IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1259

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.

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL CASE NO. D01-4350

RESPONDENTS' AMENDED ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

As set forth in the First District Court of Appeal's decision, on May 18, 1994, a vehicle owned by an employee of Michael Pratt d/b/a Spruill Auto Sales was involved in a accident which resulted in the death of Althea Jones died. Florida Insurance Guaranty Association v. Betty Jones, 847 So. 2d 1020, 1021 (Fla. 1st DCA 2003). Ms. Jones' estate brought a wrongful death action against Pratt alleging that the vehicle was available for sale at Spruill Auto Sales. Id.

In December 1994, however, Pratt's insurance company, Dealers Insurance went bankrupt. Id. Under the "Florida Insurance Guaranty Association Act," see section 631.50 et seq., Florida Statutes, (2002) (the FIGA ACT), Pratt's claim became subject to the Florida Insurance Guaranty Association (the Association). The Act provides "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." See § 631.51(1), Fla. Stat. (2002) (emphasis added). The Association is not an insurance company itself. Instead, it is a "statutorily-created nonprofit corporation that pays specified claims owed by insolvent insurance companies that most likely would be otherwise unpaid." Jones, 847 So. 2d at 1022; see also § 631.57(1), Fla. Stat. (2002).

Pursuant to its duties under the statute, the Association conducted an investigation to determine whether the action concerned a "covered claim" actually

owed by the insolvent insurance company (Dealers). The Associations' investigation and review of the Dealers insurance policy's conditions led it to conclude that the claims against Pratt were not a "covered claim" owed by Dealers. Jones, 847 So. 2d at 1022. Thus, it determined that the claims were not encompassed by the FIGA Act and it took no action to defend Pratt in the wrongful death action. Id.

A default was entered against Pratt and a jury returned a verdict on damages against him in the amount of $ 75,000,000. In an attempt to collect on the $75,000,000 verdict, the estate obtained an assignment of rights from Pratt. The estate then sued the Association asserting that it had breached its statutory, contractual and fiduciary obligations to Pratt by refusing to defend him in the lawsuit.

The trial court agreed with the estate and awarded it $299,900.00 plus statutory interest.[1] On appeal, however, the First District Court of Appeal reversed. Citing Fernandez v. Florida Insurance Guaranty Association, 383 So. 2d 974 (Fla. 3d DCA 1980) (bad faith claims against Association itself are not cognizable under FIGA act due to immunity), the First District explained that the Association was not an insurance company and was not subject to suit since it had been granted complete immunity by the Florida Legislature. Thus, it concluded, the estate's

[1] The trial court apparently awarded less than the full $75,000,000 because the FIGA statute limits the payment of all covered claims to $300,000, less a $100 statutory deductible.

claims were not cognizable under the FIGA act. The estate has now sought discretionary review.

JURISDICTIONAL ISSUE

WHETHER THE FIRST DISTRICT'S DECISION IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH FERNANDEZ V. FLORIDA INSURANCE GUARANTY ASSOCIATION, 383 SO. 2D 974 (FLA. 3D DCA 1980) AND/OR FLORIDA INSURANCE GUARANTY ASSOCIATION V. GIORDANO, 485 SO. 2D 453 (FLA. 3D DCA 1986).

SUMMARY OF THE ARGUMENT

The First District's Decision in this case does not expressly and directly conflict with either of the Third District's decisions in Fernandez v. Florida Insurance Guaranty Association, 383 So. 2d 974 (Fla. 3d DCA 1980) or Florida Insurance Guaranty Association v. Giordano, 485 So. 2d 453 (Fla. 3d DCA 1986).

The decision in this case is actually in complete harmony with Fernandez because, like the situation in this case, in Fernandez, the Third District held that under the FIGA Act immunity provisions, no bad faith claims against the Association are cognizable.

The decision in this case is not in express and direct conflict with Giordano either because both the holding and the facts in Giordano are distinguishable. The facts in this case showed that the Association had determined that the claim was not a "covered claim" for which the insolvent insurance company was or would have been responsible. In Giordano, on the other hand, the Third District specifically

stated that neither the insolvent insurance company nor the Association had ever denied that the claim was a "covered claim." Further, the issues of law are different. In this case, the issue concerns the Association's immunity under the FIGA statute. The Third District did not examine the immunity provisions at all in Giordano.

ARGUMENT

Petitioner has sought to invoke this Court's conflict jurisdiction under Article V, section 3(b)(3) of the Florida Constitution. That provision provides this Court with discretionary jurisdiction to review the District Court's decision only if the decision "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const. (emphasis added). To determine whether there is conflict, the Court may only examine "the four corners of the [district court's] majority decision," see Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986), not the underlying record. Further, the conflict must concern the very same point of law. Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985). This is because the true purpose of conflict review is to eliminate inconsistent views about the same question of law. Id.

In this case, Petitioner asserts that the First District's Decision in this case expressly and directly conflict with two decisions from the Third District. See Fernandez v. Florida Insurance Guaranty Association, 383 So. 2d 974 (Fla. 3d DCA

1980); Florida Insurance Guaranty Association v. Giordano, 485 So. 2d 453 (Fla. 3d DCA 1986).

