IN THE SUPREME COURT OF FLORIDA
CASE NO. 95,889

First District Court of Appeal Case no. 1998-334

BONNIE ROSEN,
Petitioner

vs.

FLORIDA INSURANCE GUARANTY ASSOCIATION, INC.,
Respondent

RESPONDENT FIGA'S BRIEF ON JURISDICTION

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

Petitioner Bonnie Rosen was Plaintiff in the original trial court action and Appellant in the First District case. This dispute began when Rosen sued a law firm which had been insured by a now-insolvent carrier, together with its employee. The law firm's original malpractice insurance was a "declining balance" policy in the amount of $1 million, with defense costs deducted from the indemnity amount. Once the insurer failed, the Florida Insurance Guaranty Association (FIGA) assumed obligations for "covered claims," but the amount of coverage dropped to $300,000 (see Fla. Stat. sec. 631.57). The litigation was bitter and complex; as the matter neared trial, $261,000 had been expended for defense fees and costs (slip op., p. 2). Rosen accepted the remaining $39,000 which FIGA paid on behalf of its insureds. Rosen apparently hoped to create a right to collect an "excess judgment" from FIGA by having the law firm consent to a $261,000 sham "judgment," but failed to create a legal obligation. As the First District opinion explains, "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" (Slip op., p. 3). Thus, regardless of whether she ever collected another penny, Rosen could make no claim against the

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insured parties in any fashion, or in any forum.

Subsequently, Rosen sued FIGA in Duval County, seeking a declaration that FIGA had not been entitled to deduct its defense costs from the $300,000 indemnity limits, but instead could only deduct its defense costs from the original $1 million. She contended that FIGA could therefore have been obligated to pay as much as $700,000 in defense costs before its $300,000 indemnity limit could be invaded. She wanted FIGA to pay an additional $261,000 to her. FIGA defended on multiple grounds: one was that Rosen's claim was extinguished in the original settlement, since she had never obtained any enforceable judgment against FIGA's insured. The trial court granted summary judgment for FIGA, reasoning that by releasing the insured parties, "appellant thereby released the insurer" (slip op., p. 3).[1] The First District agreed, citing the same two cases relied upon by the trial court, *Fidelity and Casualty Company of New York v. Cope*, 462 So. 2d 459 (Fla. 1985) and *Kelly v. Williams,* 411 So. 2d 902 (Fla. 5th DCA 1982)(slip op., pp. 3-4).

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[1]The trial court also held, on the merits, that FIGA's interpretation was correct, so that the defense costs for this declining-balance policy were properly deducted from the $300,000 limit. In light of its holding on the first ground, however, the District Court did not feel a need to address this second basis for the summary judgment.

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SUMMARY OF THE ARGUMENT

Petitioner seeks to create conflict jurisdiction in this Court by an extremely strained interpretation of prior case law. The First District's determination in the case at bar was based upon the well-established principle that no claim against an insurer survives the release of the insured where there is no remaining enforceable obligation against the insured, there was no assignment of any right of action against the insurer prior to the release, and there was no finding of misconduct by the insurer, *Fidelity and Casualty Company of New York v. Cope,* 462 So. 2d 459 (Fla. 1985). FIGA, as the statutory successor to certain obligations of insolvent member insurers, pays only claims which its insureds are legally obligated to pay. Although the Third District noted, in the case of *Florida Insurance Guaranty Assn. v. Giordano,* 485 So. 2d 453 (Fla. 3d DCA 1986), allowing a claim to proceed against FIGA, that said claim was not a bad faith claim, the basis for the Third District decision was that a vaild judgment existed against the insured and the insured had properly assigned its rights to the claimant prior to obtaining the claimant's promise not to enforce the judgment. Neither of these prerequisites was satisfied in the instant case, making *Cope* the applicable precedent. *Giordano* cannot be read as holding that all FIGA cases are outside the purview of *Cope,* as Petitioner contends. Accordingly, *Cope* and its progeny do not conflict with *Giordano.*

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ARGUMENT: FLORIDA LAW IS CLEAR THAT NO INSURER, AND THEREFORE NO GUARANTY ASSOCIATION, CAN BE REQUIRED TO PAY A CLAIM AFTER THE INSURED IS FULLY RELEASED FROM ALL LIABILITY, WHERE NO ASSIGNMENT WAS MADE PRIOR TO SUCH RELEASE AND THE INSURER IS NOT FOUND TO HAVE COMMITTED MISCONDUCT; THERE IS NO CONFLICT ON THIS POINT

