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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.

REPLY BRIEF OF FLORIDA MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION

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ARGUMENT

INTRODUCTION

As discussed in Appellee's Answer Brief, this proceeding is a companion case to another before this Court.[1] In the St. Paul matter, Appellee 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 jurisdiction on a timely basis. In its answer brief, Appellee avers that, although the FMMJUA filed its notice to invoke jurisdiction on a timely basis that, should the Court dismiss St. Paul's case, no actual controversy will then exist between the FMMJUA and IINA. This proposition is in error and, at best, wholly speculative. If this Court were to dismiss St. Paul's case, and IINA were to recover from St. Paul the full amount of the judgment, for which St. Paul and the FMMJUA are jointly and severally liable, and IINA were to completely and fully release and discharge the FMMJUA from any liability whatsoever and voluntarily dismiss the judgment which has been obtained against the FMMJUA, albeit joint and several liability, then the FMMJUA would agree that no actual controversy would exist between the parties and welcome the dismissal of this action. IINA does not suggest that it is willing to release the FMMJUA and dismiss the judgment as it relates to the FMMJUA, therefore FMMJUA is entitled to a review of the Fourth District's opinion.

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

IINA's argument is based on the assumption that it will be able to recover under the supersedeas bond which has been posted by St. Paul. Although there is a likelihood of such a recovery, the possibility of recovery is, at best, speculative. It is not unknown to this court that bonding companies may be without the resources to satisfy a judgment. More importantly, however, than the speculation of an ultimate and complete satisfaction of the judgment by St. Paul and/or its bonding company is the impact of the bad faith judgment as it stands against the FMMJUA. The precedential value of the Fourth District's opinion would harmfully impact the FMMJUA if the FMMJUA were denied exhaustive appellate review. Unless and until IINA releases and discharges the FMMJUA of any and all liability, the FMMJUA still has a judgment for bad faith which has been obtained against it and is legally entitled to a review of the propriety of that judgment. Any argument to the contrary would circumvent the appellate review rights guaranteed to the FMMJUA and all parties similarly situated, for which there is no support.

I.

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY CERTIFIED CONFLICT BETWEEN ITS DECISION IN THIS CASE AND THE SECOND DISTRICT COURT OF APPEAL'S DECISION IN SICHER.

This case is before this Court because the Fourth District certified conflict with the Second District's decision in Sebring Utils. Comm'n v. Sicher, 509 So. 2d 968 (Fla. 2d DCA 1987). In so doing, the Fourth District held that 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." citing City of Pembroke Pines v. Atlas, 474 So. 2d 237 (Fla. 4th DCA 1985), rev. denied, 486 So. 2d 595 (Fla. 1986). The Fourth District correctly states that its opinion in this matter is directly and expressly contrary to the position the Second District Court of Appeal took in Sebring Utils. Comm'n v. Sicher, 509 So. 2d 968 (Fla. 2d DCA 1987). In Sicher, the Second District Court of Appeal held that the defense of governmental immunity is not an affirmative defense, but is jurisdictional and may be raised at any time. Id. at 969. Both §768.28(6), as discussed in Sicher, and §627.351(4), the subject of this matter, implicate the question of statutorily conferred immunity from suit. The former relates to immunity conferred on a municipality and the later is the immunity conferred on the JUA in this instance. Furthermore, in its opinion the Fourth District states that "[t]here 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 Second District's holding is, therefore, in direct and express conflict with the Fourth District's determination that FMMJUA's immunity defense does not implicate the question of subject matter jurisdiction and, therefore, can be waived if not raised as an affirmative defense.

Although the Appellee argues that the Fourth District's opinion in Atlas is not in direct and express conflict with the Second District's opinion in Sicher that is not the appropriate

measure for this Court's jurisdiction in accordance with Article V, section 3(b)(3). See also Rule 9.030(a)(2)(A)(vi) of the Florida Rules of Appellate Procedure. The appropriate basis for this Court's jurisdiction is the conflict between the Fourth District Court's opinion in this case and the Second District Court's opinion in Sicher. See Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980). Furthermore, the FMMJUA agrees with Appellee that Atlas is not the appropriate authority in this matter and is factually distinguishable.

