CASE NO.: 95,889

Florida Bar Number: 311200

DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

IN THE

SUPREME COURT OF FLORIDA

BONNIE ROSEN

Petitioner

ORIGINAL

vs.

FLORIDA INSURANCE GUARANTY ASSOCIATION

Respondent

PETITIONER'S JURISDICTIONAL BRIEF

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the size and style of type used in this brief is 12 pt. Courier New.

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STATEMENT OF THE CASE AND FACTS[1]

Petitioner Bonnie Rosen sued a Dade County law firm (The "AB Law Firm"), its principal, and an employee, for breach of contract, fraud, breach of fiduciary duty, negligent supervision, conversion, and intentional infliction of emotional distress. (App. A, p. 1-2). Rosen alleged that the AB law firm grossly overcharged her by double-billing and churning, would not surrender the files to her new counsel, and that one member of the firm threatened to reveal her confidences to an opponent. (App. A, p. 2).

The firm had a one million dollar "declining balance" liability insurance policy with Manatee Insurance Company, ("Manatee"), meaning that defense costs reduced the amount available for coverage. (App. A, p. 2).

Manatee "initially provided the firm with legal representation." However, Manatee was declared insolvent during the litigation, and the Florida Insurance Guaranty Association ("FIGA") assumed the defense, as receiver. (App. A, p. 2).

FIGA took the legal position that its statutory $300,000 per claim liability applied to Manatee's declining balance provision, leaving only $300,000 available for both indemnification and defense costs. As the matter neared trial, FIGA had expended all

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[1] Petitioners "Statement of the Case and Facts" is taken from the four corners of the First District Court of Appeals decision, attached hereto as App. A.

but $39,000 in defense costs. (App. A, p. 2).

Shortly after being notified of this fact, the parties settled the case on the terms that (1) AB law firm would consent to a judgment against it, but the judgment could not be recorded or executed and would create no liens; (2) appellant would accept $39,000 from FIGA and attempt to collect the balance of the $300,000 from FIGA directly; and (3) upon completion of the FIGA litigation would either release the law firm or file a notice of satisfaction. (App. A, p. 2-3). FIGA participated in the settlement negotiations by agreeing to pay the $39,000, and in no other way. (App. A, p. 3).

Mrs. Rosen then filed suit in Duval County, seeking a determination that FIGA was not entitled to deduct the $261,000 it expended in defense costs from the $300,000 amount available by statute to pay claims. Rosen contended that the declining balance should be computed from the $1,000,000 limits of the policy and not from the $300,000. limit available under the statute to pay claims. (App. A, p. 3).

The parties then filed cross-motions for summary judgment. The trial court granted FIGA's motion, reasoning that "because [Rosen] had agreed to release the AB law firm at the conclusion of the litigation with FIGA, it had extinguished any liability that FIGA has as an insurer." (App. A, p. 3).

On appeal, the First District affirmed, citing this Court's decision in Fidelity & Casualty Co. v. Cope, 462 So. 2d 459 (Fla. 1985) (hereinafter Cope) and Kelly v. Williams, 411 So. 2d 902 (Fla. 5th DCA 1982), both cases for bad faith against an insurer. This decision was rendered by the denial of Mrs. Rosen's motions. (App. B).

Because the First District's decision expressly and directly conflicts with the Third District's decision in Florida Insurance Guaranty Ass'n v. Giordano, 485 So. 2d 453, 457 (Fla. 3d DCA 1986), (App. C), holding Cope inapplicable to a direct actions on a statutory claim against FIGA, petitioner seeks further review.

STATEMENT OF JURISDICTION

This Court has discretionary jurisdiction to review a District Court of Appeal decision which expressly and directly conflicts with the decisions of another District Court of Appeal on the same issue of law. Fla. Const. art V, §3(b)(3); Fla. R. App. Proc. 9.030(a)(2)(A)(iv).

Decisional conflict envisions the announcement of a rule of law which conflicts with a rule previously announced by this Court or of another district court of appeal. Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981).

