SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

BETTY JONES, as Personal Representative of the Estate of Althea Jones, and as Personal Representative of the Estate of Althea Jones, as Assignee of MICHAEL PRATT, d/b/a SPRUILL AUTO SALES,

Petitioner,

v.

FLORIDA INSURANCE GUARANTY ASSOCIATION, INC., individually, and on behalf of DEALERS INSURANCE COMPANY,

Respondent.

CASE NO. SC03-1259

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

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STANDARD OF REVIEW

This case involves the construction of an insurance policy and statutory interpretation. The standard of review for these issues is *de novo*. Jones v. Utica Mut. Ins. Co., 463 So.2d 1153, 1157 (Fla. 1985) (standard of review in construing insurance policy); State v. Glatzmayer, 789 So.2d 297, 301 n.7 (Fla. 2001) (standard of review for statutory interpretation).

STATEMENT OF THE CASE

The Plaintiff, Betty Jones, as Personal Representative of the Estate of Althea Jones, and as Personal Representative of the Estate of Althea Jones, as Assignee of Michael Pratt, d/b/a Spruill Auto Sales,[1/] provides the Statement of the Case and Facts as follows:

This case involves FIGA's failure to defend an insured of Dealers Insurance Company ("Dealers"), an insolvent insurer, under a garage liability policy that provided automobile liability and bodily injury liability insurance. The underlying case sought damages for the wrongful death of Althea Jones arising from the alleged ownership, maintenance, use or control of a motor vehicle by the named insured, Michael Pratt, d/b/a Spruill Auto Sales. Pratt was eventually defaulted, and a jury returned a verdict in the amount of Seventy-Five Million Dollars ($75,000,000.00) which was

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[1/] For ease of reference herein, the Plaintiff/Petitioner, Betty Jones, as Personal Representative of the Estate of Althea Jones and as Personal Representative of the Estate of Althea Jones, as Assignee of Michael Pratt, d/b/a Spruill Auto Sales, will be referred to as the Plaintiff or Estate. The Defendant/Respondent, Florida Insurance Guaranty Association, Inc., individually and on behalf of Dealers Insurance Company, will be referred to as FIGA. All other persons will be referred to by name. All references to the record on appeal will be referred to as (R.) followed by citation to the volume and page number of the record. Any reference to the supplemental record on appeal will be referred to as (S.R.) followed by citation to the volume and page number of the supplemental record. Citations to deposition exhibit numbers 1-50 will be to the exhibit number.

subsequently reduced to a judgment. The present case involved Plaintiff's efforts to collect that judgment.

The present case was brought by Betty Jones in two separate capacities; first, as Personal Representative of the Estate of Althea Jones, and second, as Assignee of Michael Pratt, d/b/a Spruill Auto Sales. (R. V. I, 1-2)[2/] The complaint stated that Michael Pratt had in effect automobile insurance coverage with Dealers under Policy No. GP113857, and that as a result of the insolvency of Dealers, FIGA assumed the handling of claims against Dealers and its insureds pursuant to the Florida Insurance Guaranty Association Act. (R.V. I, 1, 2) The complaint further stated that on May 18, 1994, Heath Gilliam was operating a motor vehicle in Leon County, Florida, which was involved in an accident in which the vehicle he was operating collided with a vehicle being driven by Althea Jones resulting in her death on May 19, 1994. (R.V. I, 1-3, 23-30) It was alleged that the amended complaint in the underlying tort action [hereinafter the "underlying complaint"] asserted that Heath Gilliam was responsible for the death of Althea Jones through the negligent operation of the motor vehicle. The underlying complaint also alleged that Mr. Gilliam was operating the vehicle with the permission of Anthony Dixon, an employee of Spruill Auto Sales, and Michael Pratt

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[2/] Pursuant to Fla.R.App.P. 9.220, an appendix which includes the complaint, its exhibits and the insurance policy at issue are attached to this brief.

had given his permission to Mr. Dixon to operate the vehicle which was available for sale at Spruill. (R. V. I, 1, 3-4, 25-29) The underlying complaint sought damages, pursuant to the Wrongful Death Act, on behalf of the Estate and for the sole known survivor, Aisha Murray, then age 12. (R.V. I, 26)

The present complaint also stated that the underlying complaint had been served upon Michael Pratt on April 15, 1996, that FIGA had been placed on notice to that action, but nevertheless refused to defend Michael Pratt. (R.V. I, 1, 4) The Estate alleged that as a result of FIGA's failure to defend Michael Pratt, a default was entered against him, and pursuant to a jury's verdict, a final judgment was entered on May 16, 1997 in the amount of Seventy-Five Million Dollars ($75,000,000.00) which was to bear interest at the legal rate. (R.V. I, 4-5) The complaint concluded by stating that Michael Pratt had assigned all of his rights against Dealers and/or FIGA to Betty Jones, as Personal Representative of the Estate of Althea Jones, and a proof of claim form for the loss was filed with the Florida Department of Insurance in the matter of the receivership of Dealers on September 29, 1995. (R.V. I, 1, 5)

The Estate's complaint against FIGA stated three counts. Count I was for breach of FIGA's statutory obligations. It stated that the underlying complaint alleged a claim within the scope of the insuring agreement of the Dealers' policy, and demonstrated there was an obligation to defend Michael Pratt in the tort action. (R.V.

I, 5-6) Count I further stated that FIGA was deemed an insurer to the extent of Dealers' obligations on covered claims and to such extent, had the same rights, duties and obligations of Dealers as if Dealers had not become insolvent. Count I further stated that FIGA was obligated to act in the capacity of an insurer as to the claims pursued by Mrs. Jones, and FIGA had a statutory duty to both defend and indemnify Michael Pratt, d/b/a Spruill Auto Sales for the liability arising in the underlying case. Count I stated that FIGA had a duty to investigate and adjust the claim in a good-faith manner, a duty to defend Michael Pratt for claims coming within the insuring agreement, a duty to indemnify him for claims falling within the scope of the insuring agreement, a duty to make all requisite payments under the policy, and further, a duty to attempt in good faith to settle the claims when under all the circumstances, it could have and should have done so had it acted fairly and honestly toward Michael Pratt. Count I stated that as a result of FIGA's failure to comply with its statutory obligations, Michael Pratt, d/b/a Spruill Auto Sales, had suffered catastrophic damages in the amount of Seventy-Five Million Dollars ($75,000,000.00) plus interest accruing thereon at the statutory rate. (R.V. I, 1, 7-8)

