IN THE
Supreme Court of Florida
Case No. SC10-2097

DIANE PETTY and KEVIN FARMER,

Petitioners,

v.

FLORIDA INSURANCE GUARANTY ASSOCIATION,

Respondent.

BRIEF *AMICI CURIAE* OF WILLIAM STURDIVANT AND ANNETTE STURDIVANT IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae submitting this brief, William Sturdivant and Annette Sturdivant, are insureds with a vital interest in this case. The Sturdivants had a homeowner's policy that Southern Family Insurance Company ("Southern Insurance") had issued to protect their Daytona Beach home and personal property. In a span of approximately four weeks during 2004, Hurricanes Charley and Frances devastated the Sturdivants' home, effectively rendering it a total loss. Southern Insurance inexplicably delayed payment of the claim for six months, forcing suit. After litigation and entry of partial final judgment against Southern Insurance based on post-suit claim payment, the Sturdivants and Southern Insurance entered into a pre-insolvency settlement agreement in which Southern Insurance agreed to pay additional proceeds, including the Sturdivants' attorneys' fees in bringing suit.

After Southern Insurance entered insolvency, the Florida Insurance Guaranty Association ("FIGA") stepped into the shoes of Southern Insurance, but denied the Sturdivants' attorneys' fees claim, part of the settlement agreement. The Sturdivants obtained a final judgment against FIGA, now on appeal before the Fifth District, that enforced the pre-insolvency settlement agreement providing for the Sturdivants' attorneys' fees pursuant to Florida Insurance Guaranty Association, Inc. v. Soto, 979 So. 2d 964 (Fla. 3d DCA 2008).

SUMMARY OF ARGUMENT

Petty directly contradicts the primary purpose of the FIGA Act, which is to protect policyholders and claimants from financial loss because of insurer insolvencies. By holding that all pre-insolvency fees and costs are unrecoverable from FIGA, the opinion guarantees that represented insureds will sustain considerable financial loss through the inability to recover their pre-insolvency fees and costs from FIGA under any circumstances. In a state that faces the combined risk of catastrophe and uncertain insurer solvency, Petty's new rule will encourage lawyers to collect on contingent fee agreements, shifting the risk of insolvency to the insured, rather than waiting for Section 627.428 fees that may never become available. Finally, by throwing the prospect of recovery under Section 627.428 fees into such uncertainty where incurred pre-insolvency, the Petty rule discourages lawyers from representing insureds with lower value claims and insureds who cannot afford to pay their hourly rate.

ARGUMENT

I. PETTY UNDERMINES THE PRIMARY PURPOSE OF THE FIGA ACT, WHICH IS TO PROTECT INSUREDS FROM FINANCIAL LOSS RESULTING FROM INSURER INSOLVENCIES

The Second District's holding in Florida Insurance Guaranty Association v. Petty, 44 So. 3d 1191 (Fla. 2d DCA 2010) undermines the primary purpose of the FIGA Act, which is to avoid financial loss to claimants or policyholders because of the insolvency of the insurer. As a result of Petty's exclusion of pre-insolvency attorneys' fees incurred against a now-insolvent insurer that confessed judgment for a "covered claim"—a restriction that the legislature has not seen fit to make—will have a devastating public impact.

A typical structure of fee agreements for lawyers who represent insureds is for an award of the greater of 40% or whatever the court awards. See Kaufman v. MacDonald, 557 So. 2d 572 (Fla. 1990). Where an insured experiences a total loss of the home, the lawyer typically agrees not to take proceeds out of the client's settlement because otherwise the client will not have enough money to rebuild the home. With the Petty rule forbidding pre-insolvency fees, after catastrophic losses and insurers insolvencies, lawyers will take money right out of the claim proceeds, and the homes will not get rebuilt. The lawyers will get paid either way; Petty hurts the insureds. Because they otherwise may not be paid at all, counsel representing insureds post-catastrophe or against financially-impaired insurers will

have no alternative but to take from the claim proceeds. As a result, insureds will invariably sustain financial harm simply due to their insurer's insolvency, contrary to the purpose of the FIGA Act as expressed in Sections 631.51 and 631.53, Florida Statutes. Finally, Petty's impact will fall hardest on those who can least afford it—insureds such as the Sturdivants of limited resources, whose ability to obtain counsel Petty restricts.

A. The FIGA Act Must be Liberally Construed to Serve Goal of Avoiding Financial Losses to Claimants or Policyholders Due to Insolvencies.

