IN THE SUPREME COURT OF FLORIDA

85,683

FLORIDA MEDICAL MALPRACTICE
JOINT UNDERWRITING ASSOCIATION,

Petitioner,

v.

INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON PETITION FOR REVIEW OF A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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INTRODUCTION

This proceeding, in which the Florida Medical Malpractice Joint Underwriting Association ("JUA") seeks review of a decision of the Fourth District Court of Appeal affirming judgments against it for insurance bad faith,' is a companion to another before this Court, in which co-defendant St, Paul Fire and Marine Insurance Company ("St. Paul") seeks review of the same decision.[2] We are filing simultaneously respondent's answer briefs on the merits in both cases.

At the outset we bring to the Court's attention a jurisdictional issue in the companion case that may affect its consideration of *this* case. We have filed a motion to strike St. Paul's notice to invoke this Court's jurisdiction and to dismiss its petition for review for lack of jurisdiction because St. Paul did not file its notice to invoke on time. This Court has advised that it will consider the motion at the time it determines oral argument,[3] and therefore we have included the jurisdictional challenge in our answer brief in that case as well. The importance of this to the Court in considering JUA's case is this: the judgments affirmed by the district court are joint and several. Should this Court dismiss St. Paul's case, the district court's affnmance of the judgments stands as to St, Paul, and IINA will be entitled to recover the full amount of the judgments from St. Paul under the supersedeas bond.[4] No actual controversy will then exist

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'There were two joint and several judgments entered, one on the merits and one for attorneys' fees.

[2]St. Paul Fire & Marine Ins. Co, v. Indemnity Ins, Co. of No. Am., Case number 85,715.

[3]Order dated May 25, 1995.

[4]As the Court knows, where two defendants are jointly and severally liable, the plaintiff may recover from one or both Colle v. Atlantic Coast Line R. Co., 153 Fla. 258, 14 So. 2d 422 (continued.. .)

between JUA and IINA, and any opinion by the Court in this case will be strictly advisory, exceeding this Court's jurisdiction. Sarasota-Fruitville Drainage Dist. v. Certain Lands, 80 So. 2d 335, 336 (Fla. 1955) ("We have repeatedly held that this Court was not authorized to render advisory opinions except in the instances required or authorized by the Constitution . . . . [T]he Constitution of this State gives this Court the right to issue advisory opinions only to the Governor of the State of Florida and then only concerning questions arising as to his powers and duties under the Constitution. ");[5] Department of Admin. v. Horne, 325 So. 2d 405 (Fla. 1976) (" [i] t appearing that any opinion we render would be advisory only, this cause is hereby dismissed"). See Sandstrom v. Leader, 370 So, 2d 3, 6 (Fla. 1979) (court "constrained by fundamental principles of appellate review" to decline invitation to decide whether hypothetical acts would fall within proscriptions of statute); Dade County v. Philbrick, 162 So. 2d 266, 268 (Fla. 1964) (Certified question "must not be one presenting a pure abstract issue. It must be one indispensable to the disposition of the litigation before the Court . . , . "); Evans v. Carroll, 104

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[4](. . . continued)
(1943); Anderson v. Crawford, 111 Fla. 381, 149 So. 656 (1933); 32 Fla. Jur. 2d Judgments and Decrees § 35 (1994); 46 Am. Jur. 2d Judgments § 110 (1969).

[5]The court in Schwarz v. Nourse, 390 So. 2d 389 (Fla. 4th DCA 1980), explained:

> The only provision in Florida law for advisory opinions is in Article IV, Section l(c) of the Florida Constitution. This authorizes the Governor to request the opinion of the Justices of the Supreme Court as to the interpretation of any portion of the constitution upon any question affecting his exclusive powers and duties. No *other advisory opinions are authorized within the courts of Florida*

Id. at 392 (emphasis supplied). Accord Interlachen Lakes Estates. Inc. v. Brooks, 341 So. 2d 993, 995 (Fla. 1976); Collins v. Hot-ten, 111 So. 2d 746, 751 (Fla. 1st DCA 1959). Article IV, section l(c) of the Florida Constitution provides: "The governor may request in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties."

So. 2d 375, 377-78 (Fla. 1958) (contentions that statute was unconstitutional constituted abstract issues not requiring disposition; constitutional questions posed were "merely colorable, unrelated to the particular facts involved, and therefore presented no substantial basis upon which an appeal [would] lie").[6]

In the interest of saving the Court's time, then, we respectfully refer the Court to our motion to strike and dismiss and to Point I of our brief in the companion St. Paul case, as the Court may wish to consider the separate jurisdictional issue presented there before considering this case.[7]

STATEMENT OF THE CASE AND FACTS

Our client, Indemnity Insurance Company of North America ("IINA") issued an excess coverage malpractice insurance policy to Variety Children's Hospital' (R. 1, 2, 8- 15; T. 177).[9] The hospital's primary malpractice insurer was JUA (R. 48; T. 176). By statute, the primary coverage was limited to $500,000 (T. 177). When a medical malpractice lawsuit brought against

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[6] See also Allen v. Martinez, 573 So. 2d 987, 989 (Fla. 1st DCA 1991) (court declined to render advisory opinion where issues were moot); Sabio v. Russell, 472 So. 2d 869 (Fla. 3d DCA 1985) (adjudication as to unconstitutionality of enactment constituted advisory opinion which courts were unauthorized to issue); Schwarz v. Nourse, 390 So. 2d 389, 392 (Fla. 4th DCA 1980) ("[C]ourts do not have the power to give legal advice or opinions . . . . The function of the courts should be limited to controversies between actual litigants. "); Dobson v. Crews, 164 So. 2d 252, 255 (Fla. 1st DCA 1964) ("Courts of law are established for the sole purpose of deciding issues before them arising from litigated cases and should limit pronouncements of the law to those principles necessary for that purpose. They are not designed to render advisory opinions on abstract questions of law. "), aff'd, 177 So. 2d 202 (Fla. 1965).

[7] Apart from this ground for lack of jurisdiction, in Point I of this brief we set forth an independent reason this Court has no jurisdiction over this case — there is no conflict of decisions.

'This hospital is now Miami Children's Hospital.

[9] We will refer to the record on appeal as "(R. __)" and to the trial transcript as "(T. __)."

the hospital forced IINA to pay $750,000 in settlement of the claim, IINA sued JUA and St. Paul, JUA's servicing carrier,[10] alleging that their bad faith handling of the claim resulted in IINA's needless payment of the excess amount (R. 1-31). The suit against the hospital was based on the mistreatment of a young patient by the hospital's doctors and staff (R. 2).

We need not recount the mistreatment here.[11] It is enough to say that, even though there was strict liability for at least one of the malpractices committed by the hospital in 1983 (a sponge was left in the abdomen of the patient during surgery), as of 1985, St. Paul still had not interviewed a single physician (T. 570, 999-1000, 1041, 103 1, 1032, 1035), talked to family members, school teachers, or neighbors (T. 1002, 1042, 1043), taken any depositions, hired any experts (T. 564-65), or made or negotiated any settlement offers (T. 885, 916, 1008, 1037, 1045, 1094). When St. Paul did receive a settlement offer of $375,000, it never responded (T. 434, 846, 876, 1048). It was not until 1987 that St. Paul made its first settlement offer (T. 1094), and the case ultimately settled for $1,250,000. Because JUA's primary coverage was limited to $500,000, IINA, as the excess carrier, paid $750,000 in settlement of the four-year-old claim.

"Under a contract with the JUA, St. Paul was responsible for servicing all claims against JUA's insureds (R. 148-60).

[11] We have recounted here only the facts relevant to the issue before this Court, which is whether JUA timely raised its defense of immunity to suit. That we have kept the fact portion of this answer brief concise and to the point does not mean that we agree with the facts as characterized by JUA and presented in its initial brief on the merits.

