingly one for this Court to make as a matter of policy in determining whether, as the Fourth District has concluded, the *Columbia Casualty* line of cases from the fifties and sixties either misinterpreted Chapter 86 or have simply become outdated in light of modern trends in the use of declaratory judgment actions.

We respectfully submit that the better rule is, as the Fourth District has indicated, that litigants should be allowed to use declaratory judgment actions to resolve fact issues in coverage cases, whether or not there is also a need for legal construction of policy terms. And, nowhere is the need for the availability of an independent declaratory judgment action vehicle more apparent than in cases like this case, where

the issues of fact material to determining coverage are *not* material to determining liability in the underlying tort suit. In such cases, absent the availability of a separate declaratory relief action, the question of fact material to coverage will never be answered because it is *not material in the underlying tort suit and will never be posed to the jury.*

Here, for example, under the Petitioners' current plan for Ingalls to pursue only a negligence claim against Higgins, the jury will never be asked at trial to determine whether Ingalls' injuries were expected or intended by Higgins or whether Higgins' acts were willful and malicious. The jury will be asked a single question: "Was there negligence on the part of Defendant Charles Higgins which was a legal cause of loss, injury, or damage to Plaintiff Cheryl Ingalls ?" The "YES" answer will inevitably be forthcoming as neither 'adverse' party has any reason to try to persuade the jury otherwise. Absent the availability of a declaratory relief action to resolve the *coverage* fact issues, a money judgment would automatically be entered against State Farm as an added defendant under §627.4136(4), Fla. Stat., and State Farm would have no recourse but to pay what is almost certainly an uncovered loss.

On this score, the Fourth District aptly referenced Judge Griffin's concurring opinion in *Allstate Insurance Co. v. Conde*, 595 So. 2d 1005 (Fla. 5th DCA 1992) outlining the reason for allowing insurers to institute independent declaratory judgment actions, lest the law otherwise countenance this situation of "perfect conspiracy between a plaintiff and the insured [against which]the insurer has no remedy":

I concur in the majority opinion [holding that

*declaratory relief actions are appropriate vehicles for resolving coverage disputes] because it attempts to deal with what I view as a problem that needs solving. The problem is well illustrated by this case. Given the undisputed facts of this case [insured shot paramour and her children after stating "I'm tired of everything"], **absent considerations of insurance (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.***

The plaintiff pleads negligence in a case like this because he wants a deep pocket from which to satisfy a judgment, or, even better, to obtain a settlement.

595 So. 2d at 1008-1008 (Griffin, J., concurring specifically). Judge Griffin concurred with the *Conde* majority's conclusion that a declaratory judgment action is not only available but *particularly appropriate* in cases like *Conde*, and this case, where the insured and claimant have reasons for joining together in characterizing claims as involving *negligently* inflicted injuries, when evidence in the case suggests (or more than suggests) that in fact the injuries were expected or intended.

It is perfectly obvious that Ingalls brought assault and battery claims against

Higgins in her tort suit against him because he assaulted and battered her. It is just as obvious that the only conceivable reason for amending the complaint, omitting mention of the facts (previously included in such graphic, blow-by-blow detail), and re-casting the claims as negligence claims was to trigger insurance obligations where none existed, such that insurance moneys and defense duties could be exacted where they were never owed.

In sum, the wording of the declaratory judgment statute specifically allows declaratory judgment actions to be brought to resolve fact issues upon which rights and obligations may depend, and there are circumstances in which such actions will be the only vehicle for assuring just results. We thus respectfully submit that this Court should answer the question certified by the Fourth District here and by the Fifth District in *Conde* in the affirmative.

C. Response to Petitioners' arguments on the certified question

1. Petitioners' - conflicting - legal positions as to how the certified question should be answered

The Petitioners are at odds as to how the certified question should be answered. Petitioner Ingalls *agrees* that some fact questions regarding coverage may appropriately be determined in declaratory judgment actions. Ingalls' counsel just contends that *this* declaratory judgment action was inappropriate because - without Ingalls' knowledge, and in direct disregard of her testimony to the contrary - Ingalls' counsel decided to amend her complaint to characterize Higgins' infliction of injuries upon her as 'negligence'. Leaving aside that dubious proposition as to how this

particular case should be viewed, the significance of Ingalls' brief on this point is that Ingalls agrees with our position that the Fourth District has adopted the correct legal answer to the certified question.