Count II contained the same material allegations, but sought damages against FIGA for breach of contract. (R.V. I, 1, 9-12) Count III again incorporated the same material allegations and sought to impose liability upon FIGA for breach of fiduciary

duties. (R.V. I, 12-15) Mrs. Jones sought a judgment against FIGA awarding her all the damages incurred as a result of the judgment entered against Michael Pratt, d/b/a Spruill Auto Sales, attorneys' fees, costs and interest. (R.V. I, 1, 15)

FIGA eventually answered the complaint, and for the most part, generally denied the allegations. (R.V. I, 31-37) Ultimately, after various motions and agreements between the parties, FIGA asserted three affirmative defenses. Those defenses were that FIGA's liability was limited by Fla. Stat. § 631.57, that Michael Pratt had fraudulently procured the policy from Dealers, and as such, the claim was rightfully denied based upon misrepresentations in the application for insurance, and third, FIGA asserted that the Plaintiff had failed to timely file the claim, and as such, it was time barred. (R.V. I, 48-49) The parties conducted discovery and filed cross-motions for summary judgment. (R.V. I, 159-162, R.V. II, 210-214) The trial court entered an order denying FIGA's motion for summary judgment and granting the Plaintiff's motion for summary judgment. (R.V. II, 320-321) The trial court determined that FIGA had a duty to defend Michael Pratt, and because it had failed to do so, he had a Seventy-Five Million Dollar ($75,000,000.00) judgment entered against him. The trial court further determined that the statute of limitations did not bar the Plaintiff's claims, and any purported misrepresentations concerning the insurance application did not provide a basis for FIGA to void the policy because the undisputed facts showed that

Dealers did not rely upon such misrepresentations in issuing and maintaining the policy. (R.V. II, 320-321)

FIGA appealed that judgment to the First District Court of Appeal. The Plaintiff cross appealed the trial court's determination of the amount of damages. The First District reversed the judgment and found that the alleged causes of action for breach of contract, breach of statutory duty and breach of fiduciary duty were not cognizable under Florida law. The First District concluded that the claims for damages were barred by FIGA's immunity protection and relied upon the Third District's decision in Fernandez v. Florida Ins. Guaranty Assn., Inc., 383 So.2d 974 (Fla. 3d DCA 1980) for its decision. The Plaintiff timely invoked this Court's discretionary jurisdiction, and by order dated January 7, 2004, this Court accepted jurisdiction of the case.

STATEMENT OF THE FACTS

A. The Policy Issued by Dealers

Dealers issued a Garage Policy to Michael Pratt, d/b/a Spruill Auto Sales, (Ex. 23) with an effective policy period of March 11, 1994 to March 11, 1995. The policy provided Twenty-Five Thousand Dollars ($25,000.00) in automobile liability insurance.

Part I of the policy identifies defined terms in the policy. Of significance here, the policy states:

> A. **"You"** and **"Your"** mean the person or organization shown as the named insured in ITEM 1 of the declarations.
>
> . . .
>
> C. **"Accident"** includes continuous or repeated exposure to the same conditions resulting in **bodily injury** or **property damage** the **insured** neither expected nor intended.
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> D. **"Auto"** means a land motor vehicle, trailer or semi-trailer designed for travel on public roads.
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> E. **"Bodily injury"** means bodily injury, sickness or disease including death resulting from any of these.
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> F. **"Garage operations"** means the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations. Garage operations includes the ownership, maintenance or use of the **autos** indicated in PART II as covered **autos.** Garage operations also include all operations necessary or incidental to a garage business. [emphasis supplied]

Part II of the policy identifies which automobiles are covered automobiles. It provides in pertinent part:

> A. ITEM TWO of the declarations shows the **autos** which are covered **autos** for each of **your** coverages. The numerical symbols explained in ITEM THREE of the declarations describes which **autos** are covered **autos.** The symbols entered next to a coverage designate the only **autos** that are covered **autos.**
>
> B. **OWNED AUTOS YOU ACQUIRE AFTER THE POLICY BEGINS.**
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> 1. If symbols "21", "22", "23", "24", "25" or "26" are entered next to a coverage in ITEM TWO, then **you** already have coverage for **autos** of the type described until the policy ends.

In the declarations page of the policy issued to Michael Pratt, the numerical symbol number 21 is listed next to the liability coverage of the policy. This symbol number 21is defined on the declarations page as "ANY AUTO."

Part IV addresses the liability insurance coverage. It provides in pertinent part as follows:

> A. **WE WILL PAY.**
>
> 1. **We** will pay all sums the **insured** legally must pay as damages because of **bodily injury** or **property damage** to which this insurance applies caused by an **accident** and resulting from **garage operations.**

2. **We** have the right and the duty to defend any suit asking for these damages. However, **we** have no duty to defend suits for **bodily injury** or **property damage** not covered by this policy.

B. **WE WILL ALSO PAY.**

5. All interest accruing after the entry of a judgment in a suit **we** defend. **Our** duty to pay interest ends when **we** pay or tender **our** limit of liability.

The policy also identifies who is an insured. It states:

D. **WHO IS AN INSURED.**

1. **For Covered Autos.**

a. **You** are an **insured** for any covered **auto.**

(Ex. 23)

B. FIGA's Claim Handling

As mentioned in the Statement of the Case, FIGA asserted that Michael Pratt had made misrepresentations in the application for the policy. In applying for the policy, Michael Pratt signed the application for insurance disclosing his driving record and that of a Mr. McClendon. (Ex. 26) The information concerning the driving history of both Pratt and McClendon was not accurate. However, Dealers investigated their driving records, and upon discovery that there had been infractions, it increased the premium, but kept the policy in force and effect. (Ex. 15; S.R.V. III, 457-459) On

May 19, 1994, while the policy was in effect, the vehicle operated by Heath Gilliam in Leon County struck the vehicle operated by Plaintiff's decedent, Althea Jones, which resulted in her death.