The FIGA Act serves to "[p]rovide 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." § 631.51, Fla. Stat. The FIGA Act must "be liberally construed" to effect that purpose, which serves as an aid and guide to interpretation. § 631.53, Fla. Stat. "The act is designed to protect Florida citizens, not the insurance industry." Jones v. Fla. Ins. Guar. Ass'n, Inc., 908 So. 2d 435, 442 (Fla. 2005). Although the Petty court noted these guiding principles, its opinion strictly construed the definition of "covered claim," thereby inevitably fostering "financial loss to claimants" rather than avoiding it.

B. The Sturdivants' Experience Foreshadows Difficulties Low-Income Insureds Will Face When Obtaining Counsel under Contingency Fee Agreement Alone.

The Sturdivants are an elderly couple who lived in their Daytona Beach home for more than 20 years. In 2004, they lived with their adult child, Christopher, and two of Mrs. Sturdivant's other grown children, Terrence and LaTroy. Southern Insurance had insured the Sturdivants' home since 2001. The homeowner's policy provided coverage for their home, other structure, personal property, and loss of use.

On August 13, 2004, Hurricane Charley hit the Sturdivants' home, stripping tiles from the roof, causing water intrusion, saturating the interior of the house, and causing the kitchen ceiling to partially collapse. The Sturdivants moved briefly to a motel and timely made their claim for the losses to their home, personal property, and loss of use. An adjuster thereafter visited the home, looked at the ceiling, wrote his evaluation, and accepted the Sturdivants' motel receipt, but stated they would not be reimbursed for the motel. The Sturdivants therefore moved back to the house briefly but evacuated again as Hurricane Frances approached.

On September 4, 2004, Hurricane Frances finished what Hurricane Charley started by devastating the Sturdivants' home, rendering it a total loss. Hurricane Frances blew half of the roof off the house. The kitchen ceiling collapsed entirely, allowing rain to fall into the house, destroying the appliances and personal property

therein; the ceilings in the hallway and back bedroom caved in, and severe water intrusion ruined furniture and personal property in the living room, master bedroom, dining room, laundry room, storage room, and front bathroom. Fallen debris prevented the Sturdivants from seeing the floor in parts of the house, and they could see the sky in those areas where the ceiling and roof were completely gone. The Sturdivants' personal property was completely destroyed by the rain and resulting mold. The Sturdivants were of limited means, insufficient to replace the clothing that had been destroyed. Virtually everything they owned was unsalvageable. They were forced to borrow clothing, even undergarments, from relatives. They could not afford to continue paying for a motel. Instead, they were forced to look to their relatives' aid.

The Sturdivants submitted their claim for their covered losses resulting from Hurricane Frances to Southern Insurance. Southern Family ultimately sent an inspector to adjust the loss, but after pieces of the ceiling fell on him as he entered the home, he fled and refused to re-enter the home because he said it was unsafe. Despite the obvious total loss of the home and its contents, Southern Insurance nonetheless failed to acknowledge that the Sturdivants faced a total loss.

Instead, within one week of Hurricane Frances' landing, Southern Insurance issued a check to the Sturdivants dated September 10, 2004 in the unexplained amount of $729.14, bearing the notation "Final Payment," and stating "Payment

for Hurricane Losses/Final letter will follow." The Sturdivants refused to cash the "final payment" check and wisely sought legal counsel instead.

Southern Insurance, after receiving demand letters from the Sturdivants' counsel, eventually issued three small checks for partial payment of loss of use benefits, totaling a paltry $8,227.49. By the end of December 2004, Southern Insurance had paid a total of $8,956.63 on a policy limits claim. The 2004 holiday season was the first in considerable time that the Sturdivants' children and grandchildren did not spend together in the Sturdivants' house. Worse, Southern Insurance's refusal to timely pay benefits forced the Sturdivants to live in separate cities for almost a year and a half. Because Mr. Sturdivant needed to remain in Daytona Beach for work, he moved in with Mrs. Sturdivant's mother. Mrs. Sturdivant and one of her children moved in with one of her sons in Jacksonville. William and Annette Sturdivant were forced to live apart for approximately 17 months, paying rent to their relatives as their limited means afforded, ranging from $50 to $250 monthly.

The Sturdivants counsel repeatedly demanded payment of their covered losses, which Southern Insurance refused. The Sturdivants had no alternative but to sue Southern Insurance. Counsel agreed to represent the Sturdivants in a classic contingent fee agreement for the greater of 40% or a court-ordered fee.

