SUPREME COURT OF FLORIDA
CASE NO.: 95,889

Florida Bar Number: 311200

DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

IN THE

SUPREME COURT OF FLORIDA

BONNIE ROSEN

Petitioner

vs.

FLORIDA INSURANCE GUARANTY ASSOCIATION

Respondent

PETITIONER'S REPLY BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the size and style of type used in this brief is 12 pt. Courier New.

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STATEMENT OF THE CASE AND FACTS[1]

Petitioner Bonnie Rosen stands on her original statement of the case and facts. FIGA's version of "facts" is based upon a skewed interpretation of the record in its own favor, contrary to settled law. See Moore v. Morris, 475 So. 2d 666 (Fla. 1985) (moving party must demonstrate conclusively that no genuine issue exists as to any material fact, even after all reasonable inferences drawn in favor of the opposition). FIGA's only basis for departing from *de novo* review is its claim that Rosen is precluded from "arguing that there was no factual disputes" because she "submitted the case for summary judgment on the same issues...." (A.B. p. 50). This is not the case. The parties cross-moved for summary judgment on different questions. Rosen moved for summary judgment against FIGA on the collectibility of judgment against FIGA and its interpretation of the FIGA Act and the Rumger Insurance policy. (R. Vol. I, p. 62-98). FIGA moved for summary judgment on the purportedly preclusive effect of Fidelity & Casualty Co. of New York v. Cope, 462 So. 2d 459 (Fla. 1985) and its claim that Cope barred consideration of Rosen's claim on the merits. (R. Vol. I, pp. 99-126).

The 1967 Author's comments to Rule 1.510, Fla. R. Civ. Proc. governing summary judgment expressly negates FIGA's argument,

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[1] Hereinafter, all references to Rosen's Initial Brief are denoted (I.B. p. ___) and to FIGA's Answer Brief are denoted as (A.B. p. ___).

stating squarely that:

> The fact that both parties move for summary judgment does not establish that there is no issue of fact. Although a party may, on his own motion assert that, accepting his legal theory, the facts are undisputed, he may be able and should be allowed to show that if his opponent's theory is adopted a genuine issue of fact exists. (Emphasis added).

See also Floyd v. Homes Beautiful Construction Co., 710 So. 2d 177, n. 1 (Fla. 1st DCA 1998) ("The fact that a party has moved for a summary judgment does not estop that party from challenging an adverse summary judgment."). The correct rule of law is that a party cannot assert the absence of genuine issue of material fact on a specific question, and on appeal take a contrary position on the same question. Geiser v. Permacrete, Inc., 90 So. 2d