SUPREME COURT OF FLORIDA

DIANE PETTY and
KEVIN FARMER,

Petitioners,

v.

CASE NO.: SC10-2097
DCA CASE NO.: 2D09-3749

FLORIDA INSURANCE GUARANTY ASSOCIATION, as court ordered substitute for Florida Preferred Property Insurance Company,

Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal
Second District, State of Florida

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STATEMENT OF THE CASE AND FACTS

The home of Petitioners, DIANE PETTY and KEVIN FARMER ("Petitioners" or "PETTY"), which was insured by Florida Preferred Property Insurance Company ("Florida Preferred"), suffered damages from Hurricane Charley in 2004.[1] (App. 2). PETTY filed suit to compel appraisal, which resulted in Florida Preferred owing additional monies under the insurance policy. (App. 2.). Florida Preferred paid the amounts owed per the appraisal and PETTY filed a motion to confirm the appraisal award, a motion for entry of final judgment, and a motion for an award of attorney's fees under section 627.428 Fla. Stat. (2007). Florida Preferred became insolvent before the motions were heard. (App. 2).

Subsequently, FLORIDA INSURANCE GUARANTY ASSOCIATION ("FIGA"), was substituted as Defendant and both parties stipulated that the only remaining issue was whether FIGA was required to pay PETTY's attorney's fees and costs incurred throughout the litigation with Florida Preferred. (App. 3). Both parties filed competing motions for summary judgment based on this narrow issue, and the trial court determined that Florida Preferred's payment of the appraisal

[1] In conformity with Fla. R. App. P. 9.120(d), a conformed copy of the decision of the Second District Court of Appeal is attached hereto as the Appendix. All references to the Appendix will be cited as (App. __), with references to the appropriate page number in the Appendix.

award constituted a confession of judgment which carried with it the insurer's obligation to pay attorney's fees under section 627.428. (App. 3).

In doing so, the trial court relied primarily on Florida Insurance Guaranty Ass'n v. Soto, 979 So. 2d 964 (Fla. 3d DCA 2008), which stood for the proposition that a stipulated but unpaid attorney's fee award is a "covered claim" which FIGA is required to pay under section 631.57(1) Fla. Stat. (2007). (App. 3). The trial court entered judgment in favor of PETTY for the stipulated amount of $29,300.00. FIGA appealed the court's ruling and argued that it was not required to pay Florida Preferred's attorney fee obligation imposed pursuant to section 627.428.

The Second District reversed and certified conflict with Soto and determined that although section 627.428 was an implicit part of the insurance policy, because the right to attorney's fees under 627.428 was not expressly provided for in the policy language, attorney's fees and costs incurred pre-insolvency are excluded from any "covered claim" under the Florida Insurance Guaranty Association Act, §§ 631.50–631.70, Fla. Stat. (2007) ("FIGA Act").

This case presents an issue of statewide concern regarding an insured's ability to recover attorney fees from Florida Insurance Guaranty Association under section 627.428, where the statutory obligation is not expressly stated in the policy

language. Specifically, the issue is whether attorney fees are considered a "covered claim" under the definition in section 631.54(3) Fla. Stat. (2007), when the insolvent carrier's obligation to pay such fees has accrued prior to insolvency. The issue bears directly on the question of whether any implicit coverage provision is within the purview of the FIGA Act.

The resolution of this issue by a panel of the Second District Court of Appeal in the instant case is in express and direct conflict with the decisions of this Court and other districts on this exact issue.

STATEMENT OF JURISDICTION

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 was another opinion reaching a contrary result. Persaud v. State, 838 So. 2d 529, 532–533 (Fla. 2003); The Florida Bar v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988). "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 this case, PETTY seeks further review of the decision based on the Second District's express and direct conflict with Florida Insurance Guaranty Ass'n v. Soto, 979 So. 2d 964 (Fla. 3d DCA 2008). The Second District's decision also conflicts with the law of other districts as well as this Court. *See e.g.*, Jones v. Florida Insurance Guaranty Ass'n, Inc., 908 So. 2d 435 (Fla. 2005); State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 830 (Fla. 1993); Dilme v. SBP Service, Inc., 649 So. 2d 934 (Fla. 1st DCA 1995); Fla. Ins. Guar. Ass'n v. Gustinger, 390 So. 2d 420 (Fla. 3d DCA 1980).

SUMMARY OF THE ARGUMENT

The decision of the Second District Court of Appeal expressly and directly conflicts with the Third District's decision in Soto on the issue of whether an insurer's attorney fee obligation pursuant to section 627.428 arising prior to the insurer's insolvency is considered part of a "covered claim" as defined in section 631.54(3) and applied in sections 631.57 & 631.70 of the FIGA Act. The decision in the present case also conflicts with the Third District's decision in Gustinger, the First District's decision in Dilme, as well as this Court's decisions in Jones and

Palma on the same issue. These conflicts justify resolution by this Court through its exercise of discretionary jurisdiction.

ARGUMENT

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

In the present case, the Second District reversed the attorney fee award and determined that the right to fees and costs hinged upon the definition of a "covered claim" as section 631.57 obligates FIGA to pay covered claims existing prior to adjudication of the previous carrier's insolvency. The definition of a covered claim is "an unpaid claim . . . which arises out of, and is within the coverage, and not in excess of, the applicable limits of an insurance policy." Fla. Stat. §631.57(1)(a)(1)(a). The Second District's decision noted that the insurance policy at issue did not expressly provide for attorney fees awarded under section 627.428. Consequently, the Second District determined that attorney's fees were not part of a "covered claim" because there was no express attorney fee provision written in the policy which indicated the insurer's intention to fulfill its statutory obligation to pay fees and costs pursuant to §627.428.