Dealers was declared insolvent on December 19, 1994, and the Department of Insurance was appointed as receiver. On September 29, 1995, Mrs. Jones filed her claim to the receiver and indicated the amount of the claim to be Five Hundred Thousand Dollars ($500,000.00). (R.V. I, 79; Ex. 39) FIGA confirmed that the deadline to make a claim was October 1, 1995. (R.V. I, 79)

In the fall of 1995, Plaintiff's counsel began to communicate with James Leezer, the adjuster for FIGA. Mrs. Jones' lawyer provided FIGA with a great deal of information and outlined his liability and damages theories and offered to settle the claim for the limits. (Ex. 30-31, 36, 40) On October 24, 1995, the Estate's lawyer again contacted Mr. Leezer advising that there had not been a tender of the $25,000.00 policy limits. (Ex. 31) The letter indicated that the Estate would like to settle the case, but apparently there was nothing they could do to convince FIGA to pay the claim. Id. The letter concluded that if there was no tender within two weeks, a suit would be filed. Mr. Leezer responded, in part by threatening, ". . . If you choose to file suit, you may also very well choose for us to deny coverage." (Ex. 32)

Mrs. Jones brought suit on behalf of Althea Jones, as sole survivor, her minor daughter, Aisha, against Heath Gilliam and Government Employees Insurance Company, Althea Jones' uninsured motorist carrier. (Ex. 1) That complaint ultimately was amended in mid-March, 1996, to add Michael Pratt, d/b/a Spruill Auto Sales. (R.V. I, 79-80)[3/] (Ex. 8) The Estate's lawyer sent a copy of the amended complaint along with a return of service indicating Michael Pratt had been served on April 15, 1996 to James Leezer, the FIGA adjuster, who was still handling the file.

Once again, the Estate offered to settle the case. Mr. Leezer and FIGA acknowledged receipt of those documents. ((Ex. 47) (S.R.V. I, 112-113)) On May 1, 1996, Mr. Leezer fulfilled his threat to deny coverage writing a letter to Michael Pratt advising him that FIGA was denying coverage and would not be providing Mr. Pratt with a defense. (S.R.V. II, 304-305; Ex. 53) Mr. Leezer also wrote to the Estate's attorney on May 16, 1995, advising that coverage had been denied, and FIGA would take no further action on the matter. (Ex. 48)

James Leezer, the senior claims examiner for FIGA, handled the Jones claim until his retirement, at which point in time, it was taken over by Sam Allen. (S.R.V. I, 9; S.R.V. II, 312) Mr. Leezer explained that FIGA's purported first notice of the

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[3/] FIGA or Dealers was not added as defendants because of the provisions of Fla. Stat. § 627.4136. (R.V. I, 79-80)

claim was a letter dated August 19, 1995 from the Estate's attorney. (S.R.V. I, 72) Shortly thereafter, he wrote the first of four letters sent certified mail to Michael Pratt. (S.R.V. I, 71-72; Ex. 21) At the time he wrote the letter advising it was FIGA's first notice of the claim, he did not know whether FIGA had even conducted a search of the Dealers records to determine if notice had been provided. (S.R.V. I, 72-75) The October 6, 1995 letter was returned to FIGA as undeliverable. FIGA knew that Michael Pratt had not received it. (S.R.V. I, 77; Ex. 21) FIGA sent a second letter to another address on November 8, 1995, again by certified mail. (S.R.V. I, 78; Ex. 22) That letter was signed for by an unidentified person, Chris Staten. (Ex. 22)

In his deposition, Mr. Leezer admitted that Michael Pratt would be under no obligation to report an accident if he did not own the vehicle that was involved or if he did know whether such an accident had occurred. (S.R.V. I, 179-181; S.R.V. II, 273-275, 289-290) He also stated four letters were sent to Michael Pratt, by certified mail, three of which were returned and one accepted by some unknown person who was not Pratt. (S.R.V. I, 174) Mr. Leezer also believed that an investigator spoke to a person who might have been Pratt, but FIGA did not confirm that person's identity. (S.R.V. I, 182-184; S.R.V. III, 479-480, 516) Mr. Leezer conceded that if Pratt did not see the letters and if the person FIGA's investigators spoke to was not Pratt, Pratt would not have violated any obligation to cooperate. (S.R.V. I, 177-184) Likewise,

if Pratt were not involved in the accident and did not own the car, he was not obliged to report the accident. (S.R.V. I, 179-181)

In his April 29, 1996 memo to his supervisor recommending the coverage denial, Leezer acknowledged that Pratt had been served. (S.R.V. III, 527) He advised that the claim was a double fatality, and the Estate's theory of liability against Pratt was based on the dangerous instrumentality doctrine. Id. He stated that the reservation of rights letters had been returned, or signed for by one other than the insured. Id. He also explained that investigators were not successful locating Pratt and the investigators had only spoken to a person who denied being Pratt and then admitted to being him. The memo further states that Pratt lied in the application for a dealer's license. (S.R. VIII, 520) Leezer further explained that the vehicle was probably not owned by Pratt and that the registered owner at the time of the occurrence was Brian Richotte.

The memo stated that a minimal $5,000.00 offer had been made and rejected, and Plaintiff's counsel indicated he would accept $20,000.00-$25,000.00 to settle. Id. Leezer recommended that FIGA not defend or file a declaratory action based on Pratt's failure to report the accident, his failure to cooperate and a material misrepresentation. Leezer acknowledged that ". . . more than likely. . .Pratt would take no action just as he has not done so to date."

Doreen Loughlin, a FIGA supervisor, confirmed the underlying complaint contained allegations against a person insured for bodily injury arising from the ownership, maintenance or use of a motor vehicle. She also confirmed that the allegations triggered no exclusions or conditions. (S.R.V. III, 454) Sam Allen, the adjuster who assumed responsibility for the file subsequent to Mr. Leezer's retirement, likewise conceded that if the allegations of the amended complaint in the underlying tort case were taken as true, that the amended complaint would have contained allegations against the person insured for a vehicle insured under the policy for damages that were covered under the policy and not otherwise excluded. (S.R.V. II, 364-371) Even Mr. Leezer acknowledged the principle that FIGA was required to accept the complaint's allegations as true to determine FIGA's defense obligation, but that FIGA took a position of no coverage for the reasons expressed in his memo. (R.V. III, 233-235)

Finally, Doreen Loughlin confirmed that FIGA had never tendered its policy limits, nor had it ever tendered a return of premium when it asserted the misrepresentation defense. (S.R.V. III, 398, 407)

ISSUES

I.

WHETHER FIGA BREACHED ITS STATUTORY DUTIES AND THE DEALERS CONTRACT BY FAILING TO DEFEND OR PAY A COVERED CLAIM?

II.

WHETHER FIGA IS RESPONSIBLE FOR PAYMENT IN EXCESS OF THE BODILY INJURY LIABILITY LIMITS?

SUMMARY OF THE ARGUMENT

The Florida Insurance Guaranty Association ("FIGA") was created by the Florida legislature with the express statutory purpose to provide 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 insurance company. Florida Statutes § 631.51(1) The broad powers and obligations of FIGA are addressed in Fla. Stat. § 631.57. When administering claims, FIGA is deemed the insurer to the extent of the insurer's obligations on the covered claims, and to such extent, has all rights, duties and obligations of the insolvent insurer as if that insurer had not become insolvent. In short, when an insurer becomes insolvent, FIGA is said to "stand in the shoes of the insolvent insurer" and is deemed the insurer to the extent of the obligations on covered claims. Florida Ins. Guaranty Assn., Inc. v. Johnson, 654 So.2d 239 (Fla. 4th DCA 1995).

