SUPREME COURT OF FLORIDA

CASE NO. 85,683
4TH DCA CASE NO. 93-0009

FLORIDA MEDICAL MALPRACTICE
JOINT UNDERWRITING ASSOCIATION,

Petitioner,

v.

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

Respondent.
_____/

INITIAL BRIEF OF FLORIDA MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION

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PRELIMINARY STATEMENT

Petitioner, FLORIDA MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION, will be referred to as "FMMJUA." THE ST. PAUL FIRE & MARINE INSURANCE COMPANY will be referred to as "ST. PAUL." Respondent, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, will be referred to as "IINA." References to the record on appeal will be by the prefix "R," followed by the appropriate page number. References to exhibits introduced at the trial will be by Plaintiff/Defendant, followed by the appropriate exhibit number. References to the pages of the transcript of the trial will be "T," followed by the appropriate page number. References to the district court's opinion will be by "App," followed by the appropriate page number of the opinion found in the appendix.

STATEMENT OF THE CASE AND FACTS

In 1983, Nadia Figueredo, a minor, suffered injuries while a patient at the Miami Children's Hospital. (T. 952). At the time of this incident, the hospital was insured by the FMMJUA with coverage limits of $500,000.00 per claim. (Plaintiff's Exhibit 2). In addition to this FMMJUA policy, the hospital had a $20,000,000.00 excess insurance policy through IINA. (Plaintiff's Exhibit 3).

In 1983, Ms. Figueredo, through her father, Juan Figueredo, filed suit against the hospital and others for medical malpractice. In response to this lawsuit, the FMMJUA, through its servicing carrier, ST. PAUL, appointed counsel to represent the hospital in the malpractice suit. (T. 944). The FMMJUA had contracted with

ST. PAUL to service and adjust claims against its insurers. Under the contract, ST. PAUL had complete control and authority in its handling of claims; in effect, the FMMJUA had given ST. PAUL full and sufficient power to act in its place (App. 2), including the obligation to provide FMMJUA's insurers with a defense. (T. 789). The only function of the FMMJUA was to pay the amount that ST. PAUL dictated. (T. 790).

The Figueredo's initial counsel was Fernando Freire. (T. 881). During his handling of the case, Mr. Freire did not discuss with his clients his evaluation of the case or its settlement value (T. 888), and no settlement negotiations were held with ST. PAUL. (T. 886, 892, 893, 911, 916). In 1985, the case was referred by Mr. Freire to Attorney Neil Roth. (T. 883). Throughout this time, the evaluation of counsel for the hospital and that of the claims personnel of ST. PAUL was that the case had a value of no more than $150,000.00. (T. 951-952). IINA had been placed on notice of the Figueredo claim from its inception, and on two occasions sent their representatives to review ST. PAUL's claim file. (T. 1220). (Defendant's Exhibit 4). The evaluation of the claim by the IINA personnel was substantially the same as that of ST. PAUL and counsel for the hospital. (T. 337).

Upon receiving the referral from Mr. Freire, Mr. Roth reviewed the file materials available to him and noted two significant facts about the claim. First, that Ms. Figueredo had indeed suffered a retained surgical sponge removed after several days and an I.V. infiltrate burn on her ankle, and second, that Ms. Figueredo had

significant preexisting disability and retardation stemming from meningitis she had contracted during her early childhood in Cuba. (T. 811-812). Indeed, it was complications secondary to these preexisting problems which led Ms. Figueredo to be treated by the hospital in the first instance. Without the Figueredos' knowledge or consent, Attorney Roth wrote a letter to the hospital's defense counsel demanding $375,000.00 in full settlement of the malpractice claim (T. 883), an amount well in excess of the evaluation of defense counsel hospital, ST. PAUL, IINA and Mr. Roth. (T. 842, 973). At the time of this demand, Mr. Roth had never met or communicated with either Nadia Figueredo or her father, and the family was entirely unaware of Mr. Roth's involvement in their case. (T. 823). No settlement offer was made in response to that demand. (T. 847).

