SUPREME COURT OF FLORIDA

CASE NO.: SC10-2097

SECOND DISTRICT CASE NO.: 2D09-3749
TWENTIETH JUDICIAL CIRCUIT COURT CASE NO.: 04-2449CA

DIANE PETTY and
KEVIN FARMER,

Petitioners,

vs.

FLORIDA INSURANCE GUARANTY
ASSOCIATION,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent substantially agrees with Petitioners' Statement. FIGA disagrees with Petitioners' description of the *Petty* holding. Also, "FIGA did not wrongfully refuse to pay any policy benefits" for any portion of the Petty claim for damages to their home at any time. *Fla. Ins. Guar. Ass'n v. Petty*, 44 So. 2d 1191, 1192-93 (Fla. 2d DCA 2010). Florida Preferred Property Insurance Company (Florida Preferred) paid all insurance benefits before it became insolvent. *Id.* at 1192. Thereafter, FIGA was substituted for the insolvent insurer. The parties stipulated the remaining issue was whether FIGA was required to pay Petty's attorney's fees and costs. *Id.* at 1192-93.

The trial court ruled that FIGA was obligated to pay attorney's fees under section 627.428, Florida Statutes, because FIGA was "obligated to the extent of the covered claims" that existed before the adjudication of the insurer's insolvency under section 631.51(1), Florida Statutes. *Id*. at 1193. On appeal, the Second District reversed the trial court's award of attorney's fees and expressly declined to follow the Third District in *Florida Insurance Guaranty Ass'n v. Soto*, 979 So. 2d 964 (Fla. 3d DCA 2008). *Id.* at 1195. The court held that under the Florida Insurance Guaranty Association Act (FIGA Act), sections 631.54(3) and 631.51(1), Florida Statutes, Plaintiffs' attorney's fees claim was not a "covered claim" as the

insolvent insurer's policy did not provide coverage for fees awarded under section 627.428. The Second District expressly certified conflict with the Third District's *Soto* decision. *Fla. Ins. Guar. Ass'n v. Petty,* at 1195 ("[W]e certify conflict with *Florida Insurance Guaranty Ass'n v. Soto,* 979 So. 2d 964 (Fla. 3d DCA 2008)"). The decision not only certifies the conflict but also expressly and directly conflicts with the *Soto* decision.

SUMMARY OF THE ARGUMENT

The *Petty* decision directly conflicts with the Third District's *Soto* decision. In *Petty,* the Second District reversed an attorney's fees award and held FIGA was not responsible for the award under section 627.428, Florida Statutes, after the insurer pays a claim for benefits but before it became insolvent, as the statutory claim was not a "covered claim" under sections 631.51(1) and 631.54(3) of the FIGA Act.

In contrast, in *Soto*, the Third District held the insured's claim against an insurer for attorney's fees, incurred before the insurer became insolvent, was a "covered claim" within the meaning of subsections 631.51(1) and 631.54(3) of the FIGA Act.

JURISDICTIONAL STATEMENT

This Court has discretionary jurisdiction to review a decision of a district

court of appeal "that is certified by it to be in direct conflict with a decision of another district court of appeal." Art. V, § 3(b)(4), Fla. Const. *See also* Fla. R. App. P. 9.030 (a)(2)(A)(vi). This requirement is met because the Second District certified conflict with *Florida Insurance Guaranty Ass'n v. Soto*, 979 So. 2d 964 (Fla. 3d DCA 2008). This Court also has jurisdiction to review a district court of appeal decision that "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. *See also* Fla. R. App. P. 9.030 (a)(2)(A)(iv). "One major difference [between the two jurisdictional bases] is that a decision certified as being in direct conflict under section 3(b)(4) need not involve a conflict that is apparent from the opinion of the district court." PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE § 28.2 (ed. 2010).

ARGUMENT

THIS COURT SHOULD REVIEW THE SECOND DISTRICT DECISION WHICH WAS CERTIFIED AS BEING IN CONFLICT WITH THE THIRD DISTRICT'S DECISION IN *FLORIDA INSURANCE GUARANTY ASS'N V. SOTO*, 979 SO. 2D 964 (FLA. 3D DCA 2008); THE TWO DECISIONS EXPRESSLY AND DIRECTLY CONFLICT ON THE SAME

QUESTION OF LAW.

This Court "functions as a supervisory body in judicial system for the state, exercising appellate power in certain specified areas essential to settlement of issues of public importance and preservation of uniformity of principle and practice, with review by the district courts of appeal in most instances being final and absolute." *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958). This Court also recognized its jurisdiction should be invoked "'where there is a real and embarrassing conflict of opinion and authority.'" *Id.* at 811 (citation omitted). Discretionary review is properly invoked, especially where Second and Third District decisions show a direct and express conflict–an "embarrassing conflict"–on the same question of law apparent from the decisions giving them greater precedential value. *Id.*