Petitioner Higgins, on the other hand, basically contends that the 1952 *Columbia Casualty* decision held that declaratory judgment actions may not be used for the purpose of resolving fact questions only, that certain other decisions in the 1960's followed *Columbia Casualty*, and that those authorities must be deemed controlling. Petitioner Higgins just ignores the very basic jurisprudential principle that this Court may, of course, revisit its own prior decisions. Absent some good reason for adhering to *Columbia Casualty's* narrow³ interpretation of the declaratory judgment statute (and Higgins suggests none), the policy considerations covered so thoroughly in the Fourth District's decision here as well in as the *Conde* majority and concurring opinions suggest that it is time for this Court explicitly to move beyond *Columbia Casualty*.

2. Petitioners' factual arguments

Petitioners also both make arguments on this point which continue to rely on their Emperor's-new-clothes approach to the facts of the case - in which repeated slapping

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As the Fourth District also noted, the *Columbia Casualty* Court seemed to disregard the predecessor statute's equivalent version of the subsection providing for resolution of fact issues upon which rights or immunities might depend, focusing instead exclusively upon the provisions entitled "Power to construe." (A. 5). The fact that statutory provisions may have been overlooked or ignored in *Columbia Casualty*, however, is no basis for overlooking or ignoring them now.

across the face, body-slamming into a door, and shoving over a couch are transformed into unintentional little 'no-harm-intended' self-defense⁴ manoeuvres with the stroke of a pleader's or brief writer's pen. Petitioners thus continue to rely on their contentions that (1) because Ingalls' lawyer re-drafted her complaint to contain only negligence allegations, there *were* only negligence claims being made and thus coverage *must automatically be afforded*, leaving no fact issues for resolution in a declaratory judgment action; and (2) because Higgins provided some testimony that he never intended to cause any injuries, that testimony is conclusive on his insurer and on the courts, for which additional reason there were no fact issues for resolution in a declaratory judgment action. We submit that both contentions by Petitioners are clearly incorrect.

As to the suggestion that the operative facts in this case are conclusively controlled by Ingalls' lawyer's revisionist version of her claims against Higgins, that expedient is precisely the 'perfect conspiracy' problem Judge Griffin focused on in her concurring opinion in *Conde* as the basis for affording insurers the declaratory judgment action as a vehicle for having coverage issues determined. Thus, far from

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The 'self-defense' version of the facts was no answer to the 'expected or intended' issue anyway. Florida law has been clear for quite some time that injuries intentionally inflicted on another will be excluded from coverage under 'expected or intended' or intentional acts provisions even if the intentional acts were taken purely as a matter of self-defense. *See, e.g., Aetna Casualty and Surety Company v. Griss*, 568 So. 2d 903 (Fla. 1990); *State Farm Fire and Casualty Company v. Marshall*, 554 So. 2d 504 (Fla. 1989).

precluding a declaratory judgment action, Petitioner Ingalls' lawyer's switch from alleging intentionally caused injuries to negligently caused injuries is exactly the reason that the availability of declaratory relief actions is necessary and appropriate.

And, the protests in the brief filed on behalf of Ingalls that "[f]or numerous good faith reasons supported by the evidence, Ingalls chose not to pursue her [assault and battery claim]" (Petitioner Ingalls' Initial Brief, p. 28) can hardly be allowed to carry the day, particularly in light of the record facts that Ingalls testified that she typed her own assault and battery complaint detailing what happened, that Ingalls testified that she *never saw* her lawyer's revised 'negligence' version, and that Ingalls testified *at trial* that her own initial complaint's description of the events is true.

Equally incorrect is the suggestion of Petitioner Higgins that his own testimony about his expectations and intentions is the final word in establishing the facts on that subject, and thus is conclusively binding on State Farm as his insurer, rendering a declaratory judgment action unnecessary. Higgins goes so far as to suggest that if State Farm as his insurer was acting properly and in good faith to him, it would *never question* his version of the events. We respond that no such obligation is included within an insurer's duties of good faith under Florida law, nor could it be.