In March 1986, Mr. Figueredo was deposed at his home and it was during this deposition that Attorney Roth first met Nadia Figueredo and her father. (T. 853). At the time of that visit to the Figueredo home, Mr. Roth met with the minor's parents and they communicated to him the change that had taken place in Nadia's condition since her treatment at Miami Children's Hospital. Nadia was now required to use a feeding tube, was unable to ambulate, and was basically in a vegetative state. It was only during this initial visit with Mr. Roth that the Figueredos were able to communicate the changes in their daughter's condition. (T. 853). Based on this new knowledge, Mr. Roth modified his initial evaluation of the case. (T. 857). He also learned that his

clients, knowing the true nature of their daughter's problems, would not have agreed to accept the amount offered to settle her claim. (T. 826).

Mr. Roth subsequently withdrew the $375,000.00 demand (T. 974), discovery in the case proceeded, and on October 30, 1986, Mr. Roth made a non-negotiable demand of $1.25 million to settle the case. (R. 876). In fact, the case was settled for that amount in April, 1987. In that settlement, the FMMJUA paid their $500,000.00 policy limits and IINA, after attempting unsuccessfully to negotiate a lower amount, paid the additional $750,000.00 out of their excess policy. IINA conceded and their experts agreed that $1,250,000.00 was a fair and appropriate settlement amount for Nadia's injuries. (T. 723, 932).

Subsequently, IINA sued the FMMJUA and the ST. PAUL for bad faith in the investigation, evaluation and negotiation of the malpractice claim against the hospital. (R. 51-55). The case went to trial in November 1992 on the issues of statutory and common-law bad faith against both the FMMJUA and ST. PAUL. (T. 21). On the sixth day of trial and after IINA had rested its case, the FMMJUA and ST. PAUL moved the court to dismiss the case for lack of subject matter jurisdiction and for failure to state a cause of action based on the immunity provision set forth in §627.351(4), Fla. Stat. (T. 770-774). The motion was denied by the court on November 13, 1992, and a jury verdict was returned against both the FMMJUA and ST. PAUL for bad faith. (R. 252-253).

On November 23, 1992, the FMMJUA and ST. PAUL moved for Judgment in Accordance with Motion for Directed Verdict and in the alternative moved for a new trial. (R. 256-260). Both motions were denied by the Honorable Daniel Futch (ret.) on December 8, 1992. (R. 359-360). The FMMJUA and ST. PAUL filed their notice of appeal to the district court on December 28, 1992, (R. 361-362), and on January 18, 1995, the district court entered an order affirming the jury verdict. The district court, as a matter of law, held that the FMMJUA and ST. PAUL's claim of immunity does not implicate the question of subject matter jurisdiction and was, therefore, an affirmative defense that was waived by not being plead before trial. (App. 4). The district court certified conflict between the cases of City of Pembroke Pines v. Atlas, 474 So. 2d 237 (Fla. 4th DCA 1985), rev. denied, 486 So. 2d 595 (Fla. 1986), and Sebring Utilities Commission v. Sicher, 509 So. 2d 968 (Fla. 2nd DCA 1987). (App. 4).

On January 30, 1995, the FMMJUA filed a motion for rehearing with the district court, which was denied on April 20, 1995. The FMMJUA's notice to invoke the discretionary jurisdiction was timely filed on May 3, 1995.

SUMMARY OF ARGUMENT

§627.351(4), Fla. Stat., provides that the FMMJUA is immune from suit for any action taken by it in the performance of its powers and duties. Therefore, pursuant to this immunity provision, the FMMJUA cannot be held liable for bad faith, IINA could not properly state a cause of action against the FMMJUA for bad faith,

and the trial court lacked subject matter jurisdiction to enter a judgment against the FMMJUA for bad faith.

In addition, that same Florida statute which confers immunity also sets out the types of covered claims for which the FMMJUA is responsible. A bad faith claim is not one of those covered claims. Therefore, the trail court lacked the subject matter jurisdiction necessary to enter a monetary judgment against the FMMJUA for bad faith.

For the reasons stated above, the judgment in favor of IINA should be reversed in favor of the FMMJUA since the IINA could not properly state a cause of action against the FMMJUA for bad faith, and the trial court lacked subject matter jurisdiction to enter a judgment against the FMMJUA for bad faith.

