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 REPLY BRIEF ON THE MERITS

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INTRODUCTION

Rather than address the arguments that were raised in our Initial Brief, FIGA has seen fit, without explanation, to change the issues on appeal. It has done so presumably because it can provide no satisfactory answer to the issues that are relevant in this appeal. We will do our best to respond, but plan to do so within the confines of the issues we have actually raised within this appeal.

Additionally, at the outset, FIGA devotes six pages of its brief to rearguing this Court's decision on jurisdiction. We will not burden the Court by rearguing a decision on jurisdiction that the Court has already reached. Suffice it to say, the Third District's decision in Fernandez v. Florida Ins. Guaranty Assn., 383 So.2d 974 (Fla. 1980) did not address and, therefore, could not provide the legal basis for the First District's determination that the Estate was entitled to no benefits, including those under the policy of the insolvent insurer, as a matter of law. In Fernandez, unlike the present case, FIGA paid the amount of the statutory covered claim, and thereafter, was sued for its bad-faith failure to settle. In this case, FIGA has paid nothing, even the amounts of the covered claim. This Court correctly determined that the First District's decision misapplied Fernandez and supplied the appropriate conflict upon which this Court could exercise its discretion and accept jurisdiction within the authority conferred upon this Court by the Constitution.

REPLY ARGUMENTS

I.

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

In our Initial Brief, we explained that FIGA is deemed the insurer to the extent of the insurer's obligations on covered claims, and as such, has all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent. In short, FIGA is said to "stand in the shoes of the insolvent insurer." Florida Ins. Guaranty Assn., Inc. v. Johnson, 654 So.2d 239 (Fla. 4th DCA 1995). We also explained that, as it pertains to liability claims, FIGA's duty to defend, like an insurer's, is broader than its obligation to pay. That obligation to defend arises if the allegations in the complaint arguably could bring the insured within the policy provisions of the coverage. The insurer, and in this case FIGA, must defend even if later facts demonstrate there is no coverage. See, National Union Fire Ins. Co. v. Lennox Liquors, 358 So.2d 533 (Fla. 1977).[1/] We also provided the Court with a

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[1/] We also explained that when an insurer is obligated to defend its insured and to pay damages on his or her behalf, and the insurer is duly notified of the suit and given an opportunity to defend, yet nevertheless refuses to do so, the judgment is conclusive against the insurer as to all material matters determined therein. See, e.g., Wright v. Hartford Underwriters Ins. Co., 823 So.2d 241 (Fla. 4th DCA 2002); Ahearn v.

detailed analysis, referencing facts with specific citations to the record on appeal, and a detailed analysis of the insurance policy to demonstrate why FIGA had an obligation to defend Pratt in the underlying litigation as a matter of Florida law.

FIGA's response to that analysis is remarkable. The entirety of FIGA's discussion of the insurance policy and its response to our detailed analysis concerning the obligation to defend is at Page 14 of its answer brief. Its discussion of the insurance policy is limited solely to quoting a portion of the definition of "garage operations." FIGA's "analysis" of its obligation to defend, based upon a comparison of the allegations of the underlying complaint and the insurance policy is limited to one sentence in which FIGA states that the "facts available" to FIGA did not demonstrate the accident was within the coverage afforded by the policy. Nowhere throughout the remainder of FIGA's brief has it challenged our analysis concerning its defense obligations, sought to distinguish even a single authority relied upon to support our position, nor even denied that based upon the allegations in the underlying complaint, it had an obligation to defend Michael Pratt in the underlying case. Instead, tacitly conceding the issue, FIGA has simply ignored it.

Odessy Re (London) Ltd., 788 So.2d 369 (Fla. 4th DCA 2001), rev. dis., 819 So.2d 138 (Fla. 2002).

Rather than address the primary issue in this case, FIGA instead attempts to raise issues not even discussed in the decision of the First District. What is perhaps even more remarkable than the decision to address these issues, is FIGA's omission in advising this Court that every one of these arguments was rejected by the trial court and that summary judgment was entered against FIGA in each instance.