While insurers most certainly do have obligations to act in good faith towards individual insureds, they also have duties to *all* of their insureds to exercise good faith in making sure that claims are paid only as and where they should be, as this Court has specifically noted: "Insurers have a right *and a duty* to other policyholders to contest illegitimate claims." *Time Insurance Company, Inc. v. Burger*, 712 So. 2d 389

(Fla. 1998).

Where, as here, the insured's version of events is (1) directly contradicted by other fact evidence in the case, and (2) has indicia that it may be influenced by a desire to fit within coverage claims that may not in fact be covered by the policy, an insurer is *not* bound to accept the insured's version only. The appropriate course of action, we submit, is that condoned by the Fourth District's *en banc* opinion here, to wit, for the insurer to present doubts raised by fact issues to a court for resolution in a declaratory judgment action.

3. Petitioners' misplaced reliance on *State Farm v. CTC Development*

Petitioners also contend - incorrectly, we submit - that this Court's decision in *State Farm Fire and Casualty Company v. CTC Development Corporation*, 720 So. 2d 1072 (Fla. 1998) supports their argument that declaratory judgments may not be utilized to resolve factual issues in insurance coverage cases hinging on whether injuries were negligently or intentionally caused. The *CTC Development* decision merely held that where the term "accident" is not defined in an insurance policy, it will be deemed to encompass not only accidental events, but also injuries or damages not expected or intended from the standpoint of the insured. 720 So. 2d at 1076.

That legal proposition, however, does not answer - or purport to answer - fact questions presented in a declaratory judgment action, as here, as to whether particular injuries were expected or intended under the facts of the particular case. As this Court went on to point out in *CTC Development*: "*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, such as in cases where the insured's actions were so inherently dangerous or harmful that injury was sure to follow." 720 So. 2d at 1076.

Thus, this Court's *CTC Development* opinion *recognized* that, beyond legal interpretation of an insurance contract's "accident" language, in determining whether coverage exists, there is a second step which often presents a fact issue as to whether the particular injuries were expected or intended by the insured.

It was precisely that fact issue that was tried in this declaratory judgment action, and precisely the fact question posed to the jury: "Did STATE FARM'S insured, CHARLES B. HIGGINS, intend or expect to cause the injuries for which CHERYL L. INGALLS is seeking damages in the underlying action?" In fact, in accordance with the Petitioners' attempts to have Ingalls make a recovery only for whatever injuries she might possibly be able to fit within insurance coverage, the jury was instructed: "In determining whether Charles B. Higgins intended to cause the injuries for which Cheryl L. Ingalls is seeking damages in the underlying action, you are to consider only the claims asserted in the second amended complaint filed in the underlying action and the injuries for which Cheryl L. Ingalls testified she is seeking damages in the second amended complaint." (T. 6, pp. 647-648).

The fact is that no matter how earnestly Petitioners protest that they are just seeking to allow Ingalls to pursue negligence claims against Higgins for whatever injuries were unintentionally caused that night such that State Farm should not be allowed to pursue any declaratory judgment action at all, a wolf in sheep's clothing is

a wolf all the same. Petitioners' underlying suit on the Second Amended Complaint is self-evidently a contrivance intended to manipulate the legal system into creating available insurance monies to protect Higgins and enrich Ingalls at the expense of the general pool of State Farm insureds.

D. Conclusion as to the certified question

The Fourth District has issued a thoughtful decision documenting the history and reasons for allowing the use of declaratory judgment actions to resolve factual disputes in insurance coverage cases. Based upon statements made by this Court in issuing the *Canal Insurance* decision, it appears that this Court has already concluded that declaratory judgment actions are appropriately utilized for that purpose. Petitioners' arguments herein have provided no basis for reaching an opposite conclusion. On the contrary, we submit that Petitioners' effort here only reinforce the proposition that there is a need for having declaratory judgment actions available to resolve fact issues in these types of cases.