ARGUMENT

THE FMMJUA'S ABSOLUTE AND UNQUALIFIED IMMUNITY FROM BAD FAITH ACTIONS WAS NOT REQUIRED TO BE PLEAD AS AN AFFIRMATIVE DEFENSE PRIOR TO TRIAL AND WAS PROPERLY RAISED FOR THE FIRST TIME AT TRIAL THROUGH A MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION.

A.

The case at bar is one of first impression requiring the interpretation of §627.351(4), Fla. Stat. (1987). In 1975, as a response to the medical malpractice insurance crisis, the Florida Legislature created the FMMJUA to ensure the availability of medical malpractice insurance coverage for health care providers who were unable to obtain professional liability insurance. See Hawkes, F.T., The Second Reformation: Florida's Medical Malpractice Law, 13 Fla. St. U.L. Rev. 747, 791 n.212. The powers, duties,

rights and immunities of the FMMJUA and its agents are set forth in §627.351(4), Fla. Stat. (1987). The FMMJUA's immunity from any action brought against it or its agents stems from §627.351(4)(c), Fla. Stat. (1987), which provides:

> 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.

The above-quoted provision applies directly to IINA's claim of bad faith and affords an absolute and unqualified immunity to the FMMJUA for any claim of bad faith. An application of the plain terms of §627.351(4)(c), Fla. Stat., which neither requires nor permits judicial construction, compels the conclusion that the FMMJUA is immune from any action against it for bad faith. See Fernandez v. Florida Ins. Guaranty Ass'n, 383 So. 2d 974 (Fla. 3rd DCA 1980), rev. denied, 389 So. 2d 1109 (Fla. 1980). The plain and unambiguous words of this statute are the best evidence of the legislative intent to afford the FMMJUA immunity from bad faith actions. Streeter v. Sullivan, 509 So. 2d 268, 271 (Fla. 1987); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984); Cf, §627.351(6)(i), Fla. Stat. (statutory immunity provision for Residential Property and Casualty JUA does not apply to actions for breach of contract or agreement pertaining to insurance, or any other willful tort such as a bad faith claim).

IINA's claim arose from the alleged failure of the FMMJUA, through its servicing carrier, ST. PAUL, to settle the underlying medical malpractice claim within the FMMJUA's policy limits. The FMMJUA and ST. PAUL's decision not to settle the underlying claim was an "action taken by them in the performance of their powers and duties."

§627.351(4)(c), Fla. Stat., which affords this absolute and unqualified immunity to the FMMJUA, is identical to the terms of 5631.66, Fla. Stat., which grants immunity to the Florida Insurance Guaranty Association ("FIGA"). That statute states:

> There 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.

When one applies the cases construing FIGA's immunity to the instant case, it is plain that the FMMJUA is immune from suit for the bad faith alleged against it. The strongest case supporting this rationale is Fernandez v. Florida Ins. Guarantv Ass'n, 383 So. 2d 974 (Fla. 3d DCA 1980), rev. denied, 389 So. 2d 1109 (Fla. 1980). In Fernandez, the plaintiff was injured by the negligence of an individual insured by Manchester Insurance Company. The plaintiff brought suit against the insured and Manchester. Manchester subsequently became insolvent and FIGA was brought in to succeed it as a party defendant. After FIGA rejected an offer to settle the claim for the insured's $10,000.00 policy limits, the case went to trial and the plaintiff received a $54,000.00 jury verdict. The verdict was reduced to a $10,000.00 judgment against

FIGA. The plaintiff then brought an action to recover the $44,000.00 excess, alleging that FIGA was guilty of bad faith for its refusal to settle the claim within the policy limits.

The trial court dismissed the bad faith complaint on the sole grounds that, as a matter of law, no such action could be maintained against FIGA. Id. at 975. The third district affirmed the dismissal holding:

> In establishing [FIGA]...the legislature was careful to restrict its potential liability not only concerning its vicarious responsibility for the acts of the companies it succeeds... but also as to its own allegedly wrongful activities.