In December 2004, the Sturdivants' counsel hired an independent contractor to inspect the home and provide an estimate of the cost to repair it. The Sturdivants provided the estimate to Southern Insurance in January 2005. The total cost estimate for repairs to the home was $100,144.72, showing the covered losses for damage to the home easily exceeded the $80,000 policy limits. Because repairs would cost more than 50% of the home's value, the entire house had to be brought up to building code. Another contractor who inspected the house stated that it would have to be torn down and rebuilt. Finally, the City of Daytona Beach condemned the house.

The Sturdivants served their complaint on Southern Insurance on February 2, 2005, approximately six months after Hurricane Charley and five months after Hurricane Frances. Eight days after service, on February 10, 2005, Southern Insurance confessed judgment by issuing checks of $66,784.46 for the home, $5,736.29 for other structures, $11,071.21 for personal property, and $1,976.09 for loss of use. At this time, counsel nonetheless recognized that the 40% contingent fee would leave the Sturdivants without a home. Accordingly, counsel waived their right to collect from the proceeds and would take only fees either under Section 627.428, Florida Statutes, or by settlement.

Notwithstanding its confession of judgment, Southern Insurance refused to pay policy limits and continued the litigation. The Sturdivants therefore moved for

and obtained a partial final summary judgment based on Southern Insurance's confession of judgment. The court found that the Sturdivants were thus entitled to attorneys' fees under Section 627.428, Florida Statutes. The amount of fees was to be decided at a future hearing.

After Southern Insurance's post-suit claim payment and the resulting partial summary judgment, only approximately $42,000 in losses under coverage C (personal property) and D (loss of use) remained in dispute.[1] One might therefore expect that the Sturdivants case could be quickly resolved.

Instead, Southern Insurance aggressively litigated what remained of the Sturdivants' damages claim. Southern Insurance demanded that, before paying another nickel beyond the $11,071.21 it already paid for personal property, the Sturdivants must provide receipts for all of their personal property, right down to their clothing. Presumably to assess the Sturdivants' personal property losses and to confirm that the Sturdivants had paid their relatives rent, Southern Insurance deposed William and Annette Sturdivant, four of their children, and sought to depose other relatives or individuals with whom the Sturdivants had lived. Southern Insurance even inexplicably sought to depose the contractor the Sturdivants had retained as an expert to opine with respect to Coverage A, even though the matter of coverage and amount under Coverage A was already resolved.

[1] Coverages A (structure) and B (other structure) were resolved at this point.

After taking six depositions, Southern Insurance made no settlement offer. With an approaching trial set in May 2006, the Sturdivants were required to depose Southern Insurance's two adjusters, as well as, the claims handler involved in the Sturdivants' claim. On April 7, 2006, at the claims handler's deposition, the Sturdivants and Southern Insurance entered into a settlement agreement that resolved the remaining coverage claims. Southern Insurance would provide an additional $5,000 under Coverage D and whatever amount, up to policy limits, that an independent appraiser determined the Sturdivants' personal property was worth based on a handwritten list of property that was lost. Southern Insurance also agreed to pay attorneys' fees, and in the event counsel did not agree on amount, a reasonableness hearing would occur as if the Sturdivants were the prevailing party in the litigation.

Before making those payments, Southern Insurance entered receivership on April 25, 2006, and a liquidation order issued on May 31, 2006. In accord with the stay imposed by the liquidation order, the Sturdivants' case in Volusia County was administratively closed. FIGA, who stepped into the shoes of Southern Insurance, agreed to pay the remaining agreed-upon amounts for personal property and loss of use, but refused to pay the Sturdivants' pre-insolvency attorneys' fees of $152,149.24. After the Third District's decision in Florida Insurance Guaranty

Association v. Soto, 979 So. 2d 964 (Fla. 3d DCA 2008), the Sturdivants again requested payment of their attorneys' fees, and FIGA again refused to pay.

The Sturdivants moved to reopen the case. Ultimately, on September 7, 2010, the court entered an Order Enforcing Settlement Agreement. In it, the trial court noted that

> the attorneys waived the right to claim their fee or costs from the plaintiffs' recovery in a noble act of placing the client first and putting their firm in a secondary and somewhat tentative position. That nobility occurs with great frequency in our state but is rarely recognized. The court commends plaintiffs' counsel for the quality of their work in that regard. It is indeed refreshing and a renewal of the faith this court has in the legal system.