The facts underlying the malpractice claim and the evidence supporting the jury's verdict against the insurers are stated at length in our answer brief on the merits in the St. Paul case, number 85,715.

IINA sued JUA and St. Paul for bad faith in the investigation, evaluation, and negotiation of the malpractice claim against the hospital (R. 1-31, 51-55). The case went to trial in November of 1992 on the issues of statutory and common-law bad faith against both insurance carriers (T. 21). On the sixth day of trial, after IINA had rested its case, JUA -- without ever having said a word about it before -- moved to dismiss for lack of subject matter jurisdiction based on sovereign immunity, arguing that it was immune from suit (T. 770, 773). The trial court denied JUA's motion (T. 783). At the end of the two-week trial, the jury returned a verdict against JUA and St. Paul on both counts of bad faith (R. 252-53; T. 1426-27). JUA and St. Paul appealed the judgments against them on several grounds (R. 361-62). The Fourth District affirmed both judgments (A1-A3),[12] but, having relied upon its earlier case of City of Pembroke Pines v. Atlas[13] as an analog for its decision, certified conflict with the Second District's decision in Sebrina Utils. Comm'n v. Sicher[14] (A2 n.4). The Fourth District made clear that it was not deciding the issue of whether JUA is immune vel non from bad faith claims but instead affirmed on the procedural ground that JUA's immunity defense was not timely raised and was therefore waived (A2). The district court rejected all other grounds presented for reversal (Al).

JUA has invoked the discretionary jurisdiction of this Court based on the Fourth District's perceived conflict between this case and Sicher. is our answer.

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[12]For the Court's convenience we have appended a copy of the Fourth District's opinion in this case and will refer to it as "(A_").

[13]474 So. 2d 237 (Fla. 4th DCA 1985), rev. denied, 486 So. 2d 595 (Fla. 1986).

[14]509 So. 2d 968 (Fla. 2d DCA 1987).

SUMMARY OF THE ARGUMENT

This case is before this Court without the submission of jurisdictional briefs because the Fourth District certified conflict with the Second District's decision in Sebrina Utils. Comm'n v. Sicher.[15] In its opinion in this case, the Fourth District analogized the present case to its own City of Pembroke Pines v. Atlas,[16] which the district court saw as being in conflict with the Second District's opinion in Sicher. There is none.

Even if Atlas is arguably in conflict with the Sicher decision, not just some Sicher dicta, most assuredly there is no conflict between the decision in the present case and Sicher. The points of law decided in Sicher are simply different from the points of law decided in this case and are different from the points of law decided in Atlas. There is no express and direct conflict that would satisfy the jurisdiction requirement of Article V section 3(b)(3) of the Florida Constitution. Moreover, all three cases are factually dissimilar. Although the defendants in Atlas and Sicher were governmental entities, Atlas and Sicher construe different provisions of section 768.28 of the Florida Statutes. The present case called for the interpretation of an entirely different statute -- section 627.351(4) -- and the defendant here is a nonprofit association governed by representatives of private industries and professions. Thus, this case is not properly before this Court and should be dismissed for lack of jurisdiction.

But even if JUA's petition were to survive a jurisdictional attack, the judgments against it should be affirmed because its only defense in this textbook insurance bad faith case was waived. That is because JUA's immunity from suit is not sovereign or "governmental," but

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[15] 509 So. 2d 968 (Fla. 2d DCA 1987).

[16] 474 So. 2d 237 (Fla. 4th DCA 1985), rev. denied, 486 So. 2d 595 (Fla. 1986).

statutory -- that is, bestowed by the legislature, and thus waivable. Such statutory immunity does not implicate the subject matter jurisdiction of the state circuit courts, which obviously have subject matter jurisdiction over any and all bad faith claims against insurers in this State. Thus, the burden was on JUA to timely raise its immunity defense in a motion to dismiss, in its answer as an affirmative defense, or in a motion for summary judgment. It did none of these things. Instead, it waited until the sixth day of trial -- after IINA had presented its case -- to raise its defense in a motion to dismiss for lack of subject matter jurisdiction based on sovereign immunity. But, as the district court held, the trial court correctly denied JUA's motion because JUA's immunity is not sovereign and the defense, being an affirmative one, was not timely raised. Relying on Fernandez v. Florida Ins. Guar. Ass'n,[17] JUA also argues that section 627.351(4)(c) of the Florida Statutes precludes a bad faith claim as a matter of law and, therefore, under Rule 1.140(h)(2) it was free to raise the defense of failure to state a claim mid-way through trial. Even if JUA arguably ***could*** have raised such a defense at trial under Rule 1.140(h)(2) it simply ***didn't*** do so, and thus waived that defense.

Finally, while the statute may grant JUA immunity from suit for actions it takes "in the performance of [its] powers and duties" under section 627.351(4), since JUA's duty of good faith does not arise from this statute but rather from its relationship with the insured and the law governing that relationship, JUA was not immune from suit in this case.

[17] 383 So. 2d 974 (Fla. 3d DCA), rev. denied, 389 So. 2d 1109 (Fla. 1980).

ARGUMENT

I.

THE CONFLICT THAT WAS CERTIFIED TO THIS COURT PROVIDES NO BASIS FOR THIS COURT TO TAKE JURISDICTION BECAUSE THERE IS NO CONFLICT BETWEEN THIS CASE AND THE SECOND DISTRICT'S DECISION IN SICHER, EVEN IF, ARGUENDO, THERE IS CONFLICT BETWEEN SICHER AND ATLAS

This case is before this Court because the Fourth District certified conflict with the Second District's decision in Sebrina Utils. Comm'n v. Sicher, 509 So. 2d 968 (Fla. 2d DCA 1987). As we will show, however, this Court does not have jurisdiction under Article V, section 3(b)(3) of the Florida Constitution because any purported conflict is, at best, between the decisions in City of Pembroke Pines v. Atlas, 474 So. 2d 237 (Fla. 4th DCA 1985) and Sicher, not between the decisions in *this case* and Sicher. Moreover, Sicher does not "expressly and directly" conflict with either Fourth District case.

In order for this Court to take jurisdiction under Article V, section 3(b)(3),[18] the decision in the present case must "expressly and directly" conflict with a decision of another district court of appeal. Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980). Moreover, this Court has itself limited conflict jurisdiction to those cases "where there is a real and embarrassing conflict of opinion and authority between decisions." Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958). A conflict exists only when "one decision would overrule the other if both were rendered by the same court; in other words, the decisions must be based practically on the same state of facts and announce antagonistic conclusions. " Id. As we will show, neither

[18] See also Rule 9.030(a)(2)(A)(vi) of the Florida Rules of Appellate Procedure.

the present case, nor for that matter Atlas, upon which the district court relied, is antagonistic to Sicher.

Both Atlas and Sicher construe provisions of section 768.28 of the Florida Statutes, which waives sovereign immunity for tort actions. In Atlas, the defendant municipality argued that a plaintiff suing a ***municipality*** must allege compliance with the notice provision of section 768.28(6) in order to vest the state court with subject matter jurisdiction of a tort action. The defendant did not assert, until after entry of final judgment, the plaintiff's failure to comply with the notice provision. The Fourth District rejected the municipality's contention, ruling instead that the plaintiff's "failure to allege compliance with the statutory notice provision did not deprive the circuit court of subject matter jurisdiction because such an allegation is not an element necessary to the existence of subject matter jurisdiction." Atlas, 474 So. 2d at 238. In deciding that the state may waive this notice requirement, the Fourth District treated the defense of sovereign immunity much like an affirmative defense that can be waived if not timely raised.