SUMMARY OF THE ARGUMENT

The First District Court of Appeal did not reach the merits of Plaintiff's suit which alleged that FIGA was statutorily forbidden from deducting the amount of its own defense costs from the $300,000 available to Plaintiff for her "covered claims." § 631.54(3)(5), Fla. Stats. (1995). The First District deemed this Court's decision in Fidelity & Casualty Co. of New York v. Cope, 462 So. 2d 459 (Fla. 1985) to bar Plaintiff's claims, as a matter of law.

Cope holds that a bad faith claim against an insurer cannot be maintained "once an injured party has released the tortfeasor from all liability, or has satisfied the underlying judgment" without first obtaining an assignment.

In FIGA v. Giordano, 485 So. 2d 453 (Fla. 3d DCA 1986), the Third District deemed Cope inapplicable to bar FIGA claims. As the Third District clearly recognized, these are significant distinctions between bad faith claims against an insurer to recover for an excess judgment and a direct action against FIGA for failure to pay.

When a claimant files a FIGA claim, FIGA's insured is released by operation of law to the extent of any coverage. However, the express statutory release of the insured does not apply to FIGA. § 631.193, Fla. Stats. (1995). Moreover, FIGA is immune from suit

for bad faith and thus cannot be sued by a claimant for an excess judgment.

In the instant case, the insureds were already released by operation of law to the extent of coverage when the Plaintiff's claim was filed. Converting the settlement agreement between the claimant and the insureds into a "release" of FIGA, runs contrary to the language and underlying public policy of the FIGA Act.

The conflict between the First and Third District decisions regarding Cope's application in the FIGA context creates uncertainty in the law and holds implications for others who seek the protection that the FIGA Act was intended to afford. It is respectfully submitted that this is precisely the type of case which should be afforded further review.

ARGUMENT

COPE HAS NO APPLICATION TO SUITS AGAINST FIGA FOR FAILURE TO PAY "COVERED CLAIMS."

In Fidelity & Casualty Co. of New York v. Cope, 462 So. 2d 459, 462 (Fla. 1985), this Court held that "absent a prior assignment of the cause of action, once an injured party has released the tortfeasor from all liability, or has satisfied the underlying judgment, no action may be maintained." Both Cope and Kelly v. Williams, 411 So. 2d 902 (Fla. 5th DCA 1982), following Cope, arise in the context of third party actions for "bad faith"

against a tortfeasor's insurer. In the instant case, the First District found Cope and Kelly applicable to bar a claimant's action against FIGA.

In Florida Insurance Guaranty Ass'n v. Giordano, 485 So. 2d 453, 457 (Fla. 3d DCA 1986), the Third District reached the opposite conclusion. Distinguishing Cope and its progeny, the Court wrote:

> FIGA now attacks the settlement on the basis of Fidelity & Casualty Co. v. Cope, 462 So. 2d 459 (Fla.1985), claiming that the provision agreeing not to execute against the insured requires, under Cope, that this cause of action be dismissed because the insured has been released from liability and, therefore, has no cause of action to assign.
>
> FIGA's reliance on Cope is misplaced. In Cope, the injured party, Cope, filed suit against the two tortfeasors and their insurance companies (after the insurers refused to settle) and won a jury verdict for an amount far in excess of the policy limits. Cope then brought an excess judgment action against one of the insurers. The action was settled in return for Cope's execution of a release and satisfaction of judgment in favor of the insurer and both tortfeasors. Cope thereafter filed an excess judgment action against the second insurer for the balance of the judgment awarded by the jury. The Florida Supreme Court held that since the settlement satisfied the judgment against the insured tortfeasor, there was no longer a cause of action upon which to bring a subsequent lawsuit. The court stated:
>
> We hold that if an excess judgment has been satisfied, absent an assignment of that

> cause of action prior to satisfaction, a third party cannot maintain action for a breach of duty between an insurer and its insured.
>
> In the case at bar, the insured first assigned all of its rights against FIGA to the injured party. That alone takes this cause out of Cope's purview. Secondly, there has been no satisfaction of the underlying judgment against the insured, and there won't be any such satisfaction until the entire judgment has been paid in full. As a result, until this cause is resolved, the insured has an unsatisfied judgment and an unsatisfied cost judgment recorded against it. Thirdly, this is not a bad faith action against the insurer and there is no excess judgment involved here. We find that Cope does not apply to the instant cause and therefore, Mrs. Giordano, as assignee of the insured, has a cause of action against FIGA.