The present decision directly and expressly conflicts with Soto, in which the Third District declared that attorney's fees and costs incurred pre-insolvency were

indeed part of a "covered claim." Soto, 979 So.2d at 966. The Soto decision relied on this Court's holding in Palma which held that attorney fee awards under section 627.428 are an implicit part of all insurance policies of the kind involved. Id. (citing Palma, 629 So. 2d at 832). Accordingly, the Soto court concluded that a proper fee award under 627.428 was a "covered claim" because the fee provision of §627.428 is implied in the insurance policy. Id.

In the present case, the Second District found that the attorney's fee award was not part of the policy's coverage, regardless of whether fees pursuant to section 627.428 are implied in all insurance policies. The court found that only the express policy terms determine coverage, hence unsatisfied coverage obligations which arise from "implicit" coverage provisions do not become obligations of FIGA upon the insurer's insolvency. The court clearly implied, however, that if the policy language had encompassed the §627.428 obligation, then it would be covered by the FIGA Act.

An additional conflict which exists between the Second and Third District's definition of a "covered claim" is each court's respective interpretation of the relationship between sections 631.51 and 631.53 which define the purpose of the FIGA Act. Section 631.51 states that the purpose of the FIGA Act 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." Meanwhile, section 631.53 states that the FIGA Act is to be liberally construed to effect the purposes espoused in 631.51. In Soto, the Third District explained that liberal construction should be applied to both the determination of "covered claims" and the application of such claims. However, in the instant case, the Second District asserted that liberal construction should only pertain to the application of claims already determined to be "covered." Thus, the conflict surrounding the definition of a "covered claim" stems, at least in part, from the Second and Third District's dissimilar interpretations regarding the scope of liberal construction.

Further conflict is evidenced by the Second District's reference to Fla. Stat. §627.428 as requiring strict construction in Liberty Nat'l Life Ins. Co. v Bailey ex rel. Bailey, 944 So.2d 1028 (Fla. 2d DCA 2006) to the effect that attorney fees pursuant to section 627.428 are a "penalty to discourage wrongful refusals to pay policy benefits." (App. 4). The substantive coverage provision of §627.428 as implemented by this Court in Palma is not one of "liabilities arising by operation of law" as the Second District held in the present case. Rather, this statutory scheme enforced by Palma makes it clear that fee obligations pursuant to section 627.428 are deemed to be part of the policy provisions which comes "within the

coverage of the insurance policy" and falls within the definition of a "covered claim" per §631.54(3).

It is also noteworthy that the Third District's decision in Gustinger upheld the award of attorney fees against FIGA, notwithstanding Fla. Stat. §631.57(1)(b), which states that "(i)n no event shall the association be liable for any penalties or interest." Thus, the Second and Third Districts are conflicted as to whether attorney fees involving FIGA are penalties or covered claims.

Moreover, the present interpretation by the Second District conflicts with both Palma and Jones wherein this Court stated that the FIGA Act "is designed to protect Florida citizens, not the insurance industry." Jones, 908 So. 2d at 442. Hence, the statutory policy of liberal construction of the FIGA Act to "protect Florida citizens, not the insurance policy" necessarily means that when there is ambiguity about whether a claim is covered by FIGA, FIGA should err on the side of coverage. If this Court were to accept jurisdiction, it could resolve confusion among the various districts regarding the construction of the FIGA Act to protect Florida citizens and clarify the FIGA Act's purpose in determining what constitutes a "covered claim."

Furthermore, the present decision also conflicts with the decisional law of the First District which likewise states that "[a]n award of attorney's fees . . . is

part of a covered claim for which FIGA may be responsible." Dilme, 649 So. 2d at 935. Consequently, the instant decision directly conflicts with the First and Third Districts and misinterprets this Court's holdings as to the same issue.

While there is sufficient conflict with which to demonstrate this Court's jurisdiction, this Court should also accept jurisdiction because the issue involved in this case has broad application to thousands of Florida citizens whose insurance carriers have, or will, become insolvent. If the Supreme Court of Florida does not resolve this conflict, FIGA's implicit insurance coverage obligations will be applied differently in the Second District's territorial jurisdiction than in the Third District's—and the application in the remaining districts will be unpredictable. Claimants will undoubtedly file FIGA claims that include unpaid pre-insolvency obligations based on implicit coverage in the Third (and First) District trial courts while FIGA will be motivated to establish venue in the Second District.

In addition, the Second District's decision will incentivize the insurance industry to not write any implicit coverage provisions expressly into policies so that FIGA's obligations will decrease over time and carriers' funding requirements will commensurately drop—all in conflict with this Court's language that the FIGA Act "is designed to protect Florida citizens, not the insurance industry." Jones, 908 So. 2d at 442.

CONCLUSION

Because the decision of Second District expressly and directly conflicts with decisions of this Court and other districts, Petitioners, DIANE PETTY and KEVIN FARMER, respectfully request that this Court accept jurisdiction and resolve the conflicts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via regular U.S. Mail to: Dorothy Venable DiFiore, Esquire, Haas,

Dutton, Lewis, P.L., Attorneys for Defendant, 4921 Memorial Highway, Suite 200, Tampa, Florida 33634 this _____day of November, 2010.

/s/Ron A. Hobgood_____
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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the Florida Rules of Appellate Procedure 9.210 requiring the font size of the type herein to be at least fourteen points if in Times New Roman format.

/s/Ron A. Hobgood_____
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APPENDIX

Conformed Copy of:
Florida Insurance Guaranty Association v. Petty,
Case No. 2D09-3749