The court entered an attorneys' fee award of $97,500 and for $7,500 in costs. The Sturdivants' case is now pending before the Fifth District. The ability for counsel to receive attorneys' fees where entitlement is established pre-insolvency is the primary reason counsel can waive the right to claim their fees and costs, enabling homeowners like the Sturdivants to rebuild their homes.

C. The Sturdivants under Petty.

Petty ensures that all policyholders of insolvent insurance companies would by necessity suffer financial loss due to insurer insolvency. In the Sturdivants' case and others like it, Petty means that the insured remains homeless after a catastrophic loss. Under Petty, counsel who have a contingent fee agreement representing insureds after catastrophic losses or against financially-impaired

insurers will have no practical option for payment except through collecting the contingency fee and shifting the risk of insolvency to their client. The result will be devastating to insureds like the Sturdivants.

Southern Insurance and FIGA made payments to the Sturdivants totaling $123,353.39 for the complete loss of their home and all of its contents. Fortunately, these funds enabled the Sturdivants to rebuild their home after counsel waived their right to collect from the proceeds. Under Petty, the Sturdivants would not have been so fortunate. Under Petty, knowing that FIGA will not be responsible for pre-insolvency attorneys' fees, and having invested approximately $125,344 in attorney time and advancing approximately $15,000 in costs, counsel for the Sturdivants would have had no practical alternative but to enforce their contingent fee agreement. In that circumstance, after deducting $15,000 in costs, and after taking counsel's 40% contingent fee, the Sturdivants would have received only $59,012.03 on their claim.[2] Petty leaves the Sturdivants without a home.

Under Petty, in every case involving an insolvent insurer, even if entitlement to attorneys' fees was established pre-insolvency, and even if FIGA pays all expressly covered claims, the insured will suffer financial loss because she will be forced to pay for representation. This is precisely what happened to Petty; she paid

[2] See Figure 1 on the following page.

- FIGURE 1-

The Sturdivants under <u>Petty</u>

Total Payments (Southern Insurance and FIGA) to the Sturdivants	$123,353.39
Pre-insolvency 40% Contingent Fee	$49,341.36
Pre-insolvency Costs	$15,000.00
Total Payment to the Sturdivants:	$59,012.03
Cost to Rebuild Home:	$100,144.72
Shortfall to Rebuild:	**$41,132.69**

The Sturdivants under <u>Soto</u>

Total Payments (Southern Insurance and FIGA) to the Sturdivants	$123,353.39
Pre-insolvency Attorneys' Fees	Reimbursed by FIGA
Pre-insolvency Costs	$7,500.00[3]
Total Payment to the Sturdivants:	$115,853.39
Cost to Rebuild Home:	$100,144.72
Shortfall to Rebuild:	None

[3] $7,500.00 in taxable costs were awarded by trial court.

her counsel the $29,300 in fees and costs incurred in the pre-insolvency suit against Florida Preferred, which amounts remain unreimbursed.

The FIGA Act's mandate that it must "be liberally construed" to effect the purpose of "avoid[ing] financial loss to claimants or policyholders because of the insolvency of an insurer" rings hollow to insureds like Petty, who in a Petty world will be forced to bear the risk of their insurer's insolvency. At best, they will suffer delay in receiving full payment of their claims while awaiting to be reimbursed under Section 627.428, Florida Statutes, after their attorneys segregate the contingent fee from any pre-judgment payments and assuming their insurers do not go insolvent. This is an untenable result even under Petty's unduly narrow "liberal construction": "although the Act is to be liberally construed, the liberal construction is in the context of covered claims under certain insurance policies." Petty, 44 So. 3d at 1194. Petty's rule means that even if FIGA pays the entire covered claim at issue, and no matter the circumstances giving rise to a pre-insolvency determination of entitlement to attorney's fees, a policyholder or claimant's best day can only be policy limits minus substantial fees and costs.

This rule will be harmful to all insureds, but could prove especially devastating to lower income individuals, with potentially lower value claims, who cannot easily assume litigation's financial burden. The Sturdivants' experience demonstrates how expensive such litigation can be, even where the insured's house

is a total loss and after an insurer confesses judgment eight days after service with the lawsuit. Their experience also shows that unscrupulous insurers are willing to take advantage of such desperate individuals through practices such as offering $729 checks for "final payment" after hurricane losses.