One of the express holdings of the Third District's decision was that Cope was inapplicable in a FIGA suit because it was "not a bad faith action against the insurer and there is no excess judgment involved here." This conclusion is bolstered by both public policy and certain key provisions of the FIGA Act, which, it is respectfully submitted, that the First District overlooked.

In analyzing the precise nature of a FIGA claim, some history is in order. In December 1969, the National Association of Insurance Commissioner promulgated the "Past-Assessment Property and Liability Insurance Association Model Act." ("The Model Act"). The Model Act was "designed to provide a means of assisting in the detection and prevention of insurance insolvencies" and to ease the

pain and suffering of insured, beneficiaries and injured third-party claimants if the insurance company which would normally respond to their problems becomes insolvent." Havens, "Insurance Guaranty Laws: An Update on Litigation," 16 The Forum p. 1183 (ABA 1981).

The "Florida Insurance Guaranty Ass'n Act" (the "FIGA Act") was enacted in 1970, and contains many of the Model Act provisions. §631.50 *et seq.*, Fla. Stats. (1995); Laws 1970, c. 70-201. The foremost purpose of the Act was to "[p]rovide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer." §631.51(1), Fla. Stat. (1995) (emphasis added).

The FIGA Act must be "liberally construed" to effect this statutory purpose. §631.53, Fla. Stats. (1995).

A suit against FIGA is a direct cause of action to obtain payment of a "covered claim." As the definitive insurance treatise observes:

> If a guarantee fund fails to pay a covered claim or ignores its obligation to protect the insureds of the insolvent company, the fund can be sued by the insureds and/or third party claimants. Theoretically, the lawsuit is to force the fund to comply with its statutory duty. The fund cannot be sued for liability beyond its duty to pay covered claims, however.

See Couch on Insurance 3d, §6:28 at p. 6-58 (emphasis added).

The FIGA Act itself makes the logic of Cope inapplicable to this kind of case. Pursuant to section 631.193, Fla. Stat. (1995) the mere filing of a claim "constitutes a release of the insured from liability to the claimant to the extent of the coverage or policy limits provided by the insolvent insurer ...." However, this express release of the insured "does not operate to discharge the Florida Insurance Guaranty Association or any other guaranty association from any of its responsibilities and duties set out in this chapter." § 631.193, Fla. Stats. (1995) (emphasis added).

In the instant FIGA case, the insured were already released by operation of law to the extent of coverage when the claim was filed. Converting the settlement agreement between the claimant and the insured law firm into a "release" of FIGA, runs contrary to both the express language and the public policy underlying the statute.

Cope's "bad faith" analysis is further inapplicable to this kind of statutory action because FIGA is immune from any bad faith claim, and cannot be sued for an excess judgment. §631.66, Fla. Stat. (1995); Fernandez v. Florida Ins. Guaranty Ass'n, Inc., 383 So. 2d 974 (Fla. 3d DCA), rev. denied, 389 So. 2d 1109 (Fla. 1980).

The First District's decision here creates uncertainty in the law and has implications for others in the state who seek the

protection that FIGA was intended to afford. Because the First District's decision expressly and directly conflicts with the Third District's decision deeming Cope inapplicable to where there can be no bad faith or excess judgment in a claim against FIGA, petitioner respectfully seeks further review.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully invokes this Court's jurisdiction under Fla. Const. art V, § 3(b)(3), and requests the Court to (1) accept jurisdiction; (2) establish a briefing schedule on the merits; and (3) quash the decision of the District Court of Appeal for the First District.

Respectfully submitted,

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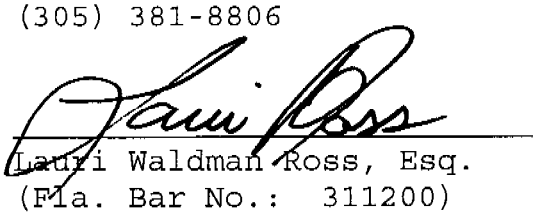
By: 
Lauri Waldman Ross, Esq.
(Fla. Bar No.: 311200)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 27 day of July, 1999.