Id. Citing the immunity afforded to FIGA pursuant to 5631.66, Fla. Stat., the third district held:

> This provision clearly, unambiguously and directly applies to the present situation. It is obvious that the present claim arises from FIGA's refusal to accept the $10,000 settlement offer which was an "action" it took "in the performance of [its] powers and duties" under the statute to dispose of the covered claim in question. An application of the plain terms of 631.66, which neither require nor permit judicial construction, therefore compels the conclusion that no bad faith action lies against FIGA.

Fernandez, 383 So. 2d at 975. See also Florida Insurance Guaranty Assoc. v. Giordano, 485 So. 2d 453, 457 (Fla. 3d DCA 1986) ("under 5631.66, Fla. Stat. (1981),...no action for bad faith lies against FIGA").

An immunity provision similar to §627.351(4)(c) and 631.66, Fla. Stat., can also be found in the Pennsylvania Insurance Guaranty Association Act. That immunity language was interpreted in Schreffler v. Pa. Ins. Assoc., 506 A. 2d 983 (Pa. supre. 1991), when the administrator of an estate sued a tavern. Subsequently,

the tavern's insurer became insolvent. Pursuant to the terms of the Pennsylvania Insurance Guaranty Association Act, the Pennsylvania Insurance Guaranty Association ("PIGA") undertook payment of the claims owed by the insolvent insurer.

During the course of the wrongful death case, the administrator offered to settle the case for $75,000.00, but the offer was rejected by PLEA. Subsequently, the tavern and administrator stipulated to an entry of judgment in excess of $1 million, and a bad faith action was filed against PIGA.

PIGA relied on the immunity provisions of the Pennsylvania statute and cited Florida's Fernandez decision as authority that the language contained within the PIGA Act barred any bad faith claims. The Pennsylvania court agreed and stated:

> We conclude that PIGA, under Section 1701.601, has no liability for actions taken by it in performance of its duties under the Act. Applying the clear language of the statute requires the conclusion that there is no cause of action for bad faith failure to settle since settlement is a power conferred upon PIGA under the terms of the Act.

Id. at 985 (emphasis added).

The FMMJUA is vested with the power and duty of providing coverage for medical malpractice claims pursuant to §627.351(4)(d), Fla. Stat. Any alleged bad faith of either the FMMJUA or its agents arises from the exercise of these powers and duties, and as such, an absolute and unqualified immunity is conferred.

B.

The lower court's holding that the FMMJUA'S claim of immunity under §627.351(4), Fla. Stat., does not implicate the question of

subject matter jurisdiction and was, therefore, an affirmative defense that was waived by not being plead before trial is erroneous as a matter of law. The immunity was related to subject matter jurisdiction and was, therefore, properly raised for the first time at trial pursuant to Rule 1.140(h)(2), Fla. R. Civ. P. In reaching its decision, the district court relied on City of Pembroke Pines v. Atlas, 474 So. 2d 237 (Fla. 4th DCA 1985), rev. denied, 486 So. 2d 595 (Fla. 1986). That case, however, is distinguishable from the instant case.

In Atlas, the city was sued for damages from a personal injury. After the entry of a judgment, the city asserted for the first time that it was immune from suit on the grounds that the plaintiff had failed to comply with the pre-suit notice requirements contained in §768.28(6), Fla. Stat. The City contended that the plaintiff failed to allege compliance with the notice provision of §768.28(6), Fla. Stat., in order to vest the circuit court with subject matter jurisdiction over the claim.

In rejecting the City's argument, the fourth district held that the compliance with the pre-suit notice requirements contained in §768.28(6), Fla. Stat., was a condition precedent to suit, and that the failure to allege compliance with the statutory notice provision did not deprive the circuit court of subject matter jurisdiction because such an allegation was not an element necessary to the existence of subject matter jurisdiction.

From the face of the fourth district opinion, it is clear that the district court in Atlas only addressed the issue of the pre-

suit notice requirement contained in §768.28(6), Fla. Stat. The case did not involve a statutory provision, as in the present case, that affords an absolute and unqualified immunity to a statutorily created entity such as the FMMJUA. In addition, the motion by the City was not made until after judgment, and the statute at issue in Atlas did not expressly forbid a cause of action against the City, as does the statute creating the FMMJUA.

