SUPREME COURT
STATE OF 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,

CASE NO. SC03-1259

Petitioner,

v.

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

Respondent.

PETITIONER'S INITIAL BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The 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,[1] adopts the decision of the First District as her Statement of the Case and Facts.[2] Betty Jones would provide the following summary as follows:

The Plaintiff's decedent, Althea Jones, was killed in an automobile accident on May 18, 1994, when she was struck by a vehicle driven by Heath Gilliam in Leon County, Florida. (A. 2) Gilliam operated the vehicle with the permission of Anthony Dixon, an employee of Spruill Auto Sales. (A. 2) Mr. Dixon had been given permission to operate the vehicle that had been available for sale at Spruill Auto Sales by Michael Pratt. (A. 2-3) Betty Jones brought a wrongful death action as personal

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[1] The Petitioner, Betty Jones, will be referred to as Plaintiff or by name. The Respondents, Florida Insurance Guaranty Association, Inc. and Dealers Insurance Company, will be referred to as FIGA and Dealers Insurance Company.

[2] In conformity with Fla.R.App.P. 9.120(d), the decision of the First District Court of Appeal is attached hereto as Appendix I. All references to the Appendix will be referred to as (A) followed by citations to the appropriate page number of the Appendix. The order denying rehearing is attached as Appendix II.

representative of Althea Jones' estate against Mr. Gilliam and Michael Pratt, d/b/a Spruill Auto Sales. (A. 3) Mr. Pratt's insurance company, Dealers Insurance Company, was later declared insolvent in December, 1994, and as such, Mrs. Jones' claims against Mr. Pratt became subject to the Florida Insurance Guaranty Association Act (FIGA). (A. 3)

FIGA determined that the claims asserted against Mr. Pratt were not covered and, refused to defend him. A default was entered against Mr. Pratt, and a jury verdict on damages was returned and a final judgment entered for $75,000,000.00. Mr. Pratt assigned all of his rights against Dealers Insurance Company and/or FIGA to Mrs. Jones. (A. 3)

Mrs. Jones brought a three-count complaint against FIGA and alleged that it had breached its statutory and contractual obligations to Michael Pratt, which in turn, constituted a breach of the policy obligations to him causing him to suffer catastrophic damages in the amount of the judgment. Count III alleged that FIGA breached a fiduciary obligation to Michael Pratt which resulted in the excess judgment. (A. 3-4)

The trial court determined that FIGA had an obligation and a duty to defend Michael Pratt. (A. 4) The trial court also determined that as a result of FIGA's refusal to defend Mr. Pratt, he had a $75,000,000.00 judgment was entered against him.

The trial court awarded $299,900.00 plus statutory interest from the date the judgment was entered against Mr. Pratt on May 16, 1997. (A. 4)

The First District reversed that judgment stating that the claims were not cognizable under the FIGA Act. The First District's decision cited to various immunity provisions incorporated into the FIGA Act. The court stated that the claims for damages were not covered obligations under the FIGA Act and were barred by FIGA's immunity protection. (A. 5) The First District relied upon Fernandez v. Florida Ins. Guaranty Assn., Inc., 383 So.2d 974 (Fla. 3d DCA 1980) as authority for its position.

JURISDICTIONAL ISSUE

WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM THIS COURT OR THE OTHER DISTRICT COURTS OF APPEAL?

SUMMARY OF THE ARGUMENT

The decision of the First District Court of Appeal expressly and directly conflicts with the Third District's decision in FIGA v. Giordano, 485 So.2d 453 (Fla. 3d DCA 1986). In Giordano, the Plaintiff, through an assignment from the insured, brought suit against FIGA for its failure to defend and sought both damages covered under the underlying insurance policy as

well as damages in excess of the limits of that policy and the statutory limits which protect FIGA. The Third District ruled that Giordano was entitled to recover the damages otherwise covered under the policy, even though she was not entitled to recover excess damages.