Statutory benefits under the Act are available when the claimant presents a "covered claim" to FIGA. Florida Statutes § 631.57. A covered claim under the Act is merely an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy issued by an insurer, if the insurer became insolvent after October 1, 1970 and the claimant or insured were residents of Florida at the time of the insured event.

Florida Statutes § 631.54(3). The obligation concerning the covered claims includes the amount of each covered claim in excess of $100.00 and less than $300,000.00.

Since FIGA is deemed to be the insurer to the extent of the obligations on covered claims, the rules pertaining to an insurance company's duty to defend are to be applied to FIGA when determining its defense obligations. In Florida, an insurance company's obligation to defend is broader than its duty to pay. Allstate Ins. Co. v. R.J.T. Enterprise, 692 So.2d 142 (Fla. 1996). The obligation to defend arises if the allegations in the complaint arguably could bring the insured within the policy provisions of coverage, and if the facts fall partially within the policy coverage, the insurer must defend, even if later facts demonstrate there is no coverage. National Union Fire Ins. Co. v. Lenox Liquors, 358 So.2d 533 (Fla. 1977). All doubts as to whether there is a duty to defend in any particular case must be resolved against the insurer and in favor of the insured. Biltmore Construction Co. v. Owners Ins. Co., 842 So.2d 947 (Fla. 2d DCA), rev. dis., 846 So.2d 1148 (Fla. 2003).

Comparing the allegations of the underlying complaint and the allegations of the present complaint to the terms of the Dealers policy, it is clear that a covered claim was presented. Both complaints allege that Michael Pratt, the insured, was a resident of Leon County at the time of the event. The underlying complaint stated a cause of action against a person insured (Michael Pratt) for the wrongful death of Althea Jones

(a bodily injury as defined in the policy) arising from the ownership, maintenance, use and/or control of a vehicle (such vehicle qualifying as a covered auto as defined in the policy). Moreover, the underlying complaint alleged a liability which resulted from garage operations defined in the policy to include liability arising from the ownership, maintenance or use of any auto.

The complaint in the present case also presented a covered claim because in addition to the allegations of the underlying complaint, it sought interest which would be covered under the supplementary payments provision of the Dealers policy and interest against FIGA on the amount of the judgment because such interest would have been required to be paid by FIGA in the absence of its wrongful denial of coverage.

The decision of the First District which found there was no covered claim presented, erroneously relied upon Fernandez v. Florida Ins. Guaranty Assn., 383 So.2d 974 (Fla. 3d DCA 1980) as the basis for its decision. In Fernandez, FIGA admitted and paid the underlying claim and was sued solely for an excess judgment. The Third District there ruled that FIGA could not be liable in a traditional, third-party, bad-faith claim. That case simply had no application to the determination in the first instance of whether FIGA was presented with a covered claim which it wrongfully refused to defend or pay.

FIGA is also responsible for payment in excess of the bodily injury limits of the Dealers policy. First, FIGA is obligated to pay interest on the judgment. The Dealers policy included a supplementary payments provision in which it agreed to pay interest accruing after the entry of a judgment, and such duty to pay interest ended only when it paid or tendered the limits of liability. Such provisions have been routinely enforced by Florida courts. See, e.g., Highway Cas. Co. v. Johnston, 104 So.2d 734 (Fla. 1958). Such provisions have also been relied upon to obtain payment in excess of the statutory claimed limit against FIGA. See, Florida Ins. Guaranty Assn., Inc. v. Johnson, 654 So.2d 239 (Fla. 1995). It is undisputed that FIGA has never tendered nor paid the limits. As such, the Estate's claim for payment of the interest on the full amount of the judgment also presented a legally-appropriate claim against FIGA.

FIGA is also responsible for interest in cases in which it has been named in the judgment. In this case, FIGA could not be named in the underlying judgment because of its wrongful denial of coverage. See, Fla. Stat. § 627.4136; Queen v. Clearwater Electric Co., Inc., 555 So.2d 1262 (Fla. 2d DCA 1989). Allowing FIGA to avoid the payment of interest that it would otherwise owe on the judgment based upon its wrongful denial of coverage would actually allow FIGA to profit from its wrongful conduct and be in a better position from having deliberately denied a covered claim than it would have been had it fulfilled its statutory obligation.

Finally, FIGA should be responsible to pay the full amount of the judgment because immunity is provided to FIGA pursuant to Fla. Stat. § 631.66 solely for action taken by FIGA or its employees in the performance of their powers and duties under the statute. Conspicuously absent from the statute is any broad grant of immunity to FIGA or its employees for their failure to perform their statutory duties, or even worse, for the breach of those obligations. No Florida case has addressed this exact issue. In Washington Ins. Guaranty Assn. v. Ramsey, 922 P.2d 237 (Alaska 1996), the Alaska Supreme Court, reviewing the Washington Act, and specifically the immunity provision, determined there was no immunity provided by the language of this uniform act where a guaranty association took actions in violation of its statutory duties.

In the present case, construing the Act, as did the Alaska court, would fulfill the express statutory purpose of the Act and would inhibit FIGA and its employees from deliberately violating their obligations under the Act with impunity. This Court should quash the decision of the First District.

ARGUMENT

I.

FIGA BREACHED ITS STATUTORY DUTIES AND THE DEALERS CONTRACT BY FAILING TO DEFEND OR PAY A COVERED CLAIM.

INTRODUCTION

Since this matter involves the Florida Insurance Guaranty Association and its obligations, Petitioner believes it would be helpful to the Court to briefly introduce the rules which will help assist the Court in determining FIGA's obligation in the present case. FIGA is a non-profit corporation created by the Florida legislature. Florida Statutes § 631.55 (1997). The express statutory purpose of the legislature in the creation of FIGA was to provide 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. Florida Statutes § 631.51(1). The legislature also gave direction to courts regarding their construction of the Act in Fla. Stat. § 631.53 in which the legislature stated:

> This part shall be liberally construed to effect the purposes set forth in s. 631.51, which shall constitute an aid and guide to interpretation.

Therefore, the statute must be liberally construed to effect its purposes, including avoiding financial loss to claimants and/or policyholders. See, Florida Ins. Guaranty Assn., Inc. v. Cole, 573 So.2d 868 (Fla. 2d DCA 1990).