In Sicher, an electric utility appealed an adverse jury verdict claiming that, as an agency of a municipality, it was immune from suit and that tort actions against a municipal agency for malicious prosecution and punitive damages were expressly prohibited by section 768.28. The plaintiff argued that since the electric utility had not raised its defense of sovereign immunity as an ***affirmative defense,*** it had waived it. While the Second District's dicta noted that "a plaintiff must allege in his complaint the specific methods by which the governmental entity has waived its sovereign immunity" and that "governmental immunity is not an affirmative defense, but is jurisdictional and may be raised at any time," Sicher, 509 So. 2d at 969, the Sicher court,

unlike the Fourth District in Atlas, specifically found that the question of sovereign immunity had been "sufficiently raised by the pleadings" because the plaintiff had alleged in its complaint that the utility had waived its sovereign immunity and the utility had denied that allegation in its answer. Id. The Second District's comments regarding sovereign immunity and subject matter jurisdiction, being purely dicta, cannot be the basis for conflict jurisdiction. See Kennedy v. Kennedy, 641 So. 2d 408 (Fla. 1994) (court refused to accept jurisdiction where plurality opinion directly conflicted with prior supreme court holding, finding that no real conflict existed because plurality opinion did not serve as basis for district court's holding); Niemann v. Niemann, 312 So. 2d 733 (Fla. 1975) (court would look only at the decision, not dicta, to determine whether there was conflict).

Sicher, then, does not conflict "expressly and directly" with Atlas. As the Sicher court implicitly recognized when it omitted any mention of the earlier-decided Atlas, it never ruled or had to rule upon the point of law presented in Atlas, that is, whether a plaintiff's failure to allege compliance with the statutory notice provision of section 768.28(6) is an element necessary to the existence of subject matter jurisdiction and therefore can be raised post-trial.[19]

But even if this Court were to find that Atlas and Sicher conflict, that conflict cannot serve as a basis of jurisdiction over this case. First, any purported conflict must exist between the case under consideration and another, not between two extraneous cases. See Dodi Publishing Co. v. Editorial Am.. S.A., 385 So. 2d 1369 (Fla. 1980) ("[t]he issue to be decided

[19]The holdings of Sicher were two: (1) that the utility was an agency of a municipality and was therefore entitled to sovereign immunity and subject to the provisions of section 768.28; and, (2) that, under section 768.28, no action for malicious prosecution or punitive damages lies against an agency of a municipality. See Sicher, 509 So. 2d at 969-70.

from a petition for conflict review is whether there is an express and direct conflict in the decision of the district court before us for review, not whether there is conflict in a prior written opinion which is now cited for authority"). The mere fact that the Fourth District relied on Atlas and believes that a conflict between Atlas and Sicher exists does not mean that a conflict exists between *this case* and Sicher. Second, the courts in both Atlas and Sicher were construing provisions of section 768.28, dealing with waiver of sovereign immunity; as even JUA admits, the present case does not involve sovereign immunity.[20] (See Petitioner's Brief at 13.)

Finally, neither Atlas nor Sicher is factually similar to the present case. Atlas involves a municipality (the City of Pembroke Pines) and an interpretation of a provision of section 768.28. Sicher involves a utility determined to be an agency of a municipality and an interpretation of a different provision of section 768.28. And the present case involves a nonprofit association and an interpretation of a separate and distinct section of the Florida Statutes. There can be no "real and embarrassing conflict of opinion and authority" between decisions that, as here, are not based "practically on the same state of facts" and do not "announce antagonistic conclusions. " See, e.g., Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962) (two district court cases were not "out of harmony" and did not generate "confusion and instability" because first opinion interpreted the substance of an agreement while second examined only procedures used to validate an agreement). We turn now to the merits of JUA's petition for review.

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[20]Even if the Fourth District relied in part on its holding in Atlas to rule that JUA's immunity defense was an affirmative defense that should have been raised in the pleadings, its decision in this case cannot conflict with the dicta in Sicher because the Fourth District did not conclude that JUA's immunity was governmental but rather reasoned that JUA's immunity was *like* the immunity conferred on municipalities under section 768.28.

II.

JUA WAIVED ITS IMMUNITY DEFENSE BY NOT PROPERLY AND TIMELY RAISING IT

Assuming for the sake of argument that JUA is immune from a bad faith suit under section 627.351(4)(c) of the Florida Statutes, we will show that JUA waived any immunity defense it may have had because it raised the defense too late and on the wrong ground.

A.

JUA's Immunity Is Not Sovereign Immunity; Therefore, JUA's Immunity Defense Could *Not* Be "Raised At Any Time" Under Rule 1.140(h)(2) On The Ground That The Court Lacked Subject Matter Jurisdiction

Although admitting on the first day of trial that the case should go forward against it (T. 15), JUA waited to the end of IINA's case to raise for the first time the defense that it was immune from suit under section 627.351(4)(c) of the Florida Statutes. It chose as a vehicle for raising the defense a motion to dismiss for lack of subject matter jurisdiction (T. 770, 773).[21] Specifically, JUA moved to dismiss the bad faith claims on the ground of sovereign immunity (T. 773). It argued that the defense of sovereign immunity has been construed by the courts of this State as relating to subject matter jurisdiction and thus may be raised at any time under Rule 1.140(h)(2) of the Florida Rules of Civil Procedure (T. 773-74). See State Dep't of Transn. v. Bailey, 603 So. 2d 1384, 1387 (Fla. 1st DCA 1992) ("Where relief is precluded by the defense of sovereign immunity, the court is said to be lacking subject matter jurisdiction to grant the relief sought."); Schmauss v. Snoll, 245 So. 2d 112, 113 (Fla. 3d DCA) ("A state's immunity

[21] We suggest that the choice of a belated motion to dismiss was a recognition that had the claim been couched as an affirmative defense, it would have been quickly identified as untimely and relegated to a certain death.

from suit relates to subject matter jurisdiction, and is not an affirmative defense. "), cert denied, 248 So. 2d 172 (Fla. 1971). JUA's argument was and is beside the point. It is not shielded from suit under sovereign immunity because JUA is not a sovereign for purposes of the defense.

Immunity of state and national governments, commonly referred to as "sovereign immunity, " originated from the idea that "the King can do no wrong. " W. Page Keeton, ed., Prosser and Keeton on the Law of Torts 1033 (5th ed. 1984). This concept of sovereign immunity was adopted early in this country and "the law of the United States has ever since been that, except to the extent the government consents to suit, it is immune. " Id. Thus, in Florida, the State may not be sued on a tort action except under the limited circumstances prescribed in section 768.28. See Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362 (Fla. 1977).

Section 768.28 of the Florida Statutes provides a limited waiver of sovereign immunity for tort actions against the state and its agencies or subdivisions. The section defines "state agencies or subdivisions" as including

> the executive departments, the Legislature, the judicial branch (including public defenders), and ***the independent establishments of the state;*** counties and municipalities; and ***corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities....***

§ 768.28(2), Fla. Stat. (1987) (emphasis added). Thus, whether JUA qualifies as a state agency or subdivision depends on whether it is either (1) an independent establishment of the state, or (2) a corporation acting as an instrumentality or agency of the state.[22] Since JUA is neither of these, the trial court was correct in denying JUA's motion to dismiss for lack of subject matter jurisdiction and the Fourth District was correct in affirming that denial.

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[22]The Florida Medical Malpractice Joint Underwriting Association is a creation of the legislature. See § 627.351(4), Fla. Stat. (1977).