In Atlas, the Fourth District discussed only 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 JUA. Additionally, the motion by the City in Atlas 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 as was the case in the decision of the second district in Sebring Utils. Comm'n v. Sicher, 509 So. 2d 968 (Fla. 2d DCA 1987). In Sicher, the court addressed the issue of subject matter jurisdiction within the context of a statutory provision, like the present case, which

expressly affords immunity. The Fourth District, however, erroneously applied its decision in Atlas to the present case, as it relates to subject matter jurisdiction, thereby creating a direct and express conflict between the Fourth District's opinion in this case and the Second District's opinion in Sicher. This case is appropriately before the Court to resolve the conflict between the Courts. Although the Court relied on Atlas, such reliance does not control the ultimate issue of whether this matter is appropriately before this Court in accordance with Article V, section 3(b)(3). See also Rule 9.030(a)(2)(A)(vi) of the Florida Rules of Appellate Procedure. In fact, it is the erroneous reliance by the Fourth District on Atlas which created the conflict that this Court must now resolve.

II.

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT ENTERED A JUDGMENT AGAINST DEFENDANT, FLORIDA MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION BECAUSE THIS DEFENDANT IS IMMUNE FROM BAD FAITH CLAIMS PURSUANT TO §627.351(4), FLA. STAT.

A. ABSOLUTE AND UNQUALIFIED IMMUNITIES MAY BE RAISED AT ANY TIME UP TO AND INCLUDING THE END OF TRIAL.

Appellee contends that since the immunity afforded to Appellants is statutory, rather than sovereign, Appellants were obligated to raise it as an affirmative defense. They contend that statutory immunities are affirmative defenses while sovereign immunities are not. However, Appellee fails to support this broad proposition with any authority - in fact, there is no authority to support such a proposition.

A review of the case law clearly indicates that only "qualified immunities," those that require some type of affirmative proof to prove entitlement to the immunity, must be raised as an affirmative defense. "Unqualified immunities" may be raised at any time since they relate to subject matter jurisdiction and are not affirmative defenses. See, Schmauss v. Snoll, 245 So.2d 112 (Fla. 3d DCA 1971) (A state's immunity from suit relates to subject matter jurisdiction and is not an affirmative defense.) 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 and/or failure to state a cause of action.

Appellee argues extensively that the FMMJUA is not a sovereign, and therefore, the immunity given to the FMMJUA does not implicate the subject matter jurisdiction of the court. There is no contention that the FMMJUA is a sovereign, but rather that it is statutorily empowered with an absolute and unqualified immunity which, much like the absolute and unqualified immunity granted to sovereigns, places the FMMJUA beyond the reach of the court's process. Buck v. McLean, 115 So. 2d 764 (Fla. 1st DCA 1959). 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 or 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. (1987), which neither requires not 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. 3d 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 bad faith claim).

§627.351(4)(c), Fla. Stat., which affords this absolute and unqualified immunity to the FMMJUA, is identical to the terms of §631.66, Fla. Stat., which grants immunity to the Florida Insurance Guaranty Association ("FIGA"). The Appellee extensively argues that FMMJUA's immunity, although identical in language, cannot be compared to FIGA's statutorily conferred and absolute immunity. Interestingly, Appellee fails to cite any authority for their proposition that FMMJUA has a "duty of good faith" which arises outside of the statute conferring immunity from suit while FIGA's identical statute does not. Absent any authority to the contrary, the Third District Court's opinion in Fernandez v. Florida Ins. Guaranty Ass'n, 383 So. 2d 974 (Fla. 3d DCA 1980), rev. denied, 389 So. 2d 1109 (Fla. 1980), is the strongest case supporting the immunity granted to the FIGA, which is identical in its terms to the immunity granted to the FMMJUA. 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.

§631.66, Fla. Stat. As was discussed in our Initial Brief, 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.

B. APPELLANTS ABSOLUTE AND UNQUALIFIED IMMUNITY RELATED TO SUBJECT MATTER JURISDICTION AND/OR FAILURE TO STATE A CAUSE OF ACTION WAS THEREFORE PROPERLY RAISED AT THE CLOSE OF APPELLEES CASE.