Respondent State Farm accordingly respectfully submits that the certified question should be answered in the affirmative and that the Fourth District's decision should be approved.

POINT II

**TRIAL COURTS SHOULD BE GIVEN DISCRETION TO
ALLOW INSURANCE COVERAGE DECLARATORY
JUDGMENT ACTIONS TO PRECEDE THE TRIAL OF
UNDERLYING TORT ACTIONS IN APPROPRIATE
CASES**

A. Question presented and standard of review

The question presented here on certified conflict is whether trial courts should be allowed in their discretion to stay underlying tort actions pending determinations as to coverage and defense obligations in declaratory judgment actions. This question too is one of law subject to *de novo* review.

B. Trial courts should be given discretion to provide in appropriate cases for resolution of coverage issues to precede the trial of the underlying action

We respectfully submit that the Fourth District was also correct in concluding that trial courts should have discretion in appropriate instances to allow the trial of a declaratory judgment action, upon which insurance coverage questions depend, to occur *before* the trial of the underlying tort claim. As the Fourth District pointed out, citing Justice Pariente's remarks from a prior decision of that court, early coverage determinations benefit *all* of the parties involved:

Generally, an insurance carrier should be entitled to an expeditious resolution of coverage where there are no significant, countervailing considerations. *A prompt determination of coverage potentially benefits the insured, the insurer, and the injured party.* If coverage is promptly determined, an insurance carrier is able to make an intelligent judgment on whether to settle the claim. If the insurer is precluded from having a good faith issue of coverage expeditiously determined, this interferes with early settlement of claims. *The plaintiff certainly benefits from a resolution of coverage in favor of the insured. On the other hand, if coverage does not exist, the plaintiff may choose to cut losses by not continuing to litigate against a defendant who lacks insurance coverage.*

In the past *it has generally been recognized as prudent insurance company practice to have coverage resolved as promptly as possible.* In *American Fidelity Fire Insurance Company v. Johnson*, 177 So. 2d 679, 683 (Fla. 1st DCA 1965), *cert. denied*, 183 So. 2d 835 (Fla. 1966), the court, in criticizing the actions of the insurer, suggested that:

[T]he better part of wisdom should have dictated to [the insurer] the resolution of the question of its liability to the insured under the claimed renewal of the policy by the simple expedient of a declaratory judgment proceeding at the inception of the litigation.

Insurers almost routinely defend under a reservation of rights when there is a coverage question, which we encourage. The decision to defend under a reservation of rights, however, should not preclude the insurer from resolving the coverage issue in a separate declaratory judgment action.

Britamco Underwriters, Inc. v. Central Jersey Investments, Inc., 632 So.2d 138, 141 (Fla. 4th DCA 1994).

In fact, it appears to have been precisely this desire for early resolution of insurance coverage issues that led to this Court's conclusion in *Canal Insurance* that declaratory decrees issued in insurance coverage cases are to be considered final judgments, immediately reviewable as such upon rendition. Furthermore, the Court held that trial courts have the power to stay underlying actions pending review of the coverage issues, recommended expediting such review, and encouraged the Appellate Court Rules Committee to provide a means for expedited review in order to avoid

unnecessary delay in the underlying action:

Although we find that this declaratory judgment regarding a determination of insurance coverage is reviewable as a final order, we must also stress that such a judgment will not automatically result in a stay in the independent underlying cause of action. See *Rios*, 491 So.2d at 1292. This is because the underlying personal injury action is separate and distinct from the insurance coverage dispute. ***The trial judge has the discretion to stay the underlying action between the parties pending resolution of the appeal or to permit it to continue concurrently with the appeal process.***

In reaching our ruling, we acknowledge that it would be in the best interests of all the parties for coverage issues to be resolved as soon as possible. We therefore suggest that the district courts expedite review of appeals involving the sole issue of coverage. We also suggest that the Appellate Court Rules Committee consider an appropriate method for providing expedited review of these cases to avoid unnecessary delays in the final resolution of the underlying actions.