1. JUA is not an "independent establishment of the state."

In Eldred v. North Broward Hosp. Dist., 498 So. 2d 911 (Fla. 1986), the Supreme Court of Florida held that the defendant hospital taxing district qualified as an "independent establishment of the state." Despite the relative independence of operations and funding of the hospitals involved,[23] the court concluded that the state legislature intended special taxing districts to fall within the definition of independent establishments of the state because special taxing districts were one of four types of local government entities *explicitly recognized in the Florida constitution*.[24] Id. at 914; see also Brown v. North Broward Hosp. Dist., 521 So. 2d 143 (Fla. 4th DCA 1988) (following Eldred). Joint underwriting associations, however, are not one of the four types of local government entities explicitly mentioned in the Florida constitution. And as we will discuss below, JUA's independence of operations and self-funding nature disqualify it as an "independent establishment of the state" for purposes of sovereign immunity.

[23] Plaintiffs in Eldred alleged that the hospitals operated independently of state funding, using ad valorem taxes only for incidental expenses mandated by state-imposed programs. Eldred, 498 So. 2d at 913. JUA on the other hand, relies not at all on taxes of any kind.

[24] Article VII, section 9(a) of the Florida Constitution lists the following local government entities as ones authorized to levy taxes: (1) counties; (2) school districts; (3) municipalities; and, (4) special districts.

2. JUA is not an "instrumentality or agency of the state."

When determining whether an entity represents the state for purposes of the Eleventh Amendment the federal courts have employed a four-factor test.[25] These factors are: (1) how state law defines the entity; (2) what degree of control the state maintains over the entity; (3) where funds for the entity are derived; and (4) who is responsible for judgments against the entity. Magula v. Broward Gen. Medical Ctr., 742 F. Supp. 645,648 (SD. Fla. 1990) (quoting Tuveson v. Florida Governor's Council on Indian Affairs, Inc., 734 F.2d 730, 732 (11th Cir. 1984)). See also Thornquest v. King, 626 F. Supp. 486 (M.D. Fla. 1985) (Florida community colleges were arms of the state entitled to Eleventh Amendment immunity because Tuveson criteria were met). Applying these four factors, it is apparent that JUA does not represent the state for purposes of shielding JUA under Eleventh Amendment sovereign immunity.[26]

Under the first factor, JUA is not "the state" for sovereign immunity purposes because, although JUA is a statutory creation, it is not defined as an instrumentality or agent of the state in either the state constitution or the statute creating it. In contrast, in Crawford v. Department of Military Affairs, 412 So. 2d 449 (Fla. 5th DCA), rev. denied, 419 So. 2d 1196 (Fla. 1982),

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[25]The Eleventh Amendment provides:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

[26]We note that while an entity may exercise sufficient independence so that it cannot claim Eleventh Amendment immunity as an arm of the state under federal law and yet be a state establishment for purposes of the state constitution and state statutes, JUA is not such an entity. See Magula v. Broward Gen. Medical Ctr., 742 F. Supp. 645, 648 (S.D. Fla. 1990).

the Fifth District found that, since the Department of Military Affairs was described as an "agency of the state government" in section 250.05 of the Florida Statutes, the department fell within the provision for waiver of tort immunity found in section 768.28. The court also found the National Guardsman sued in Crawford to be amenable to suit because in an earlier case, State v. Florida State Improvement Comm'n, 47 So. 2d 627 (Fla. 1950), this Court held that the National Guard is an "arm of the state government." Crawford, 412 So. 2d at 45 1. But this Court reached this conclusion because it was "plain from the wording of Article XIV [of the state constitution]." Florida State Improvement Comm'n, 47 So. 2d at 631. See also Op. Att'y Gen. Fla. 79-62 (1979) (where, relying, inter alia, on sections 250.05-.07 and 250.27-.28 of the Florida statutes, the attorney general opined that the Florida National Guard was an agency of the state and therefore that section 768.28 applied to waive sovereign immunity in tort actions brought against it).

As for the second factor, JUA is supervised by a "board of governors consisting of representatives of five of the insurers participating in the [JUA]," an attorney named by The Florida Bar, a physician named by the Florida Medical Association, a dentist named by the Florida Dental Association, and a hospital representative named by the Florida Hospital Association. § 627.351(4)(c), Fla. Stat. (1987); (T. 786,792). The board of governors includes no state officials, and no state official or agency approves or appoints members to the board.[27]

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[27] Compare with, section 63 1.56, Florida Statutes (1987), which provides for the Department of Insurance to ***approve and appoint*** to the board of directors of the Florida Insurance Guaranty Association (FIGA) persons ***recommended*** by the member insurers. Significantly, notwithstanding this measure of state control over the directors of FIGA, the Third District, in Kuvin. Klingensmith & Lewis. P.A. v. Florida Ins. Guar. Ass'n, 371 So. 2d 214 (Fla. 3d DCA 1979), still held that FIGA was neither a governmental subdivision nor an agency of the state for venue purposes.

Id. It can hardly be said that the State controls JUA. Cf. Jetton v. Jacksonville Elec. Auth., 399 So. 2d 396, 398 (Fla. 1st DCA) rev. denied, 411 So. 2d 383 (Fla. 1981) (electric utility *operated* by *the City* of Jacksonville was "primarily acting as" an instrumentality or agency of a municipality and therefore was entitled to a section 768.28(5) limitation on recovery). Third, JUA, which is financed primarily through premiums from its insureds, receives no state funds (T. 785-86). And, fourth, the State is not responsible for judgments against JUA. For Eleventh Amendment purposes, then, JUA is not "the state."

A similar analysis was used by the federal courts in Texas Catastrophe Property Ins. Ass'n v. Morales, 975 F.2d 1178 (5th Cir. 1992), cert. denied, 113 S. Ct. 1815 (1993), to determine that the Texas Catastrophe Property Insurance Association ("CATPOOL"), a Texas joint underwriting association, was not "part of the state" of Texas. In Morales, CATPOOL challenged a Texas statute requiring it to be represented in civil actions by the Texas Attorney General. The Fifth Circuit was required to determine whether CATPOOL was part of the state because a state agency cannot make constitutional claims against the state; in other words, the state cannot sue itself.

The court described CATPOOL:

> CATPOOL was created by the Texas Legislature in 1971. CATPOOL is a sort of assigned risk pool; all of the property insurers in Texas are required to belong to the pool as a condition of doing business in the state. . . . CATPOOL writes its own policies and pays its own claims, which are funded first from premiums, then from assessments against member companies. In short, CATPOOL is directly funded by the private monies of private citizens and corporations--not by the funds of the public treasury.
>
> Representatives of the member insurance companies comprise a majority of the board of directors.

Id. at 1179 (citations omitted).

In determining that CATPOOL was *not* the state, the Fifth Circuit emphasized that CATPOOL was privately, not publicly funded:

> If CATPOOL makes a profit, that money does not go to the state. Although some profits are used to purchase reinsurance, the member companies may receive distributions from profits. If losses exceed premiums, the member companies are assessed, not the public treasury.
>
> . . . .
>
> That the state holds, and exercises, the coercive power to force private insurers doing business in Texas to cover certain risks does not mean that the money coming out of the companies' bank accounts is state money. It is private money directed to pay private claims.

Id. at 1182-83 (footnotes and citations omitted).

The Fifth Circuit's analysis of CATPOOL is instructive here. See also 18 John A. Appleman, Insurance Law and Practice § 10133 (Stephen L. Liebo, ed., 1994) ("Although the state has the power to control the types of risks that a Joint Underwriting Association must cover, the Association is not part of the state. The legislative act creating the Association is not a grant of political power and the Association is not employed in the administration of government. ") (footnotes omitted).