Every defense in law or fact to a claim for relief in a pleading must be asserted in a responsive pleading. Fla.R.Civ.P. Rule 1.140. An exception is made for certain defenses which may be raised by motion. A further exception is made to pleading the defenses of failure to state a cause of action or a legal defense. These may be raised for the first time at trial. Fla.R.Civ.P. Rule 1.140(h)(2); see also Terry v. Johnson, 513 So.2d 1315 (Fla. 1st DCA 1987). Lack of jurisdiction over the subject matter may also be raised at any time. See Fla.R.Civ.P. 1.140(h)(2). Unqualified and absolute immunity is a jurisdictional issue. See, Buck, 115 So.2d at 765. Furthermore, the plain and unambiguous language of the statute which provides "there shall be no liability, and no cause of action of any nature shall arise against..." (emphasis added) absolutely prohibits a cause of action to be brought against the FMMJUA. Whether the immunity prevents a cause of action to be plead or fails to confer subject matter jurisdiction of this matter on the court is irrelevant. In either event, 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 and/or for lack of jurisdiction over the

subject matter. See Terry v. Johnson, 513 So. 2d 1315 (Fla. 1st DCA 1987).

Appellee argues that the FMMJUA only raised subject matter jurisdiction in its motion to dismiss but failed to allege a failure to state a cause of action. Appellee cites certain portions of the transcript to support this proposition that Appellant did not move to dismiss for failure to state a cause of action in the trial court, thereby waiving this argument on appeal. We disagree. FMMJUA raised both the jurisdictional issue and the defense of failure to state a cause of action. At trial, FMMJUA's attorney argued for the dismissal, and in support thereof, read into the record the statute granting immunity to the FMMJUA. §627.351(4)(c), Fla.Stat. states in pertinent part "there shall be ...no cause of action of any nature" (emphasis added). This statute read together with the request for dismissal sufficiently preserved the issue for appeal.

III.

THE TRIAL COURT LACKED THE SUBJECT MATTER JURISDICTION NECESSARY TO ENTER A MONETARY JUDGMENT AGAINST THE DEFENDANTS FOR BAD FAITH BECAUSE A BAD FAITH CLAIM IS NOT A "COVERED CLAIM" AS THAT TERM IS DEFINED IN §627.351(4)(D), FLA. STAT.

Appellee has skirted around the clear language of §627.351(4)(d), Fla. Stat. with theoretical arguments about why the FMMJUA is different from FIGA and why Appellants should be held liable for bad faith actions. The bottom line on this issue is that there is no statutory authority in existence whereby the Appellants could be held liable for bad faith.

Section 627.351(4)(d) clearly expresses the limited types of claims upon which the Appellants may pay. The legislature, when creating the FMMJUA specifically limited the types of claims that the FMMJUA could pay. Bad faith is not among those claims. See, P.W. Ventures Inc. v. Nichols, 533 So.2d 281 (Fla. 1988); Smith v. State, 606 So.2d 427 (Fla. 1st DCA 1992). Under §627.351(4)(d), Fla. Stat., the FMMJUA and their agents are simply not statutorily empowered to pay bad faith claims.

While Appellee correctly points out that there is no definition of the term "covered claim" found in the FMMJUA's statute, that is not the issue. The terms "covered claim" and "coverage for claims" found in §627.351(4)(d), Fla. Stat. are synonymous. No argument is made to the contrary and any other interpretation would be incorrect.

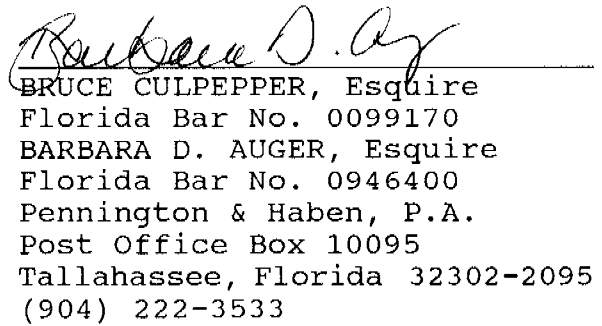
The FMMJUA does not contend that it is the same as FIGA as Appellee implies. Rather, the cases relied on by Appellants for this proposition are merely illustrative of the fact that the FMMJUA lacks statutory authority to pay on any claims other than medical malpractice claims. Thus, the issue of whether the bad faith claim against he FMMJUA is a "covered claim" is directly relevant to the issue of whether the trial court properly imposed liability on Appellants for bad faith, which Appellant adamantly contends, it did not.

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 22d day of August, 1995.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply 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 22d day of August, 1995.

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