A. <u>The Second District Correctly Certified Conflict</u>.

The Second District interpreted the FIGA Act, specifically sections 631.51(1) and 631.54(3), Florida Statutes, to hold that FIGA is <u>not</u> responsible for Plaintiffs' attorneys fees, incurred before the insurer became insolvent, under section 627.428, as the statutory fee claim <u>was</u> <u>not</u> "a covered" claim under the language of the insolvent insurer's policy. As the court pointed out, the Third District, in *Soto*, reached a totally different decision by holding that FIGA was responsible for an attorney's fee claim incurred by the insurer before its insolvency under section

627.428, as the statutory fee claim was a covered claim under section 631.54(3). *Petty,* 44 So. 3d at 1194; *Soto*, 979 So. 2d at 966. The Third District opined that section 627.428 "is an implicit part of all insurance policies of the kind involved here" and therefore the attorney's fee claim "is a covered claim" within the meaning of subsection 631.54(3). *Soto,* 979 So. 2d at 966. In contrast, the Second District held: "[T]he fact section 627.428 is an implicit part of an insurance policy does not mean that the insured's claim against the insurer for fees and costs is part of the policy's 'coverage;'" rather the Second District held "that section 631.54(3) does not impose coverage for fees claimed under section 627.428 when such fees are not within the policy's coverage provisions." *Petty,* 44 So. 3d at 1194-95. Finally, the *Petty* court totally rejected the Third District's reliance on the stated purpose of section 631.51(1) and determined that the purpose of that statute supported the *Petty*'s holding rather than the conflicting *Soto* decision. *Id.* The irreconcilable conflict in *Soto* and *Petty* is shown below.

1. *Florida Insurance Guaranty Ass'n v. Soto,* 979 So. 2d 964 (Fla. 3d DCA 2008).

Sandra Soto sued Fortune Insurance in 1997 after her car was stolen to recover under the comprehensive coverage of her automobile policy. *Id.* at 965. Fortune entered into a settlement, agreeing to pay Soto $25,000, as well as her

attorney's fees and costs, the amount to be determined by the court. Such fees were owed to Soto under section 627.428, Florida Statutes. In accordance with the settlement, Fortune paid the $25,000 negotiated settlement to Soto. Soto filed motions for attorneys' fees and costs. Before the hearing, Fortune became insolvent. Thereafter, the court awarded $112,801.50 in fees pursuant to the settlement agreement. FIGA denied it owed the fees that had been agreed to by the insolvent insurer and asserted the fees were not a "covered claim" under the policy and were prohibited by section 631.70. The trial court disagreed and entered judgment against FIGA for $112,801.50 in fees. *Id*.

On appeal, the Third District rejected FIGA's argument that fees owed under section 627.428 were not a "covered claim" under the policy and not a FIGA obligation under section 631.57. The Third District affirmed the final judgment concluding:

> In Florida, automobile insurance policies are subject as a matter of law to the obligation to reimburse an insured for attorney's fees and costs if the insured prevails in a lawsuit for payment of a claim under the policy. *Id.* at § 627.428. The Florida Supreme Court has held that section 627.428 is an implicit part of all insurance policies of the kind involved here. *See State Farm Fire & Cas. Co. v. Palma*, 629 So.2d

830, 832 (Fla. 1993). It follows that Soto's stipulated but unpaid attorney's fee judgment is a "covered claim" within the meaning of subsection 631.54(3) [*Id.* at 966].

In reaching its result, the court held the original contractual obligations of Fortune merged into the judgment approving the settlement and liquidating the claim amount and stated: "The original policy claim was extinguished and merged into the stipulated judgment; the rights under the judgment were substituted for the previously- operative contract rights." *Id.* at 966, n.4 (relying on *Whitehurst v. Camp,* 699 So. 2d 679, 684 n.2 (Fla. 1997)). The court concluded the remedial purpose of the FIGA Act would not permit denial of the fees, because the insured would be placed in a "worse" position rather than the "same" position had there been no insolvency. *Id*.

2. *Florida Insurance Guaranty Ass'n v. Petty*, 44 So. 3d 1191 (Fla. 2d DCA 2010).

Plaintiffs brought suit against Florida Preferred seeking to compel appraisal of their hurricane damaged home. Ultimately, the insurer agreed to go to appraisal and the appraisal resulted in additional payment to Plaintiffs. Insurer paid the owed additional amounts. Plaintiffs filed motions for attorney's fees under section 627.428. Before the motions were heard, the insurer became insolvent. FIGA was

substituted and denied it was obligated to pay fees owed by the insurer, arguing such fees were not "covered claims" for which it was responsible under section 631.57, Florida Statutes, and were prohibited by section 631.70. The court disagreed and entered a judgment against FIGA for fees incurred solely in litigation with the insurer. On appeal, the Second District approached the same legal issue in *Soto* in an entirely different manner.