Finally, this Court's recent advisory opinion in In re Advisory Opinion to the Governor--State Revenue Can, No. 85,949, 1995 WL 396905 (Fla. July 7, 1995), comes to the same conclusion for the same reason. There, this Court was asked to render an opinion as to whether the assessments, policy premiums and policy surcharges charged by the Florida Residential Property and Casualty Joint Underwriting Association ("the Association") were "state revenues" for the purposes of Article VII, section l(e) of the Florida Constitution. In deciding that the assessments and premiums were not state revenues this Court considered several factors. These

factors included that (1) "[t]he Association operates subject to the supervision and approval of a board of directors consisting of members of the insurance industry, consumer representatives, and the insurance consumer advocate; " (2) " [t] he board of directors sets insurance rates . . . and determines the need for and the amount of the assessments that may be imposed upon the Association's members; " and (3) "[a]lthough created by state statute, the Association's function is to provide insurance to private individuals who might not otherwise be able to obtain insurance in the voluntary market. " 1995 WL 396905 at *3-4 (citations omitted). As part of its analysis, this Court considered the Florida Attorney General's opinion "that the Legislature did not intend for the Association to be a state entity nor does the Association appear to be a state entity. " Id. at *3. For the same reasons that the Association is not a state entity, JUA is not one either. What this Court said about the Association in its advisory opinion applies equally to JUA:

> [T]he Association is not performing a traditional governmental function. Its revenues are not subjected to legislative appropriation and are held solely for the purpose of satisfying insurance claims. Though created by the Legislature, in practical effect the Association operates like a private insurance company.

Id. at *5.

3. Public policy does not require JUA to be defined as a state agency.

The four-factor test and the analyses found in Morales and Advisory Opinion, incorporate the public policy considerations underlying sovereign immunity. As the Fourth District court has observed, "[t]he doctrine of sovereign immunity rests on two public policy considerations: 1) the need to protect the public from exaggerated depletions of the public treasury, and 2) the need to administer the government in an orderly manner. " Vargas v. Glades Gen. Hosp., 566

So. 2d 282, 284 (Fla. 4th DCA 1990). Neither of these public policy considerations is implicated here. Any judgments rendered against JUA will be paid from private coffers, not the public treasury, as JUA is funded solely by premiums, the investment of those premiums (T. 791), and assessments against private insurance companies, when necessary (T. 786).[28]

In Kuvin. Klingensmith & Lewis, P.A. v. Florida Ins. Guar. Ass'n, 371 So. 2d 214 (Fla. 3d DCA 1979), the Third District was called upon to decide whether the Florida Insurance Guaranty Association ("FIGA") was a governmental subdivision or agency of the state. In concluding that it was not, the court said:

> Under the present statutory scheme, the FIGA is a non-profit corporation composed exclusively of private insurance companies which transact business in Florida. Its "governing committee" contains no public officials or employees but consists entirely of persons recommended to the insurance department by the member insurers. . . . Most importantly, the FIGA is funded entirely and exclusively by assessed contributions from the member companies.

Id. at 216 (citations omitted). In the court's view, "the total non-involvement of public funds is the most significant factor in the analysis of whether a given entity should be deemed governmental in character . , . ." Id. Thus, under this analysis as well, JUA is not a governmental entity for the purposes of sovereign immunity from suit because no public funds are at stake. Moreover, JUA -- unlike FIGA, but very much like an ordinary private insurance company -- is funded primarily by the entities it insures -- that is, its policyholders.

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[28] If the premiums are insufficient to cover claims and expenses, the JUA is authorized to *assess its insureds* a "premium contingency assessment not to exceed one-third of the premium payment. . . . " § 627.351(4)(e)(1), Fla. Stat. (1987). If the additional assessment is insufficient, the deficit is recovered from the member insurers. Id. As yet, there has never been a deficit requiring an assessment against the member insurance companies (T. 786).

In sum, JUA does not exhibit any of the characteristics of a governmental or state agency or subdivision. It is not described in the constitution or in a statute as a subdivision or an agency of the state; it is governed by representatives of the insurance industry and medical professions, not by state officials or employees (T. 786-87, 792); it levies no taxes; and it receives no other public funds. It thus does not qualify as an "independent establishment of the state" or a "corporation primarily acting as an instrumentality or agency of the state." Its immunity is strictly statutory and, therefore, JUA could not successfully raise an immunity defense on a motion to dismiss for lack of subject matter jurisdiction.

B.

Even If JUA's Statutory Immunity Provision Found In Section 627.351(4)(c) Arguably Precludes a Bad Faith Action As a Matter of Law, JUA Waived This Defense By Failing To Timely Raise It

JUA also argues that even if it did not have raise-at-any-time sovereign immunity, the immunity provision of section 627.35 1(4)(c) precludes a cause of action for bad faith. Therefore, it reasons, IINA could not have properly stated a cause of action for bad faith, and since a defense of failure to state a cause of action can be raised *at trial* under Rule 1.140(h)(2), the trial court should have dismissed the bad faith claims. As we will show, however, since JUA did not raise the defense of failure to state of cause of action but instead moved for dismissal on the ground of lack of subject matter jurisdiction, JUA waived this argument and this Court may not address it,

On the sixth day of trial, JUA made the following argument to the trial court:

> [JUA's and St. Paul's attorney]: At this time, the Plaintiff having rested, I have certain motions to make. . . .

> Your Honor is aware that Florida Statute 627.351 is the statute which creates the FMMJUA. . . .
>
> The next subsection beneath it, Subsection C, specifically provides, Your Honor, and I quote, there shall be no liability on the part of and no cause of action of any nature shall arise against any member insurer, self insurer or agents or employees, the Joint Underwriting Association or its agents or employees, members of the Board of Governors or the department or its representatives for any action taken by them in performance of their powers and duties under this subsection.
>
> This is a sovereign grant of immunity and its agents, Your Honor, which in no way has been waived in this case. (T. 770-71.)
>
> . . . .
>
> This is a jurisdictional issue, Your Honor, and can be raised by the Defendants at any time. . . .
>
> There are a number of these cases that essentially say governmental immunity is not [an] affirmative defense, but it's jurisdictional and may be raised at any time.
>
> , , . [J]urisdictional matters may be raised after trial or for the first time on appeal.
>
> What we have, quite simply, Your Honor, is the FMMJUA, which is created by the State, was given immunity from those kinds of suits by the State, (T. 773-74.)

As this record clearly shows, JUA raised its immunity defense, not as a failure to state a cause of action but rather as a lack of subject matter jurisdiction. Therefore, JUA's defense of failure to state a cause of action, even if raisable for the first time at trial, was waived. See Abrams v. Paul, 453 So. 2d 826, 827 (Fla. 1st DCA 1984) (where assertion of failure to state a cause of action was not presented to trial court and trial court had not been afforded an opportunity to determine the merits of such an assertion, appellate court will decline to consider the issue); Ivens Corp. v. Hobe Cie Ltd., 555 So. 2d 425, 426 (Fla. 3d DCA 1989) (defendant

who did not plead failure to join an indispensable party in either its motion to dismiss plaintiff's complaint or as an affirmative defense in its answer waived point for appellate review), rev. denied, 564 So. 2d 1086 (Fla. 1990). See also Kozich v. Hartford Ins. Co., 609 So. 2d 147, 148 (Fla. 4th DCA 1992) (appellant who did not make specific argument in trial court cannot successfully raise it for the first time on appeal); Wagner v. Nottingham Assocs., 464 So. 2d 166, 169 (Fla. 3d DCA) (statement of one ground precludes party from claiming later that motion should have been granted on different ground), rev. denied, 475 So. 2d 696 (Fla. 1985); Palmer v. Thomas, 284 So. 2d 709, 710 (Fla. 1st DCA 1973) ("function of an appellate court is to review errors allegedly committed by trial courts and not to entertain for the first time on appeal defenses which the complaining party could and should have but did not interpose and present to the trial court for decision"). The trial court in this case was never presented with the question of whether IINA's bad faith claims should be dismissed for failure to state a cause of action and thus the court was never afforded the opportunity to consider such an assertion. Instead, JUA relied on a motion to dismiss for lack of subject matter jurisdiction, which the trial court correctly rejected.

C.