Helen Ann Hauser, Esq.
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By: _____
Lauri Waldman Ross, Esq.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

BONNIE ROSEN,

Appellant,

v.

CASE NO. 98-334

FLORIDA INSURANCE GUARANTY ASSOCIATION,

Appellee.

_____/

Opinion filed May 14, 1999.

An appeal from the Circuit Court for Duval County. Frederic A. Buttner, Judge.

Lauri Waldman Ross, of Ross & Tilghman, Miami; and Tilghman & Vieth, P.A., Miami, for Appellant.

Helen Ann Hauser, of Dittmar & Hauser, P.A., Coconut Grove, for Appellee.

PER CURIAM.

Bonnie Rosen, the plaintiff below in a declaratory judgment action, appeals from the trial court's order granting appellee's motion for summary judgment. We affirm.

Mrs. Rosen had sued a Dade County law firm (known by the pseudonym of "the AB Law Firm"), its principal and one employee for breach of contract, fraud, breach of fiduciary duty, negligent

supervision, conversion and intentional infliction of emotional distress. The dispute arose out of representation of appellant on several matters; she alleged that the firm grossly overcharged her by double-billing and churning, that it would not surrender files to new counsel and that one member of the firm threatened to reveal confidences to a party opponent.

The firm had a $1,000,000 liability insurance policy with Manatee Insurance Co., (the policy was originally issued by Rumger Insurance Co.) and the insurer initially provided the firm with legal representation. The policy had a "declining balance" feature, meaning that defense costs reduced the amount of money available to pay damages.

Manatee was declared insolvent during the litigation, and the Florida Insurance Guaranty Association (FIGA), assumed the defense as receiver. FIGA took the position that its $300,000 per claim liability (established in section 631.57(1)(a)2., Florida Statutes) applied to the Rumger-Manatee policy's declining balance provision, meaning that only $300,000 was available for both indemnification and costs.

As the matter neared trial, all but $39,000 of the $300,000 coverage limit had been spent in costs by FIGA. Shortly after being notified of this fact, the parties settled the case on the following terms: AB Law Firm would consent to a judgment of $261,000 against it, but the judgment would never be recorded,

would create no liens and could not be executed. Instead, appellant would accept $39,000 from FIGA, would attempt to collect the balance of the $300,000 from FIGA, and upon conclusion of that litigation would release the law firm or file a notice of satisfaction of judgment. It appears that other than to agree to pay the remaining $39,000, FIGA in no way participated in the negotiations.

Mrs. Rosen then filed this suit in Duval County, seeking a determination that appellee was not entitled to deduct the $261,000 paid out in defense costs from the per-claim limit, and an order requiring appellee to pay her $261,000 in satisfaction of the judgment against the law firm. The core of appellant's claim was that the declining balance should be computed from the $1 million limits of the Rumger-Manatee policy, and not from the $300,000 statutory limit for claims.

Both sides moved for summary judgment. The trial court granted FIGA's motion, reasoning that because appellant had agreed to release the AB Law Firm at the conclusion of the litigation with FIGA, it had extinguished any liability that FIGA had as an insurer. Thus, the trial court ruled, by agreeing to release the law firm, appellant thereby released the insurer.

We believe this reasoning to be correct in light of two cases that present similar factual scenarios.

In Kelly v. Williams, 411 So. 2d 902 (Fla. 5th DCA 1982), the insurer offered policy limits to the plaintiff, who thereupon released the tortfeasor with the intention of pursuing a bad-faith claim against the insurer. The release of the tortfeasor, however, relieved the insurer of any legal obligation to pay damages, as the trial court ruled and the appellate court affirmed.

Kelly was cited in support of the holding in Fidelity & Cas. Co. v. Cope, 462 So. 2d 459 (Fla. 1985), which held that a release to the insured eliminates the obligation of the insurer to pay damages, absent an assignment of claim.