The broad powers and duties of FIGA are addressed in Fla. Stat. § 631.57. In administering claims, FIGA is deemed the insurer to the extent of the insurer's obligations on the covered claims, and to such extent, has all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent. Under Florida law, when an insurer becomes insolvent, FIGA is said to "stand in the shoes of the insolvent insurer" and is deemed the insurer to the extent of the obligations on covered claims. Florida Ins. Guaranty Assn., Inc. v. Johnson, 654 So.2d 239 (Fla. 4th DCA 1995). Under such circumstances, FIGA has the rights, duties and obligations of the insurer as if the insurer had not become insolvent. Id.

The statutory benefits under the Act are available when the claimant presents a "covered claim" to FIGA. Fla. Stat. § 631.57; Florida Ins. Guaranty Assn., Inc. v. Garcia, 614 So.2d 684 (Fla. 2d DCA 1993). A covered claim under the Act is merely an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy issued by an insurer, if the insurer became insolvent after October 1, 1970, and the claimants or insured were residents of Florida at the time of the insured event. Fla. Stat. §

631.54(3). The obligation concerning the covered claims includes the amount of each covered claim in excess of $100.00 and less than $300,000.00.

The Plaintiff Presented a Covered Claim

The first issue this Court must address is whether the Plaintiff presented a covered claim. FIGA maintained, and the First District agreed, that no covered claim was presented. With all due respect to the First District, we do not believe that court could be more wrong. This Court can easily resolve this issue first by reviewing the insurance policy issued by Dealers and comparing it to the allegations of the underlying complaint and then by reviewing the complaint filed in this case against FIGA.

Since FIGA "steps into the shoes of the insolvent insurance company" and is deemed to be the insurer to the extent of the obligations on covered claims, the rules pertaining to an insurance company's duty to defend are to be applied to FIGA when determining its defense obligations under the Dealers policy. In Florida, an insurance company's obligation to defend is broader than its duty to pay. Allstate Ins. Co. v. R. J. T. Enterprises, Inc., 692 So.2d 142 (Fla. 1996). An insurance company's obligation to defend its insured arises if the allegations in the complaint arguably could bring the insured within the policy provisions of coverage, and if the facts fall partially within the policy coverage, the insurer must defend even if later facts demonstrate there is no coverage. National Union Fire Ins. Co. v. Lenox Liquors, 358 So.2d 533 (Fla.

1977). See also, Pentecost v. Lawyers Title Ins. Co., 706 So.2d 1103 (Fla. 1st DCA 1997); Grissom v. Commercial Union Ins. Co., 610 So.2d 1299 (Fla. 1st DCA 1992). All doubts as to whether there is a duty to defend in any particular case must be resolved against the insurer and in favor of the insured. Grissom v. Commercial Union Ins. Co., 610 So.2d 1299 (Fla. 1st DCA 1992). See also, Biltmore Construction Co. v. Owners Ins. Co., 842 So.2d 947 (Fla. 2d DCA), rev. dis., 846 So.2d 1148 (Fla. 2003); N.C.O. Environmental, Inc. v. Agricultural Excess & Surplus Ins. Co., 689 So.2d 114 (Fla. 3d DCA 1997).

When an insurance company is obligated to defend its insured and to pay damages on his or her behalf and the insurance company is duly notified of the suit against its insured and has a full opportunity to defend the action, yet nevertheless refuses to do so, the judgment is conclusive against the insurance company. Cosmopolitan Mut. Ins. Co. v. Eden Roc Hotel, 258 So.2d 310, 312 (Fla. 3d DCA 1972). See also, Grain Dealers Mut. Ins. Co. v. Quarrier, 175 So.2d 83 (Fla. 1st DCA 1965). When an insurance company or indemnitor has been placed on notice of a suit and has been given an opportunity to defend, and has instead refused to do so, the judgment rendered against the insured or indemnitee, in the absence of fraud or collusion, is conclusive against the indemnitor or insurance company as to all material matters determined therein. See, Wright v. Hartford Underwriters Ins. Co., 823 So.2d

241 (Fla. 4th DCA 2002); Ahearn v. Odessy Re (London), Ltd., 788 So.2d 369 (Fla. 4th DCA 2001), rev. dis., 819 So.2d 138 (Fla. 2002); Bagley v. W. Cas. & Surety Co., 505 So.2d 678, 680 (Fla. 1st DCA 1987); Coblentz v. American Surety Co. of New York, 416 So.2d 1059 (5th Cir. 1969) (interpreting Florida law).

Comparing the allegations of the underlying complaint to the terms of the insurance policy, it is clear that the amended complaint alleged that Michael Pratt, the named insured, was legally obligated to pay damages because of bodily injury which was caused by an accident and resulting from garage operations. Specifically, the underlying complaint alleged that Michael Pratt was a resident of Leon County, Florida and was doing business as Spruill Auto Sales in Leon County. (R.V. I, 25) Count II of the underlying complaint alleged that Pratt, as owner and operator of Spruill Auto Sales, had possession and control of several automobiles. (R.V. I, 27) It was further alleged that on the date of the accident, Anthony Dixon was an employee or agent of Michael Pratt, and Pratt had given his permission and consent to Mr. Dixon to operate the vehicle involved in the accident. Further, it was asserted that Mr. Dixon, in turn, allowed Heath Gilliam to operate the vehicle extending Pratt's consent to Gilliam. (R.V. I, 27) The underlying complaint further claimed that Mr. Gilliam was negligent in the operation of the motor vehicle which caused a collision with the vehicle driven by Althea Jones, and Pratt and Spruill were legally responsible for Gilliam's

negligence. (R. V. I, 27) The underlying complaint further stated that as a result of Gilliam's negligence, Althea Jones died as a result of the serious personal injuries received in the accident. (R.V. I, 28)

In short, the underlying complaint stated a cause of action against a person insured (Michael Pratt, d/b/a Spruill Auto Sales) for the wrongful death of Althea Jones (a bodily injury as defined in the policy) arising from the ownership, maintenance, use and/or control of a vehicle that was covered auto, as defined in the policy. As such, the only remaining issue was whether the liability asserted resulted from "garage operations" as defined in the policy. As noted in the Statement of the Case and Facts, the term, "garage operations" is defined in the policy to include not only the ownership, maintenance or use of the premises used for garage business, but also, "garage operations includes the ownership, maintenance or use of the autos identified in PART II as covered autos." Based upon the definitions of "covered autos" in PART II and the symbols identified on the declarations page (specifically symbol number 21), garage operations under the policy included liability arising from the ownership, maintenance or use of any auto (symbol number 21). When the term "garage operations" is defined in the policy to include the ownership, maintenance or use of any automobile covered by the policy, the policy is not limited to the use of the

covered automobiles in the garage business. See, Arnold v. Beacon Ins. Co. of America, 687 So.2d 843 (Fla. 2d DCA 1997).[4/]