The first issue that FIGA raises is a purported material misrepresentation by Michael Pratt in the application.[2/] At page 14 of its brief, FIGA now states that Pratt made a material misrepresentation when he answered no to the question of whether vehicles were loaned to others. However, the person who signed FIGA's answers to interrogatories, Sam Allen, was asked to identify all inaccurate information in the application in his deposition. (S.R. V. II, 340-351) Mr. Allen identified the driving

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[2/] FIGA also argues throughout its brief that the trial court below did not make a determination that the claim presented was a "covered claim." See, e.g., Answer Brief, p. 36. While it is true that the trial court's order on summary judgment does not contain that term, it is clear by even a most cursory review of the order that the trial court did make such a determination without using those words. Moreover, even if semantics were important, which they are not, the absence of such a phrase in the order is not fatal to the Estate's position on appeal. When a trial court reaches the right result, but for the wrong reasons, the decision of the trial court is to be upheld if there is any basis which would support the judgment in the record. See, Dade County School Board v. Radio Station WQBA, 731 So.2d 638, 644 (Fla. 1999). In this case, there is ample evidence throughout this record to support the ruling of the trial court in its determination that FIGA had an obligation to defend the underlying case and breached it, and this obligation to defend arose from a covered claim which FIGA was obligated to pay.

records of McClendon and Pratt as inaccurate. (S.R. V. II, 347) Mr. Allen admitted that in his investigation of what Dealers Insurance Company had done to underwrite the policy, he discovered that Dealers Ins. Co., after submission of the application, obtained the accurate driving history of both McClendon and Pratt and with that information, never chose to rescind or cancel the policy because of the misrepresentation. (S.R. V. II, 348-351) Rather, with full knowledge of the inaccuracies in the application, Dealers surcharged the policy, that is, it increased the premium and kept the policy in force and effect. (S.R. V. III, 457-459)

Thus, the trial court's conclusion that the omissions were not material is completely supported by the record. Dealers' conduct either qualifies as the creation of a new offer and acceptance, or alternatively, the acceptance of the premium with full knowledge of the facts that would have allowed it to void the policy is conduct which is inconsistent with forfeiture. As such, Dealers would have been estopped from claiming a forfeiture of the policy, and FIGA, standing in its shoes, was likewise, estopped from doing so. See, e.g., Bankers Ins. Co. v. General No-Fault Ins., Inc., 814 So.2d 1119 (Fla. 4th DCA 2002).

FIGA has criticized our position that its failure to return the premium is also an act inconsistent with forfeiture which would estopp it from denying coverage on that basis. In its brief, FIGA suggests that these principles are not applicable to it. Not

surprising, there is no citation to authority for that proposition, and FIGA has never attempted to distinguish any of the cases we cite for that authority. Perhaps most surprising, however, is FIGA's failure to acknowledge the testimony of its own claims manager, Delene Loughran, who testified that in situations in which there is material misrepresentation, FIGA has in the past tendered the return of premium in order to effectuate such a rescission. (S.R. V. III, 407-408) In short, the only evidence of record in this case demonstrates that the information that FIGA claimed was not accurately provided was later discovered by the insolvent insurer, who with that knowledge, accepted the risk and charged an additional premium. This information was obviously not relevant to acceptance of the risk and a new premium was charged. There simply is no good-faith basis for FIGA to assert this purported defense.

FIGA's next contention is that Michael Pratt failed to cooperate. In its brief, FIGA refers to the testimony of Mr. Leezer who said the "failure to cooperate was complete." Of course, FIGA completely omits any discussion of his testimony (or that of any other employee) regarding the facts upon which this conclusion was based. When that testimony is reviewed, it becomes apparent that there was no basis to assert a failure to cooperate by Michael Pratt based upon the facts known by FIGA.

As FIGA has stated at the outset of its brief, Michael Pratt did not own the vehicle involved in this accident. The record evidence is that none of the letters sent

by FIGA to Michael Pratt before he was joined in the underlying lawsuit were ever received by Michael Pratt. Equally as important, even James Leezer, the adjuster handling the file, conceded that if Michael Pratt did not own the vehicle, he was not obligated to report an accident involving a vehicle he did not own. (S.R. V. II, 273-274) Mr. Leezer also admitted that Mr. Pratt would have no obligation to tell FIGA about how, when or where the accident or loss occurred, if he did not own the vehicle involved in the accident. (S.R. V. II, 274) Equally important was Mr. Leezer's admission that if Michael Pratt did not own the vehicle and his first notice of the claim was service of process upon him on April 15, 1996, Michael Pratt would not have been in violation of any cooperation clause. (S.R. V. II, 290) Under those circumstances, Mr. Leezer conceded that it would have been improper for FIGA to deny coverage to him on that basis. (S.R. V. II, 290).