The order below is affirmed.

ERVIN, MINER and KAHN, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

June 16, 1999

CASE NO.: 1998-334
L.T. No. : 97-01173 CA

Bonnie Rosen v. Florida Insurance Guaranty Association

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion filed June 1, 1999, for rehearing and/or certification is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

JON S. WHEELER, CLERK

Served:

Lauri Waldman-Ross Helen Ann Hauser

App. B

v. Weiss, 217 So.2d 836 (Fla.1969)), this court noted that

> Zoning involves much more than mere classification. Among other things it involves the consideration of future growth and development, adequacy of drainage and storm sewers, public streets, pedestrian walkways, *density of population* and many other factors which are peculiarly within the legislative competence. (Emphasis added.)

Id. at 373.

[7] In the case at bar, the settlement between Boca Development and the two property owners associations seemed to turn principally on the payment of a substantial amount of money. Nonetheless, relying on this settlement, the lower court overturned its original order which specifically found that the proposed rezoning would be harmful to the community. The county's rights and legitimate interests have been clearly affected by the forced settlement.

In summary, we reverse the trial court's order, which vacated a prior final judgment, because the trial court was without authority to alter, let alone vacate, the original judgment. Moreover, the court improperly forced a settlement on a non-assenting party whose legitimate interests were affected. Accordingly, the judgment on appeal is

REVERSED.

DOWNEY and LETTS, JJ., concur.

FLORIDA INSURANCE GUARANTY ASSOCIATION,
Appellant/Cross-Appellee,

v.

Rose GIORDANO, as Personal Representative of the Estate of Salvatore Giordano, deceased, Appellee/Cross-Appellant.

No. 84-2384.

District Court of Appeal of Florida, Third District.

March 4, 1986.

Rehearing Denied April 14, 1986.

After insured assigned its rights against insurer as part of settlement in wrongful death action, assignee who was the plaintiff in the wrongful death action brought suit against Florida Insurance Guaranty Association for enforcement of FIGA's statutory obligations and the judgments entered on the settlement agreement. The Circuit Court, Dade County, Moie J.L. Tendrich, J., entered summary judgment in favor of assignee, finding that FIGA had a duty to defend insured and a duty to pay the settlement. The court also held that assignee was not entitled to any attorney's fees or costs. FIGA appealed and assignee cross-appealed. The District Court of Appeal, Hendry, J., held that: (1) FIGA had a coextensive duty with Illinois Guaranty Fund, as a primary carrier, to defend insured; (2) plaintiff, as assignee of insured, had a cause of action against FIGA; and (3) plaintiff was entitled to recover attorney's fees for enforcement action she was forced to file after FIGA denied payment of covered claim.

Affirmed in part; reversed in part and remanded.

1. Insurance ⇐514.10(1)

If allegations of a complaint leave any doubts regarding duty to defend, question must be resolved in favor of insured requiring the insurer to defend.

App. C

2. Insurance ⇐8

Where Florida Insurance Guaranty Association stepped into insurer's place upon insurer's insolvency, it was under statutorily imposed duty to continue defense of insured in wrongful death action, and fact that insured was an Illinois corporation, and thus Illinois Guaranty Fund was also involved, did not relieve FIGA of its coextensive duty with IGF, as a primary carrier, to defend insured. West's F.S.A. § 631.57(1)(b).

3. Insurance ⇐8

Plaintiff in wrongful death action against insured had cause of action against Florida Insurance Guaranty Association which refused to defend insured after insurer became insolvent, where insured assigned all of its rights against FIGA to plaintiff as part of settlement.

4. Insurance ⇐8

Attorney's fees may be awarded when Florida Insurance Guaranty Association denies a covered claim by affirmative action. West's F.S.A. § 631.70.

5. Insurance ⇐8

Plaintiff in wrongful death action, who was assigned all rights of insured as part of settlement, was entitled to recover attorney's fees for enforcement action she was forced to file after Florida Insurance Guaranty Association denied payment of covered claim. West's F.S.A. § 631.70.