Atlas involved an interpretation of the notice requirements of §768.28(6), Fla. Stat., which are clearly not jurisdictional. See Drax International Ltd. v. Division of Administration, 573 So. 2d 105 (Fla. 4th DCA 1991). This case, on the other hand, involves a statute providing an express immunity from suit and is more akin to the decision of the second district in Sebring Utilities Commission v. Sicher, 509 So. 2d 968 (Fla. 2nd DCA 1987). In Sebring, the court addressed the issue of subject matter jurisdiction within the context of a statutory provision, like the present case, which expressly affords immunity.

Sebring was a malicious prosecution action against the Sebring Utilities Commission. The second district held that the Commission was immune from suit pursuant to the doctrine of sovereign immunity, as extended to municipalities in §768.28, Fla. Stat., and that tort actions against a municipal agency for malicious prosecution and punitive damages are expressly prohibited by §768.28(9)(a) and §768.28(5), Fla. Stat. The court held that "governmental immunity is not an affirmative defense, but is jurisdictional and may be raised at any time." Sebring, 509 So. 2d

at 969. The Sebring court follows a line of district court cases holding that sovereign immunity relates to subject matter jurisdiction and may be raised at any time. See e.g. Kirk v. Kennedy, 231 So. 2d 246 (Fla. 2nd DCA 1970) (defense of sovereign immunity relates solely to the jurisdiction of the court over the subject matter); State, Dept. of Highway Safety v. Kropff, 491 So. 2d 1252 (Fla. 3rd DCA 1986) (sovereign immunity relates to subject matter jurisdiction and may be raised at any time including appeal).

Simply because the FMMJUA is not a governmental agency in the strict sense of the term, and the immunity afforded to the FMMJUA is statutory, does not dictate a finding that the immunity is automatically an affirmative defense that must be plead or else it is waived.

The immunity afforded to the FMMJUA under §627.351(4)(c), Fla. Stat., is absolute and unqualified. The FMMJUA does not need to set forth any type of affirmative evidence in order to prove its entitlement to immunity. It makes no difference whether the immunity is statutory or sovereign. An absolute and unqualified immunity place the protected entity beyond the subject matter jurisdiction of the court. Buck v. McLean, 115 So. 2d 764 (Fla. 1st DCA 1959) (the immunity of the state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within reach of the court's process). The FMMJUA's absolute and unqualified immunity from bad faith actions was not required to be plead as an affirmative

defense prior to trial, and was properly raised for the first time at trial through a motion to dismiss for lack of subject matter jurisdiction.

THE FMMJUA'S ABSOLUTE AND UNQUALIFIED IMMUNITY FROM BAD FAITH ACTIONS WAS NOT REQUIRED TO BE PLEAD AS AN AFFIRMATIVE DEFENSE PRIOR TO TRIAL AND WAS PROPERLY RAISED FOR THE FIRST TIME AT TRIAL THROUGH A MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION.

Rule 1.140(h)(2), Fla. R. Civ. P., provides that "[t]he defenses of failure to state a cause of action or a legal defense . ..may be raised... at the trial on the merits. As a matter of law, no cause of action could be maintained against the FMMJUA for bad faith. §627.351(4), Fla. Stat. Accordingly, the FMMJUA's immunity from bad faith actions was not required to be plead as an affirmative defense prior to trial, and was properly raised for the first time at trial through a motion to dismiss for failure to state a cause of action. A case illustrative of this point is Terry v. Johnson, 513 So. 2d **1315** (Fla. 1st DCA 1987).

In Terry, a dispute arose out of a contract for the sale of real property. The contract was not fulfilled and the Terrys, the sellers, sued the Johnsons for its breach. The trial court dismissed the complaint determining that the underlying document was in the nature of a mortgage or security instrument within the meaning of §697.01, Fla. Stat., thus requiring a foreclosure proceeding to accomplish its enforcement. It denied, however, the Terrys' motion for leave to amend the complaint to seek the appropriate relief.