Initially, the Second District noted that fees imposed under section 627.428 are a "penalty to discourage wrongful refusals to pay policy benefits." *Id.* at 1193 (citing *Liberty Nat'l Life Ins. Co. v. Bailey*, 944 So. 2d 1028, 1030 (Fla. 2d DCA 2006)). The court looked to the Act's limitation on the applicability of sections 627.428 and 631.70 which stated that the provisions of section 627.428 "shall not be applicable to any claim presented to the association, under the provisions of this part," unless FIGA denied a covered claim. *Id*. In analyzing whether the fees owed solely pursuant to section 627.428 were a "covered claim," the *Petty* court looked at the definition of "covered claims" in the FIGA Act. § 631.54(3), Fla. Stat. (2004). Under that subsection, a "covered claim" is an unpaid claim which (1) "arises out of" the policy, and (2) is "within the coverage, and not in excess of, the applicable limits of an insurance policy." *Id.* While agreeing that the FIGA Act should be liberally construed, the court held that "the liberal construction is in the context of

covered claims under certain insurance policies." *Id.* at 1194.

The Second District noted it had previously rejected the argument that FIGA "simply steps into the shoes of the insolvent insurer," and reaffirmed that "FIGA is strictly a creature of statute." *Id*. (relying on *Fla. Ins. Guar. Ass'n v. All the Way with Bill Vernay, Inc.*, 864 So. 2d 1126, 1129 (Fla. 2d DCA 2003)). The court rejected the conclusion in *Soto* that fees implied by operation of law are part of the policy's coverage. The court agreed with FIGA that liabilities which arise by operation of law are not the same as liabilities which arise by express contractual terms, stating: "By linking covered claims to coverage provisions, rather than legal liabilities, the legislature limited FIGA's obligation to the express terms of the policy." *Id*. at 1195. Since there was no language in the insurance policy providing coverage for attorneys fees awarded under 627.428, such fees do not constitute a "covered claim." *Id.*

Further confirming its disagreement with *Soto,* the court noted that *Soto* failed to acknowledge that the stated purpose of the FIGA Act was to "provide a mechanism for the payment of *covered claims*" ... "not all claims." *Id*. (emphasis in original).

In *Soto*, FIGA was obligated to pay $112,801.50 in attorneys fees incurred solely in plaintiff's litigation with Fortune. In contrast, in *Petty*, FIGA was <u>not</u>

obligated to pay $29,300 in fees incurred solely in plaintiffs' litigation with insurer.

The Second District correctly ended its decision by certifying conflict with *Soto*.

B. <u>There is no Direct and Express Conflict Between the Three Additional Decisions Relied on by Petitioners and the *Petty* Decision</u>.

Respondent disagrees with Petitioners' claim that the Second District's opinion expressly and directly conflicts with three other decisions from this Court and the First District Court of Appeal: *Jones v. Florida Insurance Guaranty Ass'n, Inc.*, 908 So. 2d 435 (Fla. 2005); *State Farm Fire & Casualty Co. v. Palma*, 629 So. 2d 830 (Fla. 1993); *Dilme v. SBP Service, Inc.*, 649 So. 2d 934 (Fla. 1st DCA 1995).

First, the *Petty* decision has nothing to do with this Court's *Jones* decision which held there is no cause of action for bad faith against FIGA. *Id.* at 454. Second, the *Petty* decision creates no direct and express conflict with this Court's *Palma* decision which held that attorney's fees may not be awarded for the time spent litigating entitlement to attorney's fees. *Id.* at 833. Finally, the First District's *Dilme* decision is simply inapplicable because it did not deal with an attorney's fee claim which was based on section 627.428, Florida Statutes, as in the *Petty* and *Soto* decisions.

C. <u>Statement of Why Supreme Court Should Accept this Case on the Merits</u>.

The certified issue is one which significantly impacts claims handling and litigation decisions in a substantial number of pending cases and thousands of potential future cases. The conflict creates completely different payment obligations in South Florida than in the counties controlled by the Second District. FIGA has no way of knowing what law will be applied in jurisdictions outside of the Second and Third Districts. The lack of uniformity creates confusion and an inability by FIGA to make informed claims and litigation decisions, resulting in more litigation. Also, all exposure incurred by FIGA is passed on to the solvent insurers and ultimately to all responsible people in Florida who purchase insurance. *See, e.g.* § 631.57(3)(a), Fla. Stat.

There are currently 34 insurers in liquidation in Florida with substantial open claims requiring resolution.[1] FIGA's public information shows there are 2,978 open claims.[2] In the last four years, FIGA has handled over 66,000 claims.[3] While all claims do not involve potential fee awards under section 627.428, a large number of claims are affected by the conflicting decisions. Also, the issue could be implicated in the growing number of sinkhole claims being presented to insurers

[1]http://www.figafacts.com/reports

[2]http://www.figafacts.com/reports

[3]*Id.*

throughout the state.[4]

CONCLUSION

This Court is respectfully requested to exercise its discretionary jurisdiction to resolve the conflict as to whether attorney's fees incurred solely in previous litigation with an insolvent insurer is a "covered claim" within the meaning of the FIGA Act.

CERTIFICATE OF FONT COMPLIANCE

I CERTIFY that the font used in this brief is 14 point, Times New Roman.

BY: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Bob G. Freemon, Esquire and Ron A. Hobgood, Esquire, Freemon & Miller, P.A., 8381 Gunn Highway, Tampa, FL 33626 (Counsel for Petitioners), this ___ day of _____, 2010.

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[4]*See generally*, http://www.floir.com/pdf/2010_Sinkhole_Data_Call _Report.pdf

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