6. Insurance ⇐8

Assignee of rights of insured against insurer could recover from Florida Insurance Guaranty Association cost judgment which was entered against insured after settlement agreement was reached.

Marlow, Shofi, Smith, Connell, DeMahy & Valerius and Joseph H. Lowe, Miami, for appellant/cross-appellee.

Feldman & Levy and David L. Magidson, Daniels & Hicks and Barbara Green, Miami, for appellee/cross-appellant.

Before HENDRY, NESBITT and FERGUSON, JJ.

HENDRY, Judge.

Appellant Florida Insurance Guaranty Association (FIGA) contests a final summary judgment entered against it for the sum of $150,000. Appellee Rose Giordano cross-appeals a final summary judgment entered in favor of FIGA on her claims for attorney's fees, prejudgment interest and costs of the first action. We affirm in part and reverse in part.

I

In 1973, Salvatore Giordano died as a result of burns suffered in a gas explosion. His wife, Rose, filed a wrongful death action in 1975 on behalf of his estate against Rego Valve Company (Rego), an Illinois corporation doing business in Florida, who manufactured the gas valve which allegedly caused Mr. Giordano's death. Rego was insured with Reserve Insurance Company, with policy limits of $300,000. Rego also had excess coverage with Employer's Reinsurance Company.

Reserve undertook the defense of Giordano's suit against its insured until May 31, 1979, when Reserve was declared insolvent. The claim was then sent to FIGA pursuant to section 631.57, Florida Statutes (1979). In January, 1980, FIGA learned that the insured was an Illinois corporation. While FIGA was officially listed as the primary carrier for purposes of the lawsuit until July, 1980, FIGA had adopted the position in January, 1980, that pursuant to section 631.57(2), the Illinois Guaranty Fund (IGF), with statutory coverage limits of $150,000, was the "primary" carrier and FIGA, with statutory coverage limits of $300,000, was an "excess" carrier with no obligations owed to the insured. IGF took over the defense of the lawsuit.

Trial on the wrongful death action was set for October 27, 1980. In mid-September, settlement negotiations began between the plaintiff and Rego, IGF and Employer's Reinsurance. FIGA knew of the on-going settlement negotiations and by mid-Octo-

ber, knew that IGF would tender its policy limits of $150,000.[1]

An attorney for FIGA appeared in court on the day of the trial. The other parties announced that they had reached an agreement. The attorney for FIGA, however, stated emphatically that FIGA did not approve of the settlement, did not authorize it and did not agree with the amount of money agreed upon as a stipulated judgment in the case. The parties (not including FIGA) then drafted a settlement agreement in which Rego agreed to the entry of a $525,000 judgment against it. Payments were assessed from IGF ($150,000), Employer's Reinsurance ($225,000) and FIGA ($150,000). Rego assigned its rights against FIGA, including the $150,000 judgment, plus attorney's fees, costs, interest and punitive damages, to Mrs. Giordano. Mrs. Giordano agreed not to execute her judgment against Rego. Rego would not receive a satisfaction of judgment until the judgment was paid in full. After a hearing, at which FIGA was represented, the trial court entered a final judgment adopting the terms of the settlement agreement. Subsequently, the trial court entered a $12,177 cost judgment against the insured (Rego), which was assigned to Mrs. Giordano.

In May, 1981, FIGA notified Mrs. Giordano that it would not make any payment of the judgment. Mrs. Giordano then filed the instant lawsuit asserting 1) her rights, as assignee of Rego, for the enforcement of FIGA's statutory obligations and the judgments entered on the settlement agreement and 2) that FIGA's course of conduct had been willful, wanton, reckless and a denial of due process and equal protection. The latter count was dismissed with prejudice. Both parties moved for summary judgment on Count I. The trial court granted Mrs. Giordano's motion, finding that FIGA had a duty to defend Rego and a duty to pay the settlement. It also held that Mrs. Giordano was not entitled to any attorney's fees or costs.* This appeal and cross-appeal ensued.