In Fernandez, the plaintiff was injured in an automobile accident negligently caused by the insured. When the insured's carrier went bankrupt, the Association took over defense of the lawsuit. After the Association rejected an offer to settle the claim for the policy limits, the plaintiff recovered a jury verdict larger than the policy limits and brought a separate action against the Association to recover the difference between the policy limits and the jury verdict. Plaintiff alleged that the Association itself had been guilty of a bad faith refusal to settle the claim within the policy limits. The trial judge dismissed the complaint with prejudice on the sole ground that, as a matter of law, no such action could be maintained against the association based on the FIGA Act immunity provisions. The Third District affirmed explaining that the Association's responsibility was a type of vicarious liability in that it took over the duties of the insolvent insurance companies and even then, only to a limited extent. Fernandez, 383 So. 2d at 975. Moreover, the Third District noted, the Associations' own liability was further limited by the immunity provisions set forth in the FIGA act. Id. The Third District explained:

> FIGA is a statutory creature which is designed to serve solely as "the mechanism for the payment of covered claims under certain classes of insurance policies of insurers which have become insolvent." In establishing the institution, however, the legislature was careful to restrict its potential liability not only concerning its vicarious responsibility for the acts of the companies it succeeds . . . but also

> as to its own allegedly wrongful activities . . . . which is the [issue] before us.

Fernandez, 383 So. 2d at 975 (internal citations and footnotes omitted; emphasis added). After examining the text of the immunity statute,[2] the Third District concluded that the statutes' provision that "no cause of action of any nature" could arise against the Association itself included the bad-faith failure to settle claim set forth by the Plaintiff in Fernandez and thus, the claim was not cognizable.

The Petitioner in this case attempts to invoke this Court's conflict jurisdiction by asserting that the First District's decision in this case "misapplied" the Third District's decision in Fernandez. While the First District's decision in this case concerned a failure to defend claim and the Third District's Fernandez decision concerned a failure to settle claim,[3] both decisions were based on the same principle

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[2] The FIGA immunity statutes, section 631.66, Florida Statutes (2002) (emphasis supplied), provides, in pertinent part, as follows:

> There shall be no liability on the part of, and no cause of action **of any nature** shall arise against, any member insurer, the association or its agents or employees, the board of directors, or the department or its representatives for any action taken by them in the performance of their powers and duties under this part.

[3] In insurance law, an improper refusal to defend allegation has been determined to be a "bad faith" claim. See, e.g. Kelly v. Williams, 411 So. 2d 902, 904 (Fla. 5th DCA 1982) ("The essence of a 'bad faith' insurance suit . . . is that the insurer breached its duty to its insured by failing to properly or promptly defend the claim, which may encompass its failure to make a good faith offer of settlement within the policy limits, all of which results in the insured being exposed to an excess judgment.") (internal parentheses omitted).

that the Association is statutorily protected against suit for its own allegedly "bad faith" actions based on the broad immunity provisions set forth in the FIGA statute.

Petitioner also attempts to back-up his "misapplication" theory by asserting that the First District in this case should have reversed only a portion of the verdict (the excess judgment) because only the excess judgment portion of the verdict in Fernandez was reversed. The reason, however, for this difference in the two decisions is based on a difference in the facts of each case. In Fernandez, the Association did not contest that the claim was a "covered claim." As specifically set forth in the Fernandez decision, the Association accepted the case; assumed responsibility for the defense of it, and paid the limits of the insolvent carrier's policy. Plaintiff Fernandez, however, sought more than the limits of the insolvent carrier's policy; she sought an excess judgment against the Association above and beyond the limits of the insolvent carrier's policy for an alleged bad faith refusal to settle before trial. The Fernandez court did not preclude the plaintiff from recovery of the limits of the policy because the Association had never contested that amount and recovery of those amounts were not based on the bad-faith theory. In the First District's decision in this case, however, the Association contested the entire award as it had concluded that none of it was covered by the FIGA Act. Further, all of the money awarded by the trial court in this case was based on the alleged bad-faith failure to defend claim. In a nutshell, therefore, the Fernandez court allowed the

plaintiff to retain the policy limits of $10,000 because coverage was never contested by the Association and that amount was not the basis of the bad faith claim.

In reality, the First District's decision in this case is in complete harmony with Fernandez because in both cases, the courts held that under the FIGA Act immunity provisions, no bad faith claims against the Association are cognizable.

The decision in this case is not in express and direct conflict with Florida Insurance Guaranty Association v. Giordano, 485 So. 2d 453 (Fla. 3d DCA 1986), because both the holding and the facts in Giordano are completely distinguishable. The facts in this case showed that the Association had determined that the claim was not a "covered claim" for which the insolvent insurance company was or would have been responsible. In Giordano, on the other hand, the Third District specifically stated that neither the insolvent insurance company nor the Association had ever denied that the claim was a "covered claim." Giordano, 485 So. 2d at 456 ("The statute clearly states that FIGA shall be deemed the insurer to the extent of its obligations of the insolvent insurer . . . [and] . . FIGA did not dispute that the wrongful death action was a "covered claim."). This distinction is paramount because the entire basis for the relief granted in Giordano was that the Association was vicariously liable for the "covered claim" because it "stood in the shoes" of the insolvent insurance company. Giordano, 485 So. 2d at 455. In the First District's decision, there was no "covered claim," and thus, no vicarious liability.

CONCLUSION

Since both the facts and the issues of law in Fernandez v. Florida Insurance Guaranty Association, 383 So. 2d 974 (Fla. 3d DCA 1980), and Florida Insurance Guaranty Association v. Giordano, 485 So. 2d 453 (Fla. 3d DCA 1986), are different, there is no express and direct conflict and this Court should deny review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Respondents' Answer Brief on Jurisdiction, has been furnished by U.S. Mail to George A. Vaka, Esquire, at Vaka, Larson & Johnson, P.L., 777 S. Harbour Island Boulevard, Suite 300, Tampa, FL 33602, this _____ day of September, 2003.

_____
BARBARA DEBELIUS

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Respondents' Amended Answer Brief on Jurisdiction is submitted in New Times Roman 14-point font, as set forth in Florida Rule of Appellate Procedure 9.210.

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BARBARA DEBELIUS