JUA Also Waived The Affirmative Defense Of Statutory Immunity By Not Timely Raising It

JUA's defense of immunity is an affirmative defense. As the transcript shows, IINA objected to JUA's eleventh-hour motion on the ground that the defense had not been properly or timely pleaded (T. 780). It is also obvious from the transcript that IINA was prejudiced by the raising of this defense mid-trial (T. 778).

"An affirmative defense is any matter that avoids the action and that, under applicable law, the plaintiff is not bound to prove initially but the defendant must affirmatively establish." Langford v. McCormick, 552 So. 2d 964, 967 (Fla. 1st DCA 1989), rev denied, 562 So. 2d 346 (Fla. 1990). The applicable law is this: Non-sovereign immunity from suit, even if "absolute" as JUA argues in this case, is an affirmative defense. See e.g., Clark v. State of Ga. Pardons & Paroles Bd., 915 F. 2d 636, 639 n.2 (11th Cir. 1990) (if district court sees that an affirmative defense such as absolute immunity would defeat the action, a section 1915(d) dismissal is allowed); Harper v. Merckle, 638 F.2d 848, 855 n.8 (5th Cir.) (defendant raised "affirmative defense of absolute judicial immunity" in answer and affirmative defenses), cert. denied, 454 U.S. 816 (1981); Boyd v. Carroll, 624 F.2d 730, 732-33 (5th Cir. 1980) ("failure to plead judicial immunity waived the affirmative defense"); see also, San Filippo v. United States Trust Co., 470 U.S. 1035 (1985) ("defendants asserted several affirmative defenses" in district court "including their absolute immunity from § 1983 liability for their grand jury testimony").

As the defendant, JUA had the burden to prove that the immunity provision applied to the facts of this case; it was not IINA's burden to allege or prove that JUA was *not* immune. See Roland v. Phillips, 19 F.3d 552 (11th Cir. 1994) ("proponent of a claim to absolute immunity bears the burden of establishing the justification for such immunity") (quoting Antoine v. Byers & Anderson. Inc., 113 S. Ct. 2167, 2169 (1993)). See also Patterson v. Aiken, 628 F. Supp. 1068, 1072 (N.D. Ga. 1985) (court must determine whether conduct alleged falls

within scope of "absolute" immunity), aff'd, 784 F.2d 403 (11th Cir. 1986). JUA's non-immunity is not an element of IINA's cause of action for bad faith.[29]

An affirmative defense is deemed waived if not asserted in the answer or at any time before trial so that the plaintiff can come to trial prepared to refute the defense. Fla. R. Civ. P. 1.140(h)(1); Peninsular Life Ins. Co. v. Hanratty, 281 So. 2d 609, 611 (Fla. 3d DCA 1973). See also Triple T.. Inc. v. Jaghory, 612 So. 2d 642, 643 (Fla. 4th DCA) (failure to specifically plead affirmative defense constituted waiver), rev denied, 626 So. 2d 206 (Fla. 1993); Goldberger v. Regency Highland Condominium Ass'n, 452 So. 2d 583, 585 (Fla. 4th DCA 1984) ("[f]ailure to plead an affirmative defense waives that defense"); Gause v. First Bank, 457 So. 2d 582, 585 (Fla. 1st DCA 1984) ("Affirmative defenses must be raised in the pleadings or they are waived. ").[30] For example, in Romero v. Ciskowski, 484 N.E.2d 1150 (Ill. App. Ct. 1985), a fireman was sued for negligently causing an automobile accident. The complaint against him was filed in May of 1976. He raised no affirmative defenses in his answer and made no motions putting immunity from suit at issue. Trial began on May 25, 1984. On May 29th he sought to file an affirmative defense of statutory immunity based on his contention that he was acting in performance of his duties as a fireman at the time of the accident. The trial court denied the motion, and the appellate court affirmed, finding that the statutory immunity

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[29]As the Fourth District correctly noted in this case, unlike the Eleventh Amendment grant of immunity, section 627.351(4)(c) does not state that the courts do not have subject matter jurisdiction over claims against JUA,

[30]Here, there can be no credible contention that the issue of JUA's immunity was tried by consent. The record clearly shows that IINA was taken by surprise when the defense was raised for the first time on the sixth day of trial (T. 778), and was not prepared to argue the issue or counter the defense.

defense was untimely raised. Likewise here, JUA had three years to properly raise its immunity defense, and since it failed to do so, the trial court and the Fourth District correctly held that JUA waived the defense.

D.

Even If Not Waivable, JUA's Statutory Immunity Is Not "Identical" To FIGA's Statutory Immunity And Does Not Preclude a Bad Faith Claim Because JUA's Duty To Act in Good Faith Does Not Arise Under Subsection 627.351(4)

JUA relies on cases construing provisions of various state statutes that create and govern insurance guaranty associations, including the Florida Insurance Guaranty Association ("FIGA"), and cites numerous FIGA cases to support its theories. FIGA and JUA are not the same, however, and FIGA case law and statutes cannot be used wholesale to support the theory that JUA is immune from a bad faith suit. FIGA and JUA -- and the statutes creating them, including the immunity provisions -- are different in several critical respects.

First and foremost, JUG's duty of good faith arises not under subsection 627.351(4), but rather under the common law[31] and under section 624.155 of the Florida Statutes because JUA

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[31]This Court has summarized the common law duty of good faith which is imposed on *all* insurers doing business in this State:

> An insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business. For when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured. This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. The insurer (continued., .)

is "an insurer". On the other hand, FIGA's powers and duties arise from the statute creating it, not from any relationship with the insured. See Nevada Ins. Guar. Ass'n v. Sierra Auto Ctr., 844 P.2d 126, 128-29 (Nev. 1992) (holding that the Nevada Insurance Guaranty Association (NIGA) did not owe a duty of good faith and fair dealing to the insured of an insolvent insurer, even though NIGA assumed the obligations of the insurer under the policy, because NIGA's relationship with the insured was purely statutory, not contractual). FIGA is responsible for claims on policies written by insolvent insurers. It is the insolvent insurers that owe the duty of good faith to the insureds because it is they who entered into the contractual relationships with the insureds. It is this duty that is then assumed by FIGA under section 63 1.57 and then immunized under section 63 1.66.

Contrary to JUA's assertions Fernandez v. Florida Ins. Guar. Ass'n, 383 So. 2d 974 (Fla. 3d DCA), rev. denied, 389 So. 2d 1109 (Fla. 1980) and the other cases JUA relies on interpreting state insurance guaranty association statutes are not dispositive of the JUA immunity issue in the present case. First, and most importantly, there was of course no issue in Fernandez as to whether FIGA's immunity defense was timely raised. In that case, the immunity issue was raised and resolved on a motion to dismiss early in the proceedings. Id. at 975.

Second, the rationale for immunity from a bad faith suit applicable to FIGA is inapplicable to JUA. FIGA is not an insurance company. It does not write policies or collect

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[31](... continued)

> must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.

Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980) (citations omitted).

premiums. It was created solely to " [p]rovide a mechanism for the payment of covered claims under certain insurance policies" where the insurer has become insolvent. § 631.51, Fla. Stat. (1987). Thus, without FIGA neither the injured third party nor the policyholder would ever receive the benefit of the insurance policy, possibly paid on for years, once the insurer became insolvent. In immunizing FIGA, the legislature was free to determine that a great enough benefit had been bestowed on the insured without subjecting FIGA to additional liabilities. See Schreffler v. Pennsylvania Ins. Guar. Ass'n, 586 A.2d 983, 985 (Pa. Super. Ct.) ("the [Insurance Guaranty Association] Act does not intend to place a claimant in all cases in the same position she would have been [in] had the insurance company remained solvent. The Act creates a means by which *limited recovery* may be had in instances where none would have been possible due to the insolvency. ") (emphasis added), anneal denied, 600 A.2d 196 (Pa. 1991).