On appeal, the district court reversed, holding that the dismissal of the complaint for failure to state a cause of action on the pleaded theory of breach of contract did not bar the Terrys from seeking relief based on a different theory. The court rejected the argument by the Terrys, however, that 5697.01, Fla. Stat., armed the Johnsons with an affirmative defense and that it was waived by not having been raised by motion or in the responsive pleading. In holding that the defense could properly be raised for the first time at trial, the district court stated:

> The defect we find in the Terry's contention derives from Rule 1.140(h)(2), Florida Rules of Civil Procedure. That rule contemplates that the defense of failure to state a cause of action or a legal defense may be raised by motion for judgment on the pleadings or at the trial on the merits. See Curico v. Cessna Finance Corn., 424 So. 2d 868, 872 (Fla. 4th DCA 1982) (such motion can be made as late as the trial of an action but not thereafter). The facts alleged in the Terry's complaint stated a cause of action remedial through foreclosure, but not upon the claim that the Johnsons breached the contract. Thus, the trial court properly considered the Section 697.01 defense raised for the first time by the Johnsons at trial.

Terry, 513 so. 2d at 1316.

Similarly, in the instant case, the trail court had the authority and obligation to consider the immunity defense raised by the FMMJUA for the first time at trial because no cause of action for bad faith can exist against the FMMJUA as a matter of law. Based on the express language of the immunity statute which forbids a "cause of action" for bad faith against the FMMJUA, the FMMJUA was not required to plead this defense prior to trial. Cf, §627.351(6)(i), Fla. Stat. (evidencing legislative intent to hold Residential Property and Casualty JUA liable in tort for bad faith

actions). Rather, the defense was properly raised for the first time at trial pursuant to Rule 1.140(h)(2), Fla. R. Civ. P. This finding is supported by authority both within the State of Florida and beyond dealing specifically with bad faith actions. See e.g. Fernandez v. Florida Ins. Guaranty Ass'n, 383 So. 2d 974 (Fla. 3rd DCA 1980), rev. denied, 389 So. 2d 1109 (Fla. 1980) (no bad faith action could be maintained against FIGA based on immunity statute); Schreffler v. Pa. Ins. Guar. Ass'n, 586 A. 2d 983 (Pa. Super. 1991) (holding no cause of action for bad faith failure to settle); Veillon v. Louisiana Guar. Ass'n, 608 So. 2d 670, 672 (La. App. 3 Cir. 1992) (affirming dismissal of bad faith suit for failure to state cause of action based in part on immunity statute). Because the FMMJUA immunity statute forbids a bad faith cause of action against the FMMJUA, the immunity defense was properly raised at trial for the first time pursuant to Rule 1.140(h)(2), Fla. R. Civ. P. On this basis alone, the decisions of the trial court and district court should be reversed.

THE FMMJUA IS NOT STATUTORILY EMPOWERED TO PAY A BAD FAITH CLAIM BECAUSE THE FMMJUA ONLY PROVIDES COVERAGE FOR MEDICAL MALPRACTICE CLAIMS. THEREFORE, NO CAUSE OF ACTION CAN EXIST AGAINST THE FMMJUA AND THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION TO ENTER A BAD FAITH JUDGMENT AGAINST THE FMMJUA.

A.

The FMMJUA is an involuntary insurance pool. Under §627.351(4)(b), Fla. Stat., all entities licensed to issue casualty insurance and all self-insurers authorized to issue medical malpractice insurance must be members of the FMMJUA and participate

by paying assessments in the event of an underwriting deficit. §627.351(4)(e), Fla. Stat.

There is no legal basis or public policy reason for imposing liability against the FMMJUA for bad faith. The protective function served by imposing liability for bad faith against insurers is unnecessary because the FMMJUA is not a private, profit oriented insurance company; it does not gain financially by refusing to defend or settle claims. There is an economic incentive to deal fairly with insureds. The FMMJUA actually provides a valuable quasi-governmental benefit to insureds. Without the FMMJUA, many health care providers would be unable to purchase medical malpractice insurance coverage on the open market. Accordingly, when the Florida Legislature created the FMMJUA, it specifically granted immunity to it and its agents when performing any action in the performance of their powers and duties under the Act. §627.351(4)(c), Fla. Stat. CF, § 627.351(6)(i), Fla. Stat. (evidencing legislative intent to hold Residential Property and Casualty JUA liable in tort for bad faith actions).