In short, FIGA asserted the failure to cooperate as a purely paper issue in an attempt to avoid a summary judgment below. There is no basis in fact for the assertion of the defense. Instead, all of the record evidence and FIGA's own investigation indicates that Michael Pratt did not own the vehicle, nor did he ever receive any of the certified letters sent to him by FIGA prior to service of process upon him in the underlying lawsuit. FIGA's assertion that Pratt breached the cooperation clause by failing to timely provide suit papers is equally without merit. At

the time that James Leezer sent the May 1, 1996 declination letter to Michael Pratt, Mr. Leezer had a copy of the summons, return of service and complaint in this possession. Coverage was denied five days before an answer was due. There is no possible prejudice that FIGA could demonstrate, either as a matter of fact or as a matter of law, to even raise an issue of fact that Michael Pratt's failure to provide it with a copy of the summons and complaint prior to May 1, 1996, materially prejudiced FIGA in any way. See, Bankers Ins. Co. v. Macias, 475 So.2d 1216 (Fla. 1985).

FIGA's last contention is that the claim was not timely filed. This argument, like its previous arguments, is completely without merit. The foundation of FIGA's argument is that Mrs. Jones only sued FIGA in her capacity as assignee of Michael Pratt. That assertion is completely erroneous. First, one need only look at the style of the case to see that Mrs. Jones brought this case both as personal representative of the Estate directly against FIGA and as assignee of Michael Pratt. Second, FIGA's attorneys and its corporate representative, Delene Loughran, acknowledged these two separate capacities during Ms. Loughran's deposition. (S.R.V. III, 421-426) Moreover, as we demonstrated in our Initial Brief, it is absolutely clear that Mrs. Jones timely brought her case against Michael Pratt in compliance with all applicable statutes of limitations.

Therefore, the only claim that FIGA's argument can be addressed to is the claim that Mrs. Jones brought by way of assignment. FIGA relies exclusively upon Fla. Stat. § 631.68 as the basis for its argument. That statute simply does not apply. It does not apply for several reasons. First and foremost, Mrs. Jones did bring suit against the insured of an insolvent insurer within the one-year deadline contained within the statute. As such, the claim was timely brought. Second, FIGA's conduct giving rise to this cause of action did not occur until after the one-year deadline had passed. Michael Pratt could file no claim with the receiver for FIGA's conduct because the deadline to file with the receiver was October 1, 1995. FIGA did not breach its defense obligation until May, 1996, many months later. If FIGA's argument is to be accepted, Pratt's cause of action was barred by the statute of limitations before it even accrued. This precise argument was raised by FIGA to the trial court and was rejected. (R.V. II, 112-113)

The statute of limitations that governs Michael Pratt's claim against FIGA is not Fla. Stat. § 631.68. That statute deals with the claim for benefits against the insolvent insurer or its insured. It does not deal with a breach of statutory obligations by FIGA. Such a breach of statutory obligations is governed by Fla. Stat. § 95.11(3)(f), which is a four-year statute of limitations addressed to FIGA's statutory liability created by virtue of its "stepping into the shoes of" the insolvent insurer.

If FIGA's interpretation of the statute of limitations is correct, then FIGA can immediately withdraw from the defense of any covered claim the day following the expiration of the one-year period and can do so without there being any recourse to any insured. Such a result is completely contrary to the expressed legislative intent of the statute and is also repugnant to common sense. The liability that is addressed in Fla. Stat. § 631.68 is the liability for the underlying claim. It does not address a statute of limitations for FIGA's breach of its statutory obligation and its resulting statutory liability. In short, the Estate's lawsuit was timely commenced under both capacities, and FIGA's argument should be rejected.

In summary, there is no genuine issue of material fact that the Estate presented a covered claim. FIGA has not even mentioned, much less challenged the analysis of the insurance policy at issue here. Rather, as it did throughout the claims handling, FIGA instead relies upon flimsy and irrelevant excuses for its violation of its statutory obligations. The court should reject those excuses.

II.

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

FIGA concedes that where it is a party to the suit and judgment is entered against FIGA, post-judgment interest may properly be imposed upon FIGA. It then

argues that under no other circumstances may it be responsible for the payment of interest on judgments. To support this proposition, FIGA cites to several cases involving worker's compensation benefits which were overdue and the delay was attributable to the insolvent insurer . In those cases, the appellate courts found that the imposition of interest against FIGA, for the conduct of the underlying insurer, was not authorized by the statute.