II

The two sections of Chapter 631, Florida Statutes, which are relevant to our consideration are the following:

631.57 Powers and duties of the association.—

(1) The association shall:

(a) Be obligated to the extent of the covered claims existing:

1. Prior to the adjudication of insolvency and arising within 30 days after the determination of insolvency, ...

but such obligation shall include only that amount of each covered claim which is in excess of $100 and is less than $300,000; ...

(b) Be 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.

631.61 Nonduplication of recovery.—

(2) Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured, ... Any recovery under this part shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.

As these provisions make clear, when Reserve Insurance Company became insolvent, FIGA moved into Reserve's place and "stood in the shoes" of Reserve as if it had not become insolvent. FIGA became obligated to the insured (Rego) up to its policy limit of $300,000 (which was Reserve's policy limit also) and it acquired all of Re-

1. During this period, FIGA made three contradictory statements as to its position on whether it would provide coverage: in mid-September FIGA's opinion was that it had no responsibility whatsoever to Rego. Then FIGA took the position that it was an "excess" carrier over IGF's limits and that it would decide what it would do once IGF paid its statutory limits. Finally, by September 30, FIGA had told the plaintiffs' attorney that it would provide $150,000 coverage "excess over IGF". Brief of appellant, pp. 6–7.

serve's rights, duties and obligations to the insured. Because the insured was an Illinois resident, however, and because Illinois has an insurance guaranty association also, the plaintiff and the insured were directed by section 631.61(2), Florida Statutes (1979), to seek payment first from IGF and then the balance from FIGA.

We can find no cogent basis to support FIGA's assertion that because there existed another state insurance guaranty association, FIGA was absolutely relieved of its statutory obligations to the insured. Nothing in the statute provides for that position. The statute clearly states that FIGA *shall* be deemed the insurer to the extent of its obligations on the covered claims and *shall* have all rights, duties and obligations of the insolvent insurer. § 631.57(1)(b), Fla. Stat. (1979) (e.s.). Since FIGA did not dispute that the wrongful death action was a "covered claim," then under the statute, FIGA had no discretion as to whether it would defend the insured. Reserve Insurance had been defending the wrongful death action for four years before its insolvency. When FIGA stepped into Reserve's place upon Reserve's insolvency, FIGA was under a statutorily imposed duty to continue the defense of the insured.

[1, 2] Furthermore, it is well settled in Florida that the duty of an insurer to defend its insured is broader than, and distinct from, its duty to pay. *Baron Oil Co. v. Nationwide Mutual Fire Insurance Co.*, 470 So.2d 810 (Fla. 1st DCA 1985); *Keller Industries, Inc. v. Employers Mutual Liability Insurance Co.*, 429 So.2d 779 (Fla. 3d DCA 1983); *Florida Farm Bureau Mutual Insurance Co. v. Rice*, 393 So.2d 552 (Fla. 1st DCA 1980), *review denied*, 399 So.2d 1142 (Fla.1981). If the allegations of the complaint leave any doubts regarding the duty to defend, the question must be resolved in favor of the insured requiring the insurer to defend. *Baron Oil v. Nationwide Mutual*, 470 So.2d at 814. Clearly, the question of who eventually was going to pay the judgment against the insured was extrinsic to the question of who had a duty to defend the insured. We find, therefore, that FIGA had a coextensive duty with IGF, as a primary carrier, to defend the insured.

III

FIGA's second argument, that the insured was not harmed by FIGA's failure to defend it because IGF took over the defense and carried it through to settlement, is also wrong. In fact, FIGA's refusal to defend placed the insured in real jeopardy. While IGF assumed the obligation of defending the insured, its policy limits were set at only $150,000. Employer's Reinsurance, the true excess carrier, had policy limits of $5 million, but its coverage began after the first $300,000 was paid. FIGA's refusal to defend left the insured undefended on the balance of the first $300,000, that is, the difference between the end of IGF's policy limits and the beginning of the Employer's Reinsurance coverage. FIGA's refusal to defend also placed at risk any coverage from Employer's since Employer's was a true excess carrier and, under its policy, had no duty to pay until after the first $300,000 was paid by the primary carriers. Thus, FIGA placed the insured in a position of being potentially liable for an immense judgment in a wrongful death action with the only certain indemnification coming from a carrier with policy limits of $150,000.