666 So. 2d at 892. The Rules Committee did in fact recommend a rule amendment which resulted in the addition of Fla. R. App. P. 9.110 (n), effective January 1, 1997, providing that:

Judgments that determine the existence or non-existence of insurance coverage in cases in which a claim has been made against an insured and coverage thereof is disputed by the insurer may be reviewed either by the method prescribed in this rule or that in Rule 9.130.

Rule 9.130, covering review of non-final orders, provides for review on a much more rapid timetable than that provided in the case of final orders. The appellate rules thus now allow for expeditious processing of coverage issues.

This Court's *Canal Insurance* decision has thus already explicitly recognized the need for early resolution of coverage issues in third-party insurance cases, and has already held that underlying actions in such cases may be stayed in the trial court pending the outcome of appellate review of the coverage issue. It would appear inherent in the *Canal Insurance* reasoning, therefore, that trial courts are to be allowed the discretion to allow the trial level proceedings involving resolution of third-party insurance coverage disputes to precede the trial of the underlying tort action where necessary, just as the trial court may stay the underlying tort action pending appellate review of the coverage determination.

This case presents the opportunity for this Court to clarify that point, if, indeed, it requires a more explicit statement. The Fourth District pointed to the *Canal Insurance* ruling that stay of an underlying tort action pending resolution of the coverage issue is discretionary with the trial court, and approved the trial court's exercise of discretion here: "We hold that it was proper for the declaratory judgment case to be tried in advance of the underlying tort action." (A. 11). We respectfully submit that the Fourth District's holding should be approved. Trial courts should have discretion to stay underlying tort actions during both the trial level and appellate level proceedings on the third-party insurance coverage issues.

C. The Third District decisions cited should be overruled insofar as they present a true conflict

The Third District's cited conflict decision in *Irvine v. Prudential*, 630 So. 2d 579 (Fla. 3d DCA 1993) arguably stands for the proposition that as long as there are

some negligence claims, there may be coverage for the damages claimed and thus no declaratory action should be permitted at least until the underlying tort action is concluded. *Irvine* can actually be distinguished, as the Fourth District also pointed out, because its rationale is only applicable where there are separate actors involved, some of whom may have been negligent and some of whom may have acted with intent to injure. The *Irvine* rationale does *not* apply where - as here - only the insured's own acts are involved, and the only question is whether those acts negligently or intentionally caused the claimant's injuries, as was specifically pointed out in the Third District's own later decision in *Sunshine Birds and Supplies, Inc. v. United States Fidelity and Guaranty Company*, 696 So. 2d 907 (Fla. 3d DCA 1997).

Insofar as *Irvine* may be construed as *requiring* a coverage determination to await the outcome of the underlying tort suit in any case where there are at least some negligence allegations, *Irvine* should be overruled. Disapproving the *Irvine* approach, the Fourth District pointed out in its decision in this case:

The third district [in *Irvine*] ruled that "the better process is to require the insurer to defend the action under a reservation of rights[.]" and thereby place the risk of the "uncertainty of the ultimate outcome" on the insurance company. *Id.* ***Irvine's approach to this type of case places more emphasis on the pleadings, which can arise through creative lawyering, rather than the actual mechanism causing injury, which is the subject of the policy language pertaining to the existence of coverage.***

(A. 11).

The other cited conflict decision is *Burns v. Hartford Accident & Indemnity Co.*,

157 So. 2d 84 (Fla. 3d DCA 1963). *Burns* is actually distinguishable from the instant case as well because in *Burns* the fact issue that would be determinative as to coverage was identical to an issue that would also be determinative of liability in the tort case.

In *Burns*, the plaintiff sued the owner of a dump truck. "A crucial issue was whether the dump truck owner was an independent contractor or a sub-contractor who could take advantage of the statutory fellow-servant rule, thereby restricting the plaintiff's claim to workers' compensation." 157 So. 2d at 85. The identical issue would have determined whether the liability policy's exclusion for workers' compensation claims applied to exclude coverage. The liability insurer filed a declaratory judgment action against the parties to the tort suit seeking an answer to that question, and the Third District said that the action should have been disallowed, stating:

[W]hen 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.***

157 So. 2d at 85.

We note that *Burns* and this case are distinguishable in that the issues material to coverage and to liability in the underlying tort suit are ***not*** identical at all. In the underlying tort suit, Ingalls can recover from Higgins if his actions were a legal cause

of her injuries - whether he intended to cause the injuries or caused them through negligence. It is *not material* in that underlying tort suit to determine whether Higgins' actions were intended to cause injury or not unless Ingalls wants to press her intentional tort claims - whether for jury appeal or punitive damages purposes - a course she has studiously *avoided* - for obvious reasons.