JUA, on the other hand, was formed as an insurance company to collect and invest premiums and to pay out on claims (T. 785). It has all of the duties of any insurance company -- duties that are not listed in subsection 627.351(4) -- and JUA's insureds are entitled to the same good faith resolution of claims as are insureds of all other *solvent* insurers.

And last, JUA and FIGA were created under two separate and distinct chapters of the Florida Statutes. FIGA was created under Chapter 63 1, entitled "Insurer Insolvency; Guaranty of Payment. " JUA, on the other hand, was created under Chapter 627, which governs "Insurance Rates and Contracts. " Furthermore, JUA was created under Part 1 of Chapter 627, entitled "Rates and Rating Organizations. " Thus, the "powers and duties" of JUA found in subsection 627.35 1(4) are powers and duties to set rates, collect premiums and collate statistics.

JUA's duties as ***an insurer*** -- that is, to fairly and promptly investigate, evaluate, and attempt to settle malpractice claims -- are nowhere mentioned "under this subsection. "[32]

The FIGA statute, on the other hand, contains a separate subsection which lists specifically the " [plowers and duties of the association. " § 631.57, Fla. Stat. (1987). As one of its powers and duties FIGA is "deemed the insurer to the extent of its obligation on the covered claims, and, to such extent, shall have all rights, duties, and obligations of the insolvent insurer. . . . " § 631.57(1)(b), Fla. Stat. (1987). Thus, if FIGA commits bad faith in the exercise of duties assumed from the insolvent insurer, it is immune because these duties are explicitly listed "under this part." § 631.66, Fla. Stat. (1987).[33]

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[32]Section 627.35 1(4)(c) provides in pertinent part that

> [t]here shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, self-insurer, or its agents or employees, the Joint Underwriting Association or its agent or employees, members of the board of governors, or the department or its representatives for any action taken by them in the performance of their powers and duties ***under this subsection.***

§ 627.351(4)(c), Fla. Stat. (1987) (emphasis added).

[33]Section 63 1.66 provides in pertinent part that

> [t]here shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, the association or its agents or employees, the board of directors, or the department or its representatives for any action taken by them in the performance of their powers and duties ***under this part.***

§ 631.66, Fla. Stat. (1987) (emphasis added).

111.

WHETHER OR NOT IINA'S BAD FAITH CLAIM AGAINST JUA IS A "COVERED CLAIM" IS IRRELEVANT

JUA is liable for the bad faith judgment against it ***not*** because the bad faith claim is a "covered claim, " but because JUA was found by a jury to have committed bad faith in the settlement of a "covered claim" against one of its insureds. The term "covered claim" has no relevance in the context of this lawsuit. That term is found only in the FIGA statute, section 63 1.57, not in the JUA statute, subsection 627.35 1(4). Subsection 63 1.57(1) states that FIGA is "obligated to the extent of the covered claims" and is "deemed the insurer to the extent of its obligation on the covered claims, and, to such extent, shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent, " § 631.57(1)(a) and (b), Fla. Stat. (1987). Subsection 631.54(3) defines a "covered claim" as an unpaid claim "which arises out of, and is within the coverage" of an insurance policy issued by a member insurer that has become insolvent. § 631.54(3) and (6), Fla. Stat. (1987). Thus, FIGA is ***automatically*** obligated up to certain amounts on "covered claims" brought under its insolvent members' policies.

The term "covered claim" is not used or defined in the statute creating JUA. JUA is not automatically obligated to pay ***the*** claims of ***another*** insurer as is FIGA. Instead, JUA is the ***primary carrier*** of malpractice insurance and, unlike FIGA, obtains its funds from premiums paid by its insureds. Thus, the question of whether a bad faith claim is a "covered claim, " while relevant to lawsuits against FIGA for non-payment of "covered claims" under section 631, is

totally irrelevant[34] to the issue of whether JUA should be held liable as the primary medical malpractice insurer for the bad-faith handling of a bona fide claim against one of its insureds. That JUA is "authorized" to write policies for medical malpractice to "cover claims" against the insured doctor or hospital does not preclude *the* insured (or, as in this case, someone standing in the shoes of the insured) from bringing a claim *against* ***JUA***.

JUA's argument that there are no "excess" funds from which to pay a bad faith claim is belied by the facts of this case and by the JUA statute. The statute provides for JUA to assess its premiums at rates "adequate to pay claims and expenses" and provides for a ratemaking formula that includes a "margin for contingencies." § 627.351(4)(d), Fla. Stat. (1987). One of the "expenses" of JUA is the price of contracting with other insurance companies to provide claims services. See § 627.351(4)(f), Fla. Stat. (1987). In fact, in the present case JUA paid St. Paul a sizeable annual fee for servicing the malpractice claims brought against JUA's insureds (R. 155-56; T. 797). Moreover, the contract between JUA and St. Paul provides for JUA to indemnify St. Paul for all costs, including judgments, incurred as a result of any suit brought against St. Paul based on its actions as the servicing carrier (R. 157).[35] In agreeing

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[34]Likewise, the cases cited by the JUA for the proposition that the claim in question is not a "covered claim" and thus cannot be collected from JUA, are cases dealing exclusively with insurance guaranty associations like FIGA and are, therefore, completely inapposite.

[35]The paragraph in the Servicing Carrier Agreement between JUA and St. Paul providing for indemnification of St. Paul states in pertinent part:

> (a) The Association shall indemnify and hold harmless the Servicing Carrier and any affiliate, subsidiary, officers, employees and agents against all costs, including the amounts of judgments (including interest thereon), settlements, fines or penalties and expenses, actually and necessarily incurred in connection with the defense of any action or threatened action, suit, proceeding

(continued.. .)

to such a provision the board of governors surely contemplated that bad faith claims, as well as others would be brought against St. Paul.[36]

CONCLUSION

Since no conflict exists between the holding in this case and Sebrina Utils. Cornm'n v. Sicher, this case should be dismissed for lack of subject matter jurisdiction. If St. Paul's petition to review the same joint and several judgments in the companion case is dismissed because not timely filed, JUA's petition will be rendered moot, resulting in this Court's losing jurisdiction. On the merits, this Court should affirm the holding below because to the extent JUA had an immunity defense it was statutory only and JUA waived its defense by failing to timely raise it.

Finally, JUA should have no immunity for a bad faith action. Without threat of penalty for the bad faith resolution of claims against its insureds, JUA has no incentive to closely supervise or sanction the bad faith conduct of the servicing carrier it employs to carry out its business. Unless answerable for its bad faith, JUA is given the means to gamble with someone

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[35](... continued)

> or claim, which the Servicing Carrier or such person, firm or corporation may at any time sustain or incur by reason of any act, error or omission on behalf of the Servicing Carrier in the conduct of its duties or obligations under this Agreement. (R. 157.)

[36]Under Section III of the Agreement entitled "Powers and Duties of the Servicing Carrier" St. Paul was required

> (e) To adjust, settle, compromise, defend, litigate and pay losses and claims arising out of or in connection with Association policies, binders and applications on behalf of the Association, including, with respect thereto, the right to hire and discharge attorneys and to hire independent adjusters in those circumstances in which the use of adjusters regularly employed by the Servicing Carrier is impractical. (R. 152,)

else's money -- either the insured's or, as here, that of the insured's excess carrier. If, as it contends, JUA is not "funded" for bad faith claims, surely the appropriate remedy is not for the insured or the insured's excess carrier to pay the price of the servicing carrier's incompetence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief on the Merits was mailed this 28th day of July, 1995 to: Bruce Culpepper, Esq., **PENNINGTON & HABEN, P.A.,** Counsel for Petitioner, P.O. Box 10095, Tallahassee, Florida 32302-2095, and a courtesy copy was mailed to Scott H. Michaud, Esq., **MICHAUD, BUSCHMANN, FOX, FERRARA & MITTELMARK, P.A.,** 33 Southeast 8th Street, Suite 400, Boca Raton, Florida 33432.