[3] Given the above possible scenario, it is not surprising that the insured chose to settle with the plaintiff. It was entitled to do so. *Florida Physicians Insurance Reciprocal v. Avila*, 473 So.2d 756 (Fla. 4th DCA 1985); *Steil v. Florida Physicians' Insurance Reciprocal*, 448 So.2d 589 (Fla. 2d DCA 1984). FIGA now attacks the settlement on the basis of *Fidelity & Casualty Co. v. Cope*, 462 So.2d 459 (Fla.1985), claiming that the provision agreeing not to execute against the insured requires, under *Cope*, that this cause of action be dismissed because the insured has been released from liability and, therefore, has no cause of action to assign.

FIGA's reliance on *Cope* is misplaced. In *Cope*, the injured party, Cope, filed suit

against the two tortfeasors and their insurance companies (after the insurers refused to settle) and won a jury verdict for an amount far in excess of the policy limits. Cope then brought an excess judgment action against one of the insurers. The action was settled in return for Cope's execution of a release and satisfaction of judgment in favor of the insurer and *both* tortfeasors. Cope thereafter filed an excess judgment action against the second insurer for the balance of the judgment awarded by the jury. The Florida Supreme Court held that since the settlement satisfied the judgment against the insured tortfeasor, there was no longer a cause of action upon which to bring a subsequent lawsuit. The court stated:

> We hold that if an excess judgment has been satisfied, absent an assignment of that cause of action prior to satisfaction, a third party cannot maintain action for a breach of duty between an insurer and its insured.

Fidelity & Casualty Co. v. Cope, 462 So.2d at 461.

In the case at bar, the insured first assigned all of its rights against FIGA to the injured party. That alone takes this cause out of *Cope*'s purview. Secondly, there has been no satisfaction of the underlying judgment against the insured, and there won't be any such satisfaction until the entire judgment has been paid in full. As a result, until this cause is resolved, the insured has an unsatisfied judgment and an unsatisfied cost judgment recorded against it. Thirdly, this is not a bad faith action against the insurer and there is no excess judgment involved here. We find that *Cope* does not apply to the instant cause and therefore, Mrs. Giordano, as assignee of the insured, has a cause of action against FIGA.

All other points are without merit.

IV (Cross-Appeal)

We affirm the entry of the final summary judgment on Count II of Mrs. Giordano's complaint. The allegations of this count, though couched in the language of tort and constitutional law, still make out an action for bad faith against FIGA. Under section 631.66, Florida Statutes (1981), however, no action for bad faith lies against FIGA. *Fernandez v. Florida Insurance Guaranty Association*, 383 So.2d 974 (Fla. 3d DCA 1980). Thus, the trial court was correct in dismissing Count II with prejudice.

[4–6] We reverse the trial court's ruling on attorney's fees, costs and interest. Attorney's fees may be awarded pursuant to section 631.70, Florida Statutes (1981), when FIGA denies a covered claim by affirmative action. Mrs. Giordano is entitled to recover attorney's fees for the enforcement action she was forced to file after FIGA denied payment of the covered claim. Similarly, she can get lawful interest on the final judgment itself from the date of entry, pursuant to section 55.03, Florida Statutes (1981). *Carballo v. Warren Manufacturing Co.*, 407 So.2d 603 (Fla. 1st DCA 1981), *review denied*, 415 So.2d 1362 (Fla.1982); *Florida Insurance Guaranty Association v. Gustinger*, 390 So.2d 420 (Fla. 3d DCA 1980). Mrs. Giordano, as assignee of the insured, can recover the cost judgment which was entered against the insured after the settlement agreement was reached. *Florida Insurance Guaranty Association v. Price*, 450 So.2d 596 (Fla.2d DCA), *review dismissed*, 453 So.2d 1365 (Fla.1984).

We affirm the final summary judgment entered against FIGA. We affirm the final summary judgment entered on Count II of appellee's complaint. We reverse the trial court's denial of the claim for attorney's fees, costs and interest and we remand for further proceedings on that issue.

Affirmed in part, reversed in part and remanded.