Applying the plain and ordinary meaning of the terms used in the insurance policy, the underlying complaint clearly alleged facts which invoked the coverage and did not fall within any exclusion. Since Dealers would have had at least an obligation to defend Michael Pratt from the allegations in the amended complaint, FIGA, stepping into the shoes of Dealers, likewise had a statutorily-imposed obligation to defend Pratt. FIGA deliberately refused to honor or comply with that statutory duty. Moreover, since FIGA was properly and timely notified of the lawsuit and intentionally chose not to defend it, the facts as alleged in the underlying complaint, have now been merged into the judgment, and those are the true facts for purposes of determining coverage under the Dealers policy and FIGA's duty to pay. The complaint in the present

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[4/]

Even if there some doubt as to the meaning of the word "any," this Court can easily resolve that simply by referring to the dictionary. Merriam-Webster's Collegiate Dictionary, 10th Ed., defines "any" as follows:

> **1:** one or some indiscriminately of whatever kind: **a:** one or another taken at random, **b:** EVERY – used to indicate one selected without restriction **2:** one, some, or all indiscriminately of whatever quantity: **a:** one or more – used to indicate an undetermined number or amount **b:** ALL – used to indicate maximum or whole **c:** a or some without reference to quantity or extent **3 a:** unmeasured or unlimited in amount, number, or extent **b:** appreciably large or extended.

case also alleged a covered claim. It alleged that Michael Pratt was a resident of Leon County, and at all times material, there was in effect an automobile insurance policy with Dealers Insurance Company. (R.V. I, 2) The complaint further stated that as a result of Dealers' insolvency, FIGA had assumed the responsibility for handling the claims against Dealers and its insureds. (R.V. I, 2) The complaint further alleged that the underlying action was brought as a Florida wrongful death case (a copy of which was attached), that it alleged Pratt had given permission for the operation of the motor vehicle, and Pratt had been served on April 15, 1996. (R.V. I, 3-4) It was further stated that FIGA had received a copy of the amended complaint, that FIGA refused to defend Pratt, and as a result, a default was entered against him. (R.V. I, 4) The complaint further stated that the trial resulted in a final judgment against Pratt that was to bear interest at the legal rate. (R.V. I, 5) The complaint further stated that a proof of claim had been filed with the Florida Department of Insurance in its capacity as receiver for Dealers Insurance Company on September 29, 1995, and Pratt had assigned his rights to Betty Jones, as Personal Representative of Estate of Althea Jones. Count I of the complaint was brought against FIGA for violation of its statutory duties. It was alleged that FIGA breached those duties which resulted in the underlying judgment and interest accruing thereon against Pratt. (R.V. I, 5-8) Jones

sought all damages, costs, interest, attorneys' fees and such other relief as the court deemed just and appropriate against FIGA.

The complaint also stated the existence of an unpaid claim which arose out of and was within the coverage provided by Dealers. It stated that the claimant and the insured were residents of Florida at the time of the insured event. To the extent that the complaint sought damages in excess of the liability insurance limits of $25,000.00, it further stated a covered claim for at least two reasons. First, the policy issued by Dealers had a supplementary payments provision requiring the insurance company to pay all interest accruing after the entry of a judgment against the insured in which Dealers defended. Since Dealers would have been required to defend, the obligation to pay the interest would have accrued under the policy and, therefore, by virtue of the statute, was imposed upon FIGA. Moreover, to the extent that FIGA is required to pay interest on judgments it defends (as further explained at pages 34-35 of this brief), the responsibility to pay interest on the judgment was clearly FIGA's as well. The request for attorneys' fees was proper by virtue of Fla. Stat. §§ 631.70 and 627.428.

In spite of the undisputed evidence indicating that the Estate presented a covered claim, the First District inexplicably reversed the entire judgment, relying upon the Third District's decision in Fernandez v. Florida Ins. Guaranty Assn., Inc., 383 So.2d 974 (Fla. 3d DCA 1980) and Fla. Stat. § 631.66 (1995). In Fernandez, the

plaintiff sought to recover an excess judgment against FIGA alleging that it had been guilty of a bad-faith refusal to settle within the policy's limits. The trial court there dismissed the complaint with prejudice on the sole ground that as a matter of law, no such action could be maintained against FIGA. The Third District affirmed that decision citing Fla. Stat. § 631.66. Unlike the present case, in Fernandez, FIGA had paid the policy limits, and the claim was being brought against it solely for the amount of the excess judgment on a bad-faith theory of recovery. In short, Fernandez has no application to any determination of whether a covered claim was presented for those amounts within the liability limits and the supplementary payments provision of the policy.

To the extent that the First District's decision in some fashion suggests that the method by which the present claim was brought was improper, this Court should also quash the decision. The method used in this case was specifically approved in Florida Ins. Guaranty Assn. v. Giordano, 485 So.2d 453 (Fla. 3d DCA 1986). The claim was brought in that case, as it was here, for breach of statutory duties by way of assignment. The only alternative way for Mrs. Jones to bring her claim against FIGA in the present case was one for breach of contract. She was prohibited from joining FIGA directly in the tort suit against Mr. Pratt by virtue of Fla. Stat. § 627.4136 and FIGA's denial of coverage. That statute also applies to FIGA when it steps into the

shoes of an insolvent insurer. See, Queen v. Clearwater Electric Co., Inc., 555 So.2d 1262 (Fla. 2d DCA 1989). As such, Mrs. Jones brought the present suit under the only two legal capacities which have been recognized by Florida courts. That is, she brought it directly after having obtained a judgment against Mr. Pratt as well as Mr. Pratt's assignee.

With all due respect, we do not believe there is any plausible basis to argue that the underlying complaint or the present complaint did not assert a covered claim as defined under the Act. The underlying complaint clearly contained allegations which fell within the insuring agreement of the Dealers policy and did not fall within any exclusion. The complaint in the present case included not only those allegations, but FIGA's breach of its statutory duties in stepping into the shoes of Dealers. Quite clearly, the complaint stated a covered claim, and the trial court was correct in finding that FIGA had breached its statutory obligation of defense and was responsible to make certain payments as a result. The decision of the First District should be quashed, and the decision of the trial court finding that FIGA breached its obligation to defend Michael Pratt and that Pratt had been damaged as a result should be reinstated.