In the present case, the First District relied upon a different Third District case, Fernandez v. FIGA, 383 So.2d 974 (Fla. 3d DCA 1980), which held that FIGA may not be sued in bad faith to collect an excess judgment. The First District applied the Fernandez rule and reversed not only the portion of the judgment that reflected damages in excess of the policy limits, but also the damages that reflected the benefits owed under the insurance policy. As such, the First District determined that the Estate of Mrs. Jones is entitled to no benefits whatsoever based upon a rule of law that says FIGA may not be held responsible for the payment of excess judgments because of its bad faith conduct. This Court should exercise its discretion, grant review and review this case on the merits.

ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM THIS COURT OR THE OTHER DISTRICT COURTS OF APPEAL.

Pursuant to Article V, § 3(b)(3), Florida Constitution (1980), this Court may exercise its discretionary jurisdiction

when an appellate decision expressly and directly conflicts with the decision of another District Court of Appeal or this Court on the same question of law. This Court's constitutional authority to review an appellate decision establishing a point of law requires only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result. The Florida Star v. B. J. F., 530 So.2d 286, 288 (Fla. 1988); Persaud v. State, 838 So.2d 529, 532-33 (Fla. 2003). "Conflict" jurisdiction also arises when a District Court of Appeal misapplies the law by relying on a decision that involves facts materially at variance with the case under review. See, Gibson v. Avis Rent-A-Car Systems, Inc., 386 So.2d 520, 521 (Fla. 1980).

In the present case, the First District reversed the entire judgment, including the amounts representing benefits under the policy and not in excess of the statutory limitation which arose from the trial court's determination that FIGA had an obligation to defend Michael Pratt. The decision expressly relied upon Fla. Stat. § 631.66 (Fla. 1995) and the Third District's decision in Fernandez v. Florida Ins. Guaranty Assn., Inc., 383 So.2d 974 (Fla. 3d DCA 1980).

In Fernandez, the plaintiff sought to recover an excess judgment against FIGA alleging that FIGA had been guilty of a bad faith refusal to settle the claim within the policy limits. The trial court dismissed the complaint with prejudice on the sole ground that as a matter of law, no such action could be maintained against FIGA. Affirming the decision of the trial court, the Third District, citing Fla. Stat. § 631.66, stated that the provision was clear and unambiguous, and no such cause of action for bad faith lies against FIGA.[3] Thus, Fernandez has no application to the trial court's determination that FIGA had an obligation to defend and was, at a minimum, responsible to pay the policy limits for its failure to defend. The First District misapplied Fernandez to that portion of the claim.

The present decision also conflicts with Florida Ins. Guaranty Assn. v. Giordano, 485 So.2d 453 (Fla. 3d DCA 1986). In Giordano, Mrs. Giordano filed a wrongful death action in 1975 on behalf of her husband's estate against Rego Valve Company, an Illinois corporation, which manufactured a gas valve alleged to have caused an explosion resulting in fatal burns to Mr.

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[3] FIGA had paid the policy limits of $10,000.00, and as such, the Third District did not rule that FIGA was not responsible, at all for the Fernandez claim. It was not responsible for the excess judgment under a bad faith theory.

Giordano. Rego was insured with Reserve Insurance Company with policy limits of $300,000.00. Rego also had an excess policy with Employers Reinsurance Company.

Reserve undertook the defense of the Giordano suit against Rego until May 31, 1979 when it was declared insolvent. The claim was then sent to FIGA. In January, 1980, FIGA learned that the insured was an Illinois corporation and adopted the position that pursuant to Fla. Stat. § 631.57(2), the Illinois Guaranty Fund, with statutory coverage limits of $150,000.00, was the primary carrier, and FIGA, with statutory coverage limits of $300,000.00, was an excess carrier with no obligations owed to the insured. The Illinois Guaranty Fund assumed the defense of the lawsuit.

The parties, excluding FIGA, settled, and Rego agreed to a $525,000.00 stipulated judgment. Payments were assessed from the Illinois Guaranty Fund in the amount of $150,000.00, Employers Reinsurance at $225,000.00, and FIGA at $150,000.00. Rego assigned its rights against FIGA, including the $150,000.00 judgment, plus attorneys' fees, costs, interest and punitive damages to Mrs. Giordano.