It is, on the other hand, *pivotal* to the coverage suit to determine whether Higgins' actions were intended to cause injury or not. This case is thus distinguishable from *Burns* because, absent allowing the declaratory relief suit, the pivotal issue for the coverage determination would never be resolved, or at least would have to await resolution until after the underlying suit - the very evil this Court said should be avoided in *Canal Insurance* given the proposition that "it is in the best interests of all the parties for insurance coverage issues to be resolved as soon as possible." 666 So. 2d at 892. And, as the Fourth District's decision here noted in commenting on the overly-broad holding in *Burns*:

One problem with the holding in *Burns* is its effect on the liability insurer's ability to participate in the resolution of a fact issue that determines coverage. *This is of concern, since in some cases, the interests of the plaintiff and the defendant in a tort action might be aligned in framing a cause of action to fit within the coverage of a liability policy.*

(A. 11). This comment harkens back to the problem discussed at length above in Point I, but illustrates the point that if *Burns* is to be taken as a flat prohibition of allowing insurance declaratory judgment actions to proceed before underlying tort suits, it, too, should be overruled.

D. Conclusion on the certified conflict point

We respectfully submit that this Court should approve the Fourth District's conclusion that trial courts should have discretion to issue stays as necessary in underlying tort actions pending resolution of third-party insurance coverage issues. Insofar as the Third District's decisions in *Irvine* and *Burns* may be taken to hold otherwise, they should be overruled.

E. The Fourth District correctly pointed out that in cases like this, the insurer should not have any further duty to defend once it had been finally determined that no coverage exists for the actual claims in the underlying action

A final point in the Fourth District's decision that requires confirmation is that concerning the termination of the duty to defend when a declaratory judgment action has resulted in a determination that there is no coverage for any of the claims in the underlying tort action. On this point, the Fourth District's decision correctly noted:

We believe that the better procedural approach in this type of case is that adopted by the [F]ifth [D]istrict in *Conde*. In the underlying lawsuit, the plaintiff in *Conde* sued under the alternative theories of intentional wrongdoing and negligent conduct. Intentional wrongdoing was excluded from coverage under the policy. See 595 So.2d at 1006. *The court observed that in such a case, "the indemnity issue and the duty to defend issue are inextricable."* Id. The [F]ifth [D]istrict held that before a determination of the defendant's liability in the underlying tort case, the insurer could properly bring a declaratory judgment action to determine both the

duty to defend and coverage, so long as the injured party plaintiff in the tort suit was made a party to the declaratory action. *See id.* at 1008. The court's reasoning is especially applicable to this case:

It is only appropriate that the insurer be permitted to participate in the coverage issue in an alternative, mutually exclusive case. Otherwise, the insurer must sit back and provide an attorney to "defend" an insured by, in concert with the plaintiff, establishing that what might be the most deliberate shooting was, in fact, a negligent shooting. Even if not bound by the coverage verdict, it may nevertheless suffer the [State Farm Fire & Casualty Co. v. Nail, 516 So.2d 1022, 1023 (Fla. 5th DCA 1987)] "irreparable harm" by providing a defense when it had no legal obligation to do so.

(A. 10). The Fourth District's commentary in this regard properly suggests, we submit, that once a separate declaratory judgment action has established that there is no coverage on a liability policy for *any* of the claims in the underlying action, the duty to defend also ends.

This conclusion in no way violates the established principles as to an insurer's duty to defend, which we readily acknowledge, i.e., that the duty to defend is broader than the duty to indemnify, that duty to defend is determined by the four corners of the complaint, or that the duty to defend all claims exists where both covered and uncovered claims are pled. All of those principles continue to hold true unless and until there is a final determination, including after exhaustion of any appellate review, that no coverage exists for *any* of the claims in the underlying action.