The no fees or costs rule announced by Petty is not only unsupported by Section 631.70, which limits the applicability of Section 627.428 to certain claims presented to FIGA, but also "disregard[s] the remedial purposes of the FIGA statute and … [would] place the insured in a worse position, not the same position, than the insured occupied pre-insolvency with regard to the operative insurance policy." Florida Ins. Guar. Ass'n, Inc. v. Soto, 979 So. 2d 964, 966 (Fla. 3d DCA 2008). Further, by way of counterbalancing Soto, FIGA continues to enjoy the protections afforded by the FIGA payment cap under Section 631.57, Fla. Stat.

Petty, however, will cause more widespread harm. Future catastrophic events such as Hurricane Charley and Hurricane Frances are a certainty in Florida. Moreover, even in the ordinary course of business, the threat of insurer insolvencies continues to rise in Florida. See Paige St. John, "Special Report: Weak Insurers Put Floridians at Risk," Miami Herald, Mar. 1, 2010, http://www.heraldtribune.com/article/20100301/article/303019999 (last visited Mar. 14, 2011); Kris Hundley, "Homeowners Flee Back to Citizens as Private Insurers Collapse," St. Petersburg Times, May 30, 2010, available online at

http://www.tampabay.com/news/business/homeowners-flee-back-to-citizens-as-private-insurers-collapse/1098445 (last visited Mar. 14, 2011). This rise is much more likely and foreseeable after catastrophic losses, from which small insurers are less likely to recover. Here in Florida, catastrophic losses from hurricane risks and future hurricane risks are an inevitability, not a possibility. Petty does not craft a rule of law that comports with the policy of the FIGA Act and keeps the risk of loss in the guaranty fund. To do otherwise is going to create whole classes of people who will just be losing their homes when we have insurance insolvencies that will follow those hurricanes.

It is also foreseeable that counsel will be wary about cases against insurers whose financial stability is unknown or questionable. Lawyers considering the prospect of protracted litigation against an insurer for a contingency fee, given the precarious availability of Section 627.428 fees surrounding catastrophic claim events, such as hurricanes or in cases of already financially-impaired insurers, will likely shift to a more conventional contingent fee analysis (i.e., how big is the loss?) before taking a case. They will be incentivized to decline representation in lesser value cases. The Sturdivants' case is but one example of the staggering time and costs that representing homeowners against recalcitrant insurers can demand, even where the case appears to be a straightforward, policy limits case involving a house hit by not one but two hurricanes. National Conference of Insurance

Guaranty Funds trumpets as the original intent of the guaranty fund system: "delivering protection to those least able to weather the impact of insurance company insolvencies." Insolvency Trends 2011, National Conference of Insurance Guaranty Funds, available online at http://www.ncigf.org/media/files/Insolvency_Trends_2011.pdf (last visited March 12, 2011). The Petty decision deals a devastating blow to that lofty goal.

CONCLUSION

Because the Second District's opinion in Petty countermands the primary purpose of the FIGA Act and would have devastating public policy consequences for Florida insureds, this Court should quash the decision of the Second District and approve the Petitioners' interpretation of Section 631.70, Florida Statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing brief *amici curiae* was furnished by U.S. Mail on March 14, 2011 to the Clerk of the Court (original and seven copies) and to: **Dorothy Venable DiFiore**, Haas, Dutton, Lewis, P.L., Counsel for Respondent, 4921 Memorial Highway, Suite 200, Tampa, Florida 33634; **Betsy E. Gallagher** and **Michael C. Clarke**, Kubicki Draper, P.A., 201 North Franklin Street, Suite 2550, Tampa, FL 33602, Counsel for Respondent; **Bob G. Freemon** and **Ron A. Hobgood**, Freemon & Miller, P.A., 8381 Gunn Highway, Tampa, FL 33626, Counsel for Petitioners; **Bryan S. Gowdy** and **Jessie L. Harrell**, Creed & Gowdy, P.A., 865 May Street, Jacksonville, FL 32204, Counsel for Petitioners; **Jeffrey M. Liggio**, Liggio Benrubi, 1615 Forum Place, Suite 3B, West Palm Beach, FL 33401, Counsel for the Florida Justice Association as Amicus Curiae; and **Perry Tanksley**, P.O. Box 249, Sarasota, FL 34230, Counsel for the Florida Justice Association as Amicus Curiae.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this amicus brief was prepared in New Times Roman, 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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