In holding that Rosen had no right of action, the First District relied upon *Fidelity and Casualty Company of New York v. Cope,* 462 So. 2d 459 (Fla. 1985). In *Cope, supra,* this Court held that a third-party cause of action can exist only where there is an enforceable judgment against the insured party, because the third-party action is a derivative claim. "An essential ingredient to any cause of action is damages," *Cope, supra,* 462 So. 2d at 461. If the injured claimant has released the tortfeasor without previously obtaining an assignment of his rights against the insurer, there are obviously no damages. "[O]nce an injured party has released the tortfeasor from all liability, or has satisfied the underlying judgment, no such action may be maintained," *Cope, supra*, 462 So. 2d at 459. This rule applies to FIGA as well as to the insurance companies whose obligations it partially assumes pursuant to statute. FIGA pays only if its insured is "legally obligated to pay," since the existence of such obligation is a condition precedent to liability under virtually any insurance policy, *e.g., Troso v. Florida Insurance Guaranty Assn.,* 538 So. 2d 103 (Fla. 4th DCA 1989); *Peoples*

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v. Florida Insurance Guaranty Assn., 313 So. 2d 40 (Fla. 2d DCA 1975).

In *Kelly v. Williams*, 411 So. 2d 902 (Fla. 5th DCA 1982), cited with approval in *Cope* and relied upon in the First District's opinion, the defendant's liability insurer had agreed to pay the plaintiff its $50,000 coverage. In return, the plaintiff covenanted to execute a satisfaction of judgment in favor of the defendant at the conclusion of the litigation, unless a bad-faith claim were commenced against the insurer. If such a claim were pursued, the satisfaction would be executed after its conclusion, regardless of outcome. In no event could the defendant be responsible beyond the $50,000 already paid. The parties did not intend to wipe out an excess claim against the insurer, but "[u]nder the arrangement stipulated to by the parties in this case, the insured could not be exposed to an excess judgment under any circumstances. If one was obtained, the insured was entitled to a complete satisfaction of it, as soon as the judgment became final or enforceable," *Kelly*, supra, 411 So. 2d at 904. Thus, the insured party suffered no detriment, and the case against the insurer could not be maintained. *Kelly* is virtually identical to the case at bar.[2]

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[2]One of the issues argued in the Duval County case was whether *Steil v. Florida Physicians Insurance Reciprocal*, 448 So. 2d 589 (Fla. 2d DCA 1984), could be applied. *Steil* may be read to allow a third-party claim despite a release, if an insurer has wrongfully abandoned its insured. However, the trial court specifically found no abandonment in this case, and the First District did not address that issue. Thus, for purposes of this Court's review, the finding of no misconduct or abandonment stands.

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Rosen attempts to create inter-district conflict by distorting the holding of a 1986 Third District case, *Florida Insurance Guaranty Assn. v. Giordano,* 485 So. 2d 453 (Fla. 3d DCA 1986). In *Giordano*, there was an assignment from the insured to the claimant of all rights against the insurer, before any such claims were extinguished by the other terms of the settlement. The settlement specifically provided that no satisfaction would be given to the insured until the judgment was paid in full, *Id.*, 485 So. 2d at 455. The Third District concluded that the claim could proceed, and that *Cope* was inapplicable because "the insured first assigned all of its rights against FIGA to the injured party. That alone takes this cause out of *Cope's* purview," *Id.*, at 457. Second, the insured had actually suffered the detriment of recorded, unsatisfied judgments which would not be satisfied until the claimant received payment in full, unlike the "sham" judgment that Rosen took, *Id.* Third, "this is not a bad faith action against the insurer and there is no excess judgment involved here," *Id.* It is this latter phrase that Rosen creatively interprets as a pronouncement that *Cope* can never apply to a FIGA case, as FIGA is not liable for bad faith.

In the first place, the phrase is *dictum*. The result of the *Giordano* case is mandated by its facts: an assignment was taken before a release was executed, and there was a valid and enforceable judgment remaining against the insured. Had those two factors been missing as they are in the instant case, the *Giordano* court would

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not have ruled as it did. Clearly, the case does not enunciate a rule that an action against the insurer survives the complete release of the insured simply because the action is denominated as a claim to enforce the policy rather than a "bad faith" case, or simply because FIGA is involved. Additionally, for the reasons explained above, *Giordano* is factually distinguishable from the instant case. There is no likelihood that, placing the two cases side by side, confusion will be created in Florida. Thus, there is no "direct and express" conflict. Indeed, if Rosen's view were accepted–that *Cope* applies to bad faith claims but not to claims seeking to enforce policy obligations–equity would be turned on its head. An insurer who commits bad faith could not be sued without an enforceable obligation against its insured, but one which behaves properly would be subjected to suit even though its insured has suffered no detriment and there is no instrument creating an obligation to indemnify the insured under the policy! If anything, the rule should more liberal toward plaintiffs claiming bad faith than for those who have no such basis for recovery.