The proper course for obtaining such a determination in cases like this is just the

course that was followed here. Once the original assault and battery complaint - alleging only intentionally and maliciously caused injuries - was amended to include negligence claims, State Farm assumed the defense under reservation of rights and brought this declaratory judgment action. State Farm did pay for the defense and must continue to pay for the defense until there has been a final determination that there is no coverage for any of the claims remaining in the underlying action. Once there *has* been such a final determination, however, it has been established that no duties are owed with respect to those claims - no duty to indemnify and no further duty to defend.

We respectfully submit that the only cases in which the duty to defend will cease upon a declaration of no coverage are those like the instant case where what has been plead in the underlying action is at odds with the actual facts such that the only motivation for the discrepant pleading is to reach insurance coverage. So far the main culprits have been cases like these characterizing intentional torts as negligence to avoid 'expected or intended' and 'willful and malicious' exclusions.

Another example, however, would be if a plaintiff who fell and sustained injuries in a defendant's home were to discover that the defendant had no homeowners insurance but *did* have auto coverage, and thus plead an auto negligence suit against the defendant. Once a declaratory judgment action decree finally determined that no automobile was involved in the accident, the automobile carrier should be relieved not only of the duty to indemnify but also of the duty to defend.

We mention this point only because the Fourth District's decision reaches that

correct conclusion in the cited portion of the decision, but had also mentioned earlier that the trial court should have granted directed verdict as to the duty to defend. It is quite correct that until there has been a final declaration of no coverage for any claims, the insurer's duty to defend continues if there are allegations in the underlying complaint that fall within coverage. A directed verdict as to that point would be appropriate - although not really necessary in this case since State Farm *was* providing the defense under reservation of rights.

But, as the Fourth District's decision went on to note in the later portions cited above, the final declaration of no coverage as to any of the claims alleged in the underlying action would also terminate the duty to defend: "Otherwise, the insurer

must sit back and provide an attorney to 'defend' an insured by, in concert with the plaintiff, establishing that what might be the most deliberate shooting [or battery] was, in fact, a negligent shooting [or battery]. Even if not bound by the coverage verdict, it may nevertheless suffer . . . 'irreparable harm' by providing a defense when it had no legal obligation to do so." (A. 10, *citing Conde, supra*, 595 So. 2d at 1008).

POINT III

PETITIONER INGALLS HAS STATED NO OTHER BASIS FOR RELIEF FROM THIS COURT

Petitioner Ingalls' brief re-argues all of the evidentiary and other claimed trial error arguments previously presented to - and rejected by - the trial court and by the Fourth

District. The Fourth District's decision carefully addresses each of the issues now re-raised by Ingalls. For the reasons articulated by the Fourth District, we respectfully submit that Petitioner Ingalls' additional points do not warrant any changes in the trial court's rulings.

CONCLUSION

Based on the forgoing facts and authorities, Respondent State Farm Fire and Casualty Company respectfully submits that the certified question should be answered in the affirmative just as the Fourth District has answered it, that the inter-district conflict should be resolved in favor of the Fourth District's decision, and that Fourth District's conclusion that the duty to defend ceases upon a final determination

in a declaratory judgment action that there is no coverage for any of the claims in the underlying action should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Answer Brief of Respondent was mailed this 23rd day of May, 2001 to: John Wiederhold, Esquire, Wiederhold, Moses, Bulfin & Rubin, P.A., Counsel for Petitioner Charles Higgins, Brandywine Centre II, Suite 240, 560 Village Boulevard, West Palm Beach, Florida 33409; Joseph K. Still, Jr., P.A., 500 Australian Avenue South, Suite 600, West Palm Beach, Florida 33401 and Theodore A. Deckert, Esquire, Law Office of Theodore A. Deckert, P.A., Counsel for Petitioner Cheryl Ingalls, P. O. Box 607, West Palm Beach, Florida 33402-0607.

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Answer Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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