In addition, by its statutorily created structure of operation, the FMMJUA in effect spreads any loss for "covered claims" among other insurers, in the form of a potential assessment against participating members. The FMMJUA generally causes the insurers to subsidize the FMMJUA's payments to policyholders for their "covered claims." The FMMJUA is statutorily unable to collect funds from member insurers beyond that necessary to pay "covered claims." In sum, the legislature, unlike the Residential

Property and Casualty JUA, neither provided for the FMMJUA to obtain money to discharge an adverse tort judgment nor did it authorize it to actually pay such a judgment against it, were one to be rendered. Even if the FMMJUA was authorized to pay a judgment against it beyond the scope of a "covered claim," it is the policyholders and member insurers, not the FMMJUA, who would feel the direct and sole economic impact. Thus, the structure of the FMMJUA demonstrates no intent to require the insurance buying public to pay for damage awards obtained against the FMMJUA for bad faith.

§627.351(4)(d), Fla. Stat., limits the liability of the FMMJUA and the scope of coverage the FMMJUA may offer. Under §627.351(4)(d), Fla. Stat., the FMMJUA shall only:

> provide coverage for claims arising out of the rendering of, or failure to render, medical care or services and ,in the case of health care facilities, coverage for bodily injury or property damage to the person or property of any patient arising out of the insured's activities....

The lower court entered judgment against the FMMJUA for bad faith in the handling of the underlying medical malpractice claim. IINA's claim for bad faith is not included within the types of claims that may be statutorily compensable by the FMMJUA.

The record reflects that the FMMJUA, pursuant to its limited statutory authority, provided coverage to Miami Children's Hospital in the amount of $500,000.00 for claims arising out of the rendering of, or failure to render, medical care or services. (Plaintiff's Exhibit 2). Nowhere in the insurance policy or within

§627.351, Fla. Stat., creating the FMMJUA is there a provision providing coverage for bad faith actions.

Unlike the Residential Property and Casualty JUA, there is no statutory authority in existence whereby the FMMJUA could be held liable for bad faith. No statutory authority exists, express or implied, that would allow the FMMJUA's insurers to be held liable in tort for anything other than a medical malpractice claim. Because a bad faith claim is not a "covered claim," no cause of action can exist against the FMMJUA and the trial court lacked subject matter jurisdiction under §627.351(4)(d), Fla. Stat., to hold the FMMJUA liable for bad faith. Accordingly, the trial court erred when it denied the FMMJUA and ST. PAUL's motion to dismiss raised for the first time at trial. (T. 783). Rule 1.140(h)(2), Fla. R. Civ. P.

B.

§627.351(4)(d), Fla. Stat., is clear in expressing the limited types of claims upon which the FMMJUA may pay, that is, medical malpractice claims. The legislature, in creating the FMMJUA, provided "coverage" for only medical malpractice claims and further gave the FMMJUA and its agents immunity from tort liability arising out of the handling of a claim. In determining whether a claim of bad faith is included within the meaning of "coverage for claims," this court is guided by two well-established legal principles. First, the plain and unambiguous words used in a statute are the best evidence of legislative intent. Streeter v. Sullivan, 509 So. 2d 268, 272 (Fla. 1987); Holly v. Auld, 450 So. 2d 217, 219 (Fla.

1984). In addition, the express mention of a particular class or subject implies exclusion of another. P.W. Ventures Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988); Smith v. State, 606 So. 2d 427 (Fla. 1st DCA 1992). Applying the above principles to the instant case can lead only to the conclusion that the phrase "coverage for claims" was intended to refer solely to medical malpractice claims and not claims for bad faith.

Further, by expressly limiting the types of claims by which the FMMJUA may provide coverage to medical malpractice claims, the legislature demonstrated its intention that bad faith claims should not be "covered." The trial court's judgment imposing liability on the FMMJUA for bad faith in the face of this statutory language was in error and must be reversed.

Although this is a case of first impression involving an interpretation of §627.351(4), Fla. Stat., courts in other states have addressed the specific question of whether a bad faith claim is included within the meaning of a "covered claim," and thus compensable. Each of these courts answered this question in the negative.