Rosen cannot escape the bar erected by her agreement to release the insured through contending, as she failed to do below, that hers is in fact a direct claim rather than a third-party claim. In *Florida Physicians Insurance Reciprocal v. Avila*, 473 So. 2d 756 (Fla. 4th DCA 1985), the Fourth District held that even the insured party himself cannot force an insurer to pay where he has no legal liability. In *Avila*, a

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physician sued his insurer after the insurer declined to offer as much as the plaintiff was demanding. The physician thereupon accepted a $250,000 "loan" from his codefendant's carrier and fully settled the case. The "loan" was the liability that he sought to impose upon his insurer. However, the physician would have to repay this "loan" only upon the happening of two contingencies, one of which did not occur. Thus, he could never be required to repay the "loan." When this physician attempted to sue his insurer, the court pointed out that he had no legal liability, therefore no damages, and was barred from recovery under *Cope, supra*. And, of course, this argument was not made below and is not the basis of the First District's ruling.

Another argument now presented by Rosen was untimely raised in her reply brief below, and was not considered nor ruled upon by the First District–that section 631.193, Florida Statutes, somehow applies. The statute provides that the filing of a claim with the receiver of an insolvent insurer (which, pursuant to Chapter 631, part I, is the Florida Department of Insurance and *not* FIGA[3]) will release the insured from personal liability up to the amount of the original policy limits, but will not affect FIGA's liability. This statute is a part of the "Insurers Rehabilitation and Liquidation

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[3]*See, e.g., Kuvin, Klingensmith & Lewis, P.A. v. Florida Ins. Guaranty Assn., Inc.*, 371 So. 2d 214 (Fla. 3d DCA 1979) for authority that FIGA is not a governmental entity; see also Fla. Stat. sec. 631.141 (1997), specifying that the Department of Insurance must always be appointed as receiver of an insolvent insurance company.

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Act" (Chapter 631, part I) rather than the "Florida Insurance Guaranty Association Act" (Chapter 631, Part II). Rosen incorrectly states (at pp. 4, 9 of "Petitioner's Jurisdictional Brief") that such a release is part of the FIGA statutes and is triggered by making a claim against FIGA; it is quite apparent from the statute (secs. 631.171 through 631.193) that the claims procedure referred to requires a claim against the Receivership estate. Claims covered by FIGA are governed by Part II of the chapter. A claimant may seek payment from the insured party and FIGA, in which case the insured would remain personally liable for any amounts not paid by FIGA, *see Ramos v. Jackson*, 510 So. 2d 1241 (Fla. 3d DCA 1987). Only if the claimant elects to seek any unpaid portion *from the Receivership estate* is there any release of the insured party from personal liability above FIGA's payment, and then only up to the amount of the original insurance policy, *see Queen v. Clearwater Electric*, 555 So. 2d 1262 (Fla. 2d DCA 1989).

FIGA never contended that its obligations were in any way affected by Rosen's election to file a Receivership claim. Nevertheless, Rosen now argues that because she had voluntarily filed a claim with the Receiver, her own written agreement to release FIGA's insured, given in settlement of the underlying litigation, for which she accepted valuable consideration, is a nullity. The argument makes no sense. Because FIGA's liability was wholly unaffected by the filing of a claim in the Receivership

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estate, it remained obligated to defend and pay "covered claims" up to the amount required by the policy and the governing statutes. But that obligation, as so limited, depended upon its insured having a legal obligation to the claimant. After Rosen accepted $39,000 in return for her unconditional agreement to release FIGA's insured, there no longer existed any legal obligation which could be enforced against the insured *or* against FIGA. Since FIGA did not and does not contend that a claimant who merely makes a claim against FIGA triggers section 631.193's release, there is no public policy problem requiring the attention of this Court, nor was this issue addressed below. Likewise, the question of whether the "declining balance" provisions of a malpractice policy should be enforced against the original limit or the new statutory limit after the carrier's insolvency, an obscure legal issue, was not addressed in the First District opinion, so it cannot be addressed herein.

CONCLUSION

Petitioner has failed to demonstrate an express and direct conflict which would create jurisdiction in this Court; this case was correctly decided in conformity with firmly established Florida law.

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CERTIFICATE REGARDING TYPEFACE

The typeface used herein is Times New Roman, proportionately spaced, fourteen point.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy hereof was mailed on this 5th day of August, 1999 to: Lauri Waldman Ross, Ross & Tilghman, 9130 S. Dadeland Blvd., Ste. 1705, Miami, Fl 33156.

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