When FIGA refused to pay, Mrs. Giordano filed a lawsuit, as Rego's assignee, to enforce FIGA's statutory obligations and the judgment entered on the settlement agreement. That suit claimed

FIGA's course of conduct had been willful, wanton, reckless and a denial of due process and equal protection. Count II for the excess amount was dismissed with prejudice. Both parties moved for summary judgment on Count I.

The trial court found that FIGA had a duty to defend Rego and a duty to pay its portion of the settlement. Affirming that decision and citing Fla. Stat. § 631.57, the Third District stated that when Reserve became insolvent, FIGA moved into Reserve's place and "stood in the shoes" of Reserve as if it had not become insolvent.[4] FIGA became obligated to Rego up to its policy limits of $300,000.00, and it acquired all of Reserve's rights, duties and obligations to the insured. Citing Fla. Stat. § 631.61(2), the court stated that since Rego was an Illinois resident, the plaintiff and the insured were directed to seek payment first from the Illinois Guaranty Fund and then the balance from FIGA.

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[4] See also, Florida Ins. Guaranty Assn., Inc. v. Johnson, 654 So.2d 239, 240 (Fla. 4th DCA 1995):

> It is established law in Florida that after insurer becomes insolvent, FIGA "stands in the shoes" of the insolvent insurer, and, pursuant to section 631.57(3)(b) Florida Statutes (1991), will "be deemed the insurer to the extent of its obligations 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."

FIGA was not relieved of its statutory obligations to Rego merely because of the existence of another state guaranty association. The Third District stated that FIGA was 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. Citing Fla. Stat. § 631.57(1)(b), the court then determined that since FIGA had not disputed the wrongful death action was a covered claim, it had no discretion as to whether it would defend the insured. The court then applied well-settled Florida law concerning an insurer's duty to defend and concluded that FIGA had a co-extensive duty with the Illinois Guaranty Fund, as a primary carrier, to defend the insured.

To the extent the decision of the First District suggests that the method by which the present claim was brought was improper, the method was specifically approved in Florida Ins. Guaranty Assn. v. Giordano, 485 So.2d 453 (Fla. 3d DCA 1986). That is, it was first brought for breach of statutory duties by way of assignment. The alternative way for Mrs. Jones to pursue FIGA was through a breach of contract action. She was prohibited from joining FIGA directly in the tort suit brought against Mr. Pratt by virtue of Fla. Stat. § 627.4136. That statute has been applied in situations in which FIGA has stepped

into the shoes of the 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 two legal capacities which have been recognized by Florida courts. That is, she brought it directly after having obtained a judgment against Mr. Pratt, and as an assignee of Mr. Pratt.

Not only does there exist sufficient conflict upon which to demonstrate this Court's jurisdiction, this Court should exercise its discretion and review this case on the merits because the issue involved in this case has broad application to literally thousands of Florida citizens. If the decision of the First District is allowed to stand, then FIGA will be allowed to ignore its statutory duties with impunity. FIGA will be able to unlawfully refuse to defend an insured, allow that insured to suffer catastrophic damages, well in excess of the policy limits, without even the threat that it would be held responsible for the amount of the covered claim. The express statutory purpose of FIGA is 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). If the decision of the

First District is allowed to stand, not only is the express statutory purpose of FIGA ignored, but the protection purportedly provided by the statute will become illusory at best for all of those who were required to have their claims administered by FIGA in the future.

CONCLUSION

The decision of the First District expressly and directly conflicts with other reported decisions. This Court should exercise its discretion, grant review, and address the case on the merits.

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, and **Stephen K. Masterson, Esquire,** 1911 Capital Circle N.E., Tallahassee, Florida 32308, on August 15, 2003.

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George A. Vaka, Esquire

CERTIFICATE OF COMPLIANCE

I hereby certify that 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, Initial Brief on Jurisdiction complies with font requirements pursuant to Fla.R.App.P. 9.100(l) and 9.210(a)(2).

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__ George A. Vaka, Esquire

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