In Vaughn v. Vaughn, 597 P.2d 932 (Wash. App. Ct. 1979), a wife obtained a $30,000.00 judgment against her husband for damages arising out of an automobile accident. The couple's automobile liability insurance policy with Medallion Insurance Company had liability limits of $15,000.00. The wife was paid $15,000.00 on the liability policy in June 1975, but by September, Medallion had declared itself insolvent. In January 1977, the wife obtained an

ex-parte order substituting the Washington Insurance Guaranty Association ("WIGA") as the defendant in place of Medallion in a lawsuit seeking damages for the entire $30,000.00 for bad faith in Medallion's handling of the tort action.

The lower court entered judgment in favor of the WIGA, holding that a bad faith claim is not compensable under the Washington statute governing the WIGA. Id. at 933. The appellate court affirmed. Id. at 934. After pointing out that WIGA was liable only for "covered claims," the court went on to examine the language in the Washington statute governing WIGA and held that a bad faith action could not be maintained against it on the grounds that the bad faith claim was not a "covered claim." Id. Although the statutory definition as to the meaning of "covered claims" is different in Vaughn, the case is instructive in that it supports the proposition that the FMMJUA in the case at bar can be held liable only for "covered claims," and that the statutory language controls the question of whether a specific claim is included within the meaning of "covered claims."

In Wells Fargo Credit Co. v. Arizona Prop. & Cas., 799 P. 2d 908 (Ariz. App. 1990), Wells Fargo brought a bad faith action against the Arizona Property and Casualty Insurance Guaranty Fund (the "Fund"). Like the FMMJUA, the Fund was created by statute and recovery from the Fund was limited to the payment of "covered claims."

In determining whether the Fund could be held liable in tort for bad faith, the court examined the language in the Fund's governing statute relating to the definition of "covered claims." "A 'covered claim' is defined as: an unpaid claim, including one for unearned premium, which arises out of and is within the coverage of an insurance policy to which this article applies...." Id. at 912. The court went on to hold that the Fund was thus statutorily limited to the payment of "covered claims," the definition of which did not include tort claims made against the Fund. Id at 913.

Based upon the express language in §627.351(4)(d), Fla. Stat., which limits the liability of the FMMJUA and its agents, and the scope of coverage the FMMJUA may offer for medical malpractice claims, it is clear that there exists no coverage and no cause of action against the FMMJUA for bad faith. No cause of action can exist and the trial court lacked subject matter jurisdiction to enter judgment against the FMMJUA for bad faith, because a bad faith action is not included within the types of claims that are covered. Accordingly, the complaint against the FMMJUA failed to state a cause of action, the trial court lacked subject matter jurisdiction to enter judgment against the FMMJUA for bad faith, and, therefore, the judgment entered by the trial and lower courts should be reversed.

CONCLUSION

Based upon the foregoing facts and citation of authority, the decision of the fourth district should be reversed with the trial

court being directed to **vacate** the judgment against the FMMJUA and enter final judgment in favor of the FMMJUA.

DATED this 5th day of June, 1995.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief of Florida Medical Malpractice Joint Underwriting Association has been furnished to Scott **Michaud, Esquire,** 1515 North Federal Highway, Suite 111, Boca Raton, Florida **33432**; **Edward R. Curtis, Esquire,** Post Office Box 21607, Ft. Lauderdale, Florida 33315; **Daniel S. Pearson, Esquire,** Holland & Knight, 701 Brickell Avenue, Miami, Florida **33131**; and **Marie Lefere, Esquire,** Holland & Knight, One East Broward Boulevard, Suite 1300, Ft. Lauderdale, Florida 33301, by U.S. Mail, this 5th day of June, 1995.

ATTORNEY

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1995

FLORIDA MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION and ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Appellant,

v.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Appellee.

CASE NO. 93-0009
L.T. Case No. 88-12582(24)

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed January 18, 1995

Appeal from the Circuit Court for Broward County, M. Daniel Futch, Judge.

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

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

FARMER, J.

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 malpractice 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

[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.

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 grounds that the court lacked subject matter jurisdiction because of the

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[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 plaintiff's 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."

JUA and St. Paul's 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

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[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).

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 says 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 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.