Most respectfully, we believe that these cases provide no support for FIGA's position in this matter. The Estate has not sought the imposition of interest against FIGA for delays associated with the conduct of Dealers Insurance Company. Rather, the Estate has sought the imposition of interest against FIGA for FIGA's own wrongful conduct which prohibited the Estate from properly joining FIGA to the judgment in the first instance, so that interest would have commenced to run against FIGA at the time of the entry of the underlying judgment. FIGA's Answer Brief is completely silent on this point. It has not addressed, and we must assume it has conceded, that it makes little sense to allow FIGA to benefit from its own illegal conduct by intentionally denying a defense when it had no lawful basis to do so. That illegal conduct is what prohibited 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).

FIGA's brief is also silent on the other basis for which the Estate sought the imposition of interest on the underlying judgment. That is, the Dealers policy contained an unambiguous supplementary payments provision which required the payment of such interest until the limits of liability were tendered. Given FIGA's silence on the issue, we will not repeat the analysis contained in our Initial Brief. Suffice it to say, FIGA is responsible for interest on the judgment in this case for two reasons. First, is its own wrongful conduct. The Estate is not seeking to impose liability upon FIGA for the conduct of Dealers or any benefits owed by Dealers. Rather, it was FIGA's own illegal conduct which precluded the Estate from ever joining FIGA in the underlying judgment. Second, the Estate is seeking to impose liability upon FIGA for interest on the judgment by virtue of the obligations imposed by FIGA under the contract and under the FIGA statute.

FIGA is also responsible to pay the full amount of the judgment because its conduct does not fall within the immunity provisions of Fla. Stat. § 631.66. FIGA has gone to great lengths to criticize the Alaska Supreme Court's decision in Washington Ins. Guaranty Assn. v. Ramsey, 922 P.2d 237 (Alaska 1996). FIGA maintains that all the other courts which have looked at the issue have focused upon what FIGA believes, and apparently those courts believe, to be the underlying public policy of the Act. That is, the Association is a creature designed to serve solely as the mechanism

for the payment of covered claims under certain classes of insurance policies of insurance companies which have become insolvent. (Answer Brief, p. 28) Most respectfully, we believe that FIGA and the decisions it has cited in support of its contention, have misstated the public policy expressed in the Act. The express statutory purpose of the Florida Act could not be more clear. The Association was created to provide 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 stated that the section should be liberally construed to effect the purposes set forth in Fla. Stat. § 631.51, which are to constitute an aid and guide to the interpretation of the Act.

When viewed in the context of the expressed legislative intent, FIGA's position and the holding of Fernandez v. Florida Ins. Guaranty Assn., Inc., 383 So.2d 974 (Fla. 3d DCA 1980), pet. for rev. den., 389 So.2d 1109 (Fla. 1980) must be rejected. The undisputed facts of this case provide a poignant example of how the express legislative intent is frustrated by FIGA rather than fulfilled. FIGA threatened to deny coverage if the Estate sought to vindicate its legal rights on behalf of Althea Jones' sole survivor, her minor daughter. FIGA fulfilled that threat when it denied coverage in retaliation for the filing of a lawsuit. FIGA then relied upon a series of bogus excuses to

camouflage the true character of its conduct. It did so, notwithstanding the fact that its own investigation showed that the insured, Michael Pratt, did not own the vehicle that was involved in the accident. FIGA continued the ruse, know that Pratt was under no obligation to report a loss to a vehicle he did not own and could not be considered to have failed to cooperate when he did not report a loss to a vehicle he did not own. The charade continued when FIGA asserted that Pratt's failure to provide FIGA the complaint was a breach of the obligation to cooperate, when FIGA denied coverage five days before an answer was due while in possession of the very legal documents it claimed it needed from Pratt. Most respectfully, it is difficult to understand how the express legislative intent of the statute can ever be effectuated if FIGA is given freedom, not only to ignore its statutory duties, but to consciously violate them at the expense of insureds and claimants alike who must endure incredible financial hardship. The legislature has told the courts of this state how the Act should be interpreted. Most respectfully, the only way to interpret the Act so as to accomplish the express legislative intent is to provide FIGA with the immunity that the legislature intended to give it. That is, immunity for the performance of its statutory duties, not immunity for failure to fulfill them.

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 April 7, 2004.

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George A. Vaka, Esquire

CERTIFICATE OF COMPLIANCE

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

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George A. Vaka, Esquire

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STATUTES