II.

FIGA IS RESPONSIBLE FOR PAYMENT IN EXCESS OF THE BODILY INJURY LIABILITY LIMITS.

Not only was the First District's decision erroneous concerning its conclusion that there was no covered claim, the decision was also erroneous in its determination that FIGA could not be held responsible for any amounts in excess of the bodily injury liability limits. Existing Florida law holds precisely the opposite. FIGA may be held responsible for amounts in excess of the liability limits when the policy contains a supplementary payments provision and when the amount in excess of the liability limits represents interest on the judgment to which FIGA has properly been joined. Moreover, we respectfully suggest that not only was the First District's reliance upon the Third District's decision in Fernandez v. Florida Ins. Guaranty Assn., 383 So.2d 974 (Fla. 3d DCA 1980) misplaced, but the rule announced in Fernandez is over broad because it provides FIGA with immunity for actions it takes which are not within or in direct contravention to its statutory duties, as well as those taken in performance of those duties.

A. FIGA's Obligation to Pay Interest on the Judgment

FIGA's responsibility to pay interest on the judgment in this case arises from two sources. The first is the supplementary payments provision in the Dealers policy.

The second is the law which requires FIGA to pay interest on judgments it defends and to which it has been joined. The only way for FIGA to be exonerated from its responsibility to pay interest on the judgment is if FIGA is allowed to benefit from its wrong-doing and to place itself in a better position by having breached its statutory obligations than had it fulfilled and performed them.

The Dealers policy contains a supplementary payments provision which provides:

> B. **WE WILL ALSO PAY.**
>
> 5. All interest accruing after the entry of a judgment in a suit **we** defend. **Our** duty to pay interest ends when **we** pay or tender **our** limit of liability.

(Ex. 23)

This Court first addressed a similar provision in an insurance policy in Highway Cas. Co. v. Johnston, 104 So.2d 734 (Fla. 1958). There, the Court concluded that the insurance company was responsible to pay interest on the full amount of the judgment ($40,000.00), notwithstanding the fact that its liability limits were only $10,000.00. The Court found the language of the provision was unambiguous, and since the insurance carrier had not paid, tendered or deposited in the court the amount of its limits, it was responsible to pay interest on the full amount of the judgment until it had done so. Since that time, Florida courts have regularly enforced similar language in insurance

policies. See, e.g., State–Wide Ins. Co. v. Flaks, 233 So.2d 400 (Fla. 3d DCA 1970); Aetna Cas. & Surety Co. v. Protective National Co. of Omaha, 631 So.2d 305, 309 (Fla. 3d DCA), rev. den., 641 So.2d 1346 (Fla. 1994); Graber v. Clarendon National Ins. Co., et al, 819 So.2d 840 (Fla. 4th DCA 2002); Perez v. Publix Service Mut. Ins. Co., 821 So.2d 1189 (Fla. 3d DCA 2002). In order to limit the liability for interest on a judgment, insurers are required to do precisely what their policies state, that is, either offer or tender the policy limits. See, e.g., Campbell v. Turner, 744 So.2d 1261 (Fla. 1st DCA 1999).

These provisions have also been relied upon against FIGA to obtain payment in excess of the statutory "covered claim" limit against FIGA. In Florida Ins. Guaranty Assn., Inc. v. Johnson, 654 So.2d 239 (Fla. 4th DCA 1995), FIGA was required to pay an award of costs which was over and above the damage award of $9,900.00.[5/] FIGA asserted it was not responsible to pay the award because it exceeded the "covered claim" limits. The Fourth District noted that FIGA stood in the shoes of the insolvent insurer and the policy's supplementary payments provision

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5/ The policy of the underlying insurer was $10,000.00 less a $100.00 statutory deduction which was not an issue. FIGA only contested payment of the cost award.

required the insolvent insurer to pay in addition to its limits of liability, other reasonable expenses incurred at its request. The court explained that the request referred to took the form of the insolvent insurer's election to litigate the claim and the policy expressly covered such costs.

In the present case, the policy contains an unambiguous supplementary payments provision. That provision provides coverage above and beyond the bodily injury liability limits. Had Dealers not become insolvent, that provision would have required it to pay interest on the full amount of the judgment until it paid or tendered its limits of liability. The evidence in this case is undisputed. FIGA has never tendered the limit of liability. In a traditional insurance case, when an insurance company wrongfully refuses to defend its insured, the insurance company is responsible for all damages naturally flowing from the breach. See, Carousel Concessions, Inc. v. Florida Ins. Guaranty Assn., 483 So.2d 513 (Fla. 3d DCA 1986); Thomas v. Western World Ins. Co., 343 So.2d 1298, 1304 (Fla. 2d DCA), cert. dis., 348 So.2d 955 (Fla. 1977). In this case, FIGA violated its statutory obligations, has never paid or tendered the policy limits, and as a result, interest has been running on the underlying judgment for many years. Had Dealers likewise wrongfully refused to defend, it would have been responsible for the payment of interest on the judgment as damages naturally flowing from its breach of contract. So too, FIGA is responsible

for payment of the interest as damages naturally flowing from the breach of its statutory obligations to assume the responsibilities articulated in the insurance policy.

FIGA has contended below that it is not responsible for the payment of interest on the judgment by virtue of Fla. Stat. § 631.57(1)(b) which states in pertinent part that in no event shall the Association be liable for penalties or interest. We certainly admit that several of the cases which have interpreted this provision have held that FIGA is not responsible for interest on benefits that may have otherwise been due from the insolvent insurer, and some of those cases have required that FIGA actually be named in the judgment before interest may begin to accrue.[6/] However, that rule does not appear to be absolute. See, Florida Ins. Guaranty Assn. v. Giordano, 485 So.2d 453, 457 (Fla. 3d DCA 1986) (finding plaintiff who sued FIGA for breach of statutory duty to defend by way of assignment was entitled to lawful interest on the judgment). In this case, the Estate could not join FIGA in the underlying judgment. FIGA's wrongful denial of coverage actually precluded the Estate from joining FIGA in the underlying judgment. See, Fla. Stat. § 627.4136. See also, Queen v. Clearwater Electric Co., Inc., 555 So.2d 1262 (Fla. 2d DCA 1989). Interpreting Fla. Stat. §

[6/] See, e.g., Florida Ins. Guaranty Assn. v. Gustinger, 390 So.2d 420 (Fla. 3d DCA 1980); Travoli Amusement Co. v. Rodriguez, 413 So.2d 163 (Fla. 1st DCA 1982); Florida Ins. Guaranty Assn. v. Jacques, 643 So.2d 101 (Fla. 4th DCA 1994).