Lucinda A. Hofmann

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INDEX TO APPENDIX

Florida Medical Malpractice Joint Underwriting Ass'n v. Indemnity Ins. Co. of N. Am.
652 So. 2d 1148 (Fla. 4th DCA 1995) . . . . . , . , ... , Al

FLORIDA MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION and St. Paul Fire & Marine Insurance Company, Appellant,

v.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Appellee.

No. 93-0009.

District Court of Appeal of Florida, Fourth District.

Jan. 18, 1996.

Rehearing Denied April 20, 1995.

Excess carrier brought action for damages against medical malpractice Joint Underwriting Association (JUA), as primary carrier, and its agent for statutory and common-law bad faith in the investigation, evaluation and settlement of claim against an insured of JUA. The Circuit Court for Broward County, M. Daniel Futch, J., entered judgment on a jury verdict in favor of excess carrier, and defendants appealed. The District Court of Appeal, Farmer, J., held that contention of JUA and its agent that they were statutorily immune from excess carrier's suit did not implicate question of subject matter jurisdiction, and tlierefore their claim of immunity was afkirmative defense that was waived by not being pleaded before trial.

Affirmed.

Insurance ⇐514.5(1)

Contention of medical malpractice Joint Underwriting Association (JUA), as primary carrier, and its agent that they were statutorily immune from bad faith lawsuit by excess carrier did not implicate question of subject matter jurisdiction, and thus was affirmative defense that was waived by not being pleaded before trial, since statute upon which they were relying merely states that there shall be no liability and no cause of action against JUA and its agents arising from exercise of powers and duties under the statute, not that the court shall lack jurisdiction of any claim brought against such entities. West's F.S.A. § 627.351(4)(c).

Bruce Culpepper, Scott H. Michaud, and James T. Ferrera of Michaud, Buschmann, Fox, Ferrera & Mittelmark, P.A., Boca Paton, and Darren A. Schwartz, Tallahassee, for appellants.

Linda Wells, Daniel S. Pearson, and Lucinda A. Hofmann of Holland & Knight, Miami, for appellee.

FARMER, Judge.

We review a judgment upon a jury verdict in which an excess insurance carrier recovered bad faith damages from the primary carrier equal to the amount of the settlement exceeding the primary coverage. Although a number of issues have been raised on this appeal by the primary carrier, we discuss only one, immunity from suit, the others having no merit. We affirm.

Juan Figueredo sued the Miami Children's Hospital [MCH] in medical &practice for severe injuries to his daughter that he claimed resulted from premature discharge from the hospital's ER, and negligent treatment after she was admitted, including a surgery that closed with a sponge in the patient, all of which left her blind, deformed, scarred, and comatose. MCH had primary insurance with the Florida Medical Malpractice Joint Underwriting Association [JUA] in the amount of $500,000. The JUA in turn had contracted with St. Paul Fire & Marine Insurance Company [St. Paul] to service and adjust claims against its insureds in the same way that the JUA could do if it were doing the servicing. Under the contract, St. Paul had complete control and authority in its handling of claims; in effect the JUA had given St. Paul full and sufficient power to act in its place, including the obligation to provide JUA's insureds with a defense.

Meanwhile, MCH also had a policy with Indemnity Insurance Company of North America [IINA] providing excess coverage from $500,000 up to $20,000,000. IINA was a true excess carrier, with no responsibility to provide its insured with coverage for the

first $500,000 of any claim or with its primary defense.

Some two years after suit was filed, counsel for the personal injury plaintiff made a demand to settle the case for $375,000, or well within the' primary coverage.[1] St. Paul never responded to the demand, although it had had nearly two years 'to evaluate the case; nor did it ever notify IINA of it.[2] When no response was forthcoming after a month's time had elapsed, the lawyer withdrew it.

In May 1987, the case' finally settled for $1,250,000, of which amount IINA paid $750,000. IINA sued St. Paul and the JUA for statutory and common law bad faith in the investigation, evaluation, 'and settlement of the Figueredo claim. After a two-week trial, a jury returned a verdict in favor of IINA

On appeal, JUA and St. Paul claim immunity from this kind of lawsuit under section 627.351(4)(c), Florida Statutes (1993).[3] The immunity defense was not raised in any pleading or pretrial stipulation. It was asserted for the first time on the sixth day of trial, couched as a *motion to* dismiss *the* claims on the ground8 that the court lacked subject matter jurisdiction because of the JUA and St. Paul'8 lately filed claim to immunity. We agree with IINA's arguments on appeal.

Plainly the claim of immunity does not implicate the question of subject matter jurisdiction and was, therefore, an affirmative defense that was waived by not being pleaded before trial. In City *of Pembroke Pines v. Atlas,* 474 So.2d 237 (Fla. 4th DCA 1985), *rev. denied,* 486 So.2d 595 (Fla.1986), the city was sued for damages from a personal injury. After the entry of 'a default judgment, the city asserted for the first time that it was immune from suit and that in failing to allege compliance with section 768.28 plaintiff's complaint did not vest the court with subject matter jurisdiction of the suit. On appeal, we noted that even though the. city had knowledge of the claim and suit, it had failed to raise the pleading defect until after entry of final judgment. We held:

> "appellee's failure to allege compliance with the statutory notice provision did not deprive the circuit court of subject matter jurisdiction because such an allegation is not an element necessary to the existence of subject matter jurisdiction."

474 So.2d at 238. We conclude that the *Atlas* holding applies to the assertion of immunity in this case.[4]

There'.is little difference between the kind of immunity conferred on. municipalities under section 768.28, and that conferred on the JUA and its agents under section 627.351(4). The latter statute does not state that the court shall lack jurisdiction of any claim brought against the JUA or its agents; in fact it merely say8 that "there shall be no *liability* * * * and no *cause of action* of any nature shall arise * * * ." Hence, we conclude that kind of immunity conferred by this statute is an ordinary affirmative defense which must be pleaded or it is deemed waived. Appellants' attempt to assert, it for the first time on the sixth day of trial was

1. There was a dispute as to whether the lawyer had the authority to make the offer,. which we assume the jury resolved in favor of-IINA.

2. Within weeks after suit was filed, an adjustor with St. Paul wrote a report recommending settlement if the allegations of the sponge were "correct and documented." Several weeks after that recommendation St. Paul received the child's medical records and sent them to two physicians for evaluation. One of the two doctors concluded that MCH was liable for the sponge mistake, and concluded that there was an issue as to whether MCH was responsible for a premature discharge from the hospital as well as other issues. Another consultant to St. Paul told it that plaintiffs attorney was known to prefer settling medical malpractice cases rather than trying them. IINA prodded St. Paul to settle the case, but it wasn't until March 1987 that it made the first offer-$400,000.

3. That statute provides in part: "There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer, self-insurer, or its agents or employees, the Joint Underwriting Association or its agents or employees, members of the board of governors, or the department or its representatives for any action taken by them in the performance of their powers and duties under this subsection."

4. The second district has decided this issue contrary to the position we took in *Atlas.* We certify conflict with *Sebring Utilities Commission v. Sicher,* 509 So.2d 968 (Fla. 2d DCA 1987).

improper without the consent of the adverse party and the approval of the court.

We disclaim making any decision as to whether the immunity granted by section 627.351(4) would operate to avoid the kinds of claims asserted by IINA. Our decision is purely a procedural one, with no implications on the substantive questions raised by IINA as to the scope of the immunity granted by this statutory provision.

AFFIRMED.

GUNTHER, J., and OWEN, WILLIAM C., Jr., Senior Judge, concur.