631.57(1)(b), as urged by FIGA below would directly violate the expressed legislative purpose of the statute and the legislative instruction on how to construe the statute. Rather than avoiding excessive delay and financial hardship, FIGA's interpretation would actually foster even greater delay and more burdensome financial hardship. Accepting FIGA's interpretation would actually allow FIGA to benefit from its wrongful conduct because it could avoid all interest on amounts it clearly owed until such time as an insured or claimant obtained the underlying judgment, and thereafter, litigated with FIGA for years before obtaining a judgment against FIGA. Most respectfully, such an interpretation is offensive not only to the expressed legislative intent of the statute, but is also offensive to justice, logic and common sense.

B. FIGA is Responsible to Pay the Full Amount of the Judgment Because the Conduct of FIGA's Employees Was Not Taken by Them in the Performance of Their Powers and Duties Under the Act

Florida Statutes § 631.66 states in pertinent part:

> Immunity – 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 of 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. . . .

The statute clearly and unambiguously affords immunity to the Association and its employees for the performance of their statutory duties and powers. The statute

is equally clear that it confers no immunity for the failure of FIGA or its employees to perform their statutory duties and powers or worse, for the breach of those duties.

The First District relied upon the Third District's decision in Fernandez v. Florida Ins. Guaranty Assn., Inc., 383 So.2d 974 (Fla. 3d DCA 1980) to determine that no such claim could be pursued. Fernandez essentially was a case in which FIGA had failed to accept a reasonable settlement offer, and a judgment in excess of the policy limits had been rendered against the insured. The court there stated that the statute was unambiguous, and FIGA could not be sued for bad faith for the performance of its powers and duties under the Act.

We have not, however, proceeded under a traditional bad-faith cause of action. Rather, our cause of action is based upon FIGA's failure to perform its statutory duties or worse, its violation of those obligations. The undersigned has been unable to locate any reported Florida decisions that has specifically analyzed FIGA's liability for its failure to perform its statutory obligations as opposed to the immunity it receives for the performance of such duties. The FIGA Act, however, is a uniform Act, and there are courts from around the country which have interpreted various aspects of the statute. In Washington Ins. Guaranty Assn. v. Ramsey, 922 P.2d 237 (Alaska 1996), the Alaska Supreme Court reviewed the Washington Act, specifically the immunity portion, to determine whether a cause of action for failure to settle a

claim could properly be brought against the Washington association (WIGA). In reviewing the immunity statute, the court focused on the following language:

> There shall be no liability on the part of and no cause of action shall arise against . . . the association . . . for any action taken . . . in the performance of [its] powers and duties under this chapter.

The Alaska Supreme Court held that this language simply stated that WIGA cannot be held liable for any actions it takes in accordance with its duties. The court further held that the language necessarily implied that WIGA could be held liable for actions it took which were not within its duties. Id. at 243. The court continued,

> It follows that if it is within WIGA's duties to reasonably settle claims and WIGA refuses to reasonably settle the claim, such refusal is not in accordance with WIGA's statutory duties and, therefore, WIGA cannot claim immunity from liability based upon that refusal.

The court determined that any action taken which would violate the very duties imposed by the statute would not be afforded the protection of the immunity included within the statutory provision.

The Ramsey court also addressed Fernandez. The Alaska Supreme Court indicated that it was unclear from the opinion whether the action in Fernandez was brought in tort or contract on the one hand or was like the one before it, an action to enforce the statutorily-imposed obligations. The Ramsey court stated that if the suit was brought to enforce FIGA's statutory obligations, it was of the belief that the

Fernandez court had misinterpreted the immunity provision by ruling that FIGA was completely immune from suit. The court, therefore, held that WIGA had no immunity for a claim to enforce the statutory duties. Id. at 246.

In the present case, we brought suit against FIGA to enforce its statutory obligations which it clearly failed to perform in this case. FIGA was under an obligation to pay a covered claim. It certainly was under an obligation to defend the covered claim. FIGA refused to perform its statutory obligation to defend the insured or to pay the covered claim. It did so with full knowledge that Pratt was not the registered owner of the vehicle, that he probably never owned the vehicle, that he never received any of its certified letters and he would probably not respond to the lawsuit. FIGA did this notwithstanding the fact that a default would mean the imposition of liability when its investigation showed there was probably none, and it declined to file an action for declaratory judgment to determine the validity of its so-called coverage defenses. Most respectfully, it certainly can be reasonably asserted that FIGA's coverage decision in this case, particularly in light of the facts known to FIGA and the knowledge of its employees concerning defense obligations, was nothing more than the fulfillment of Mr. Leezer's threat. That is, coverage was denied by FIGA in retaliation against the Estate's attorney having filed suit in the first instance. When the statute is interpreted liberally in accordance with the legislative directive, it is

reasonable to believe that the legislature did not intend to provide FIGA with blanket immunity regardless of whether it was performing its statutory duties on the one hand or deliberately violating them on the other. If that was the legislative intent, one would believe that the legislature could have and would have said so. Moreover, if such immunity is granted to FIGA, it is given free rein to completely violate its statutory obligations, in clear derogation of the express legislative intent of the statute, with no adverse consequences whatsoever.

This Court should interpret the statute precisely the way the legislature has expressed it should be interpreted. That is, it should be interpreted to avoid financial hardship to claimants and insureds alike. Under the current interpretation, FIGA can drag its feet, wrongfully deny coverage with actual knowledge that its decision is in violation of its obligations and the law, and with impunity, actually impose financial hardship upon the very people the statute is intended to protect. We respectfully submit that such a result is completely contrary to the express legislative intent of the statute, and the better way to interpret the statute so as to effectuate its intent is provide FIGA with immunity solely for the performance of its obligations, not for the willful breach of those statutory obligations.

CONCLUSION

This Court should quash the decision of the First District and determine that the Estate presented a "covered claim," that FIGA breached its statutory obligations pertaining to the claim and is required to pay not only the covered claim, but interest on the judgment until the benefits of the liability insurance have been offered according to the supplementary payment provision of the policy. This Court should also determine that FIGA has no immunity for violating its statutory obligations and require judgment be entered against FIGA for the underlying judgment and interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. MAIL to **Richard B. Bush, Esquire,** 3375-C Capital Circle, NE, Suite 200, Tallahassee, Florida 32308, on February 26, 2004.

_____

George A. Vaka, Esquire

CERTIFICATE OF COMPLIANCE

I hereby certify that Petitioner's Initial Brief on the Merits complies with font requirements, and this brief is typed with 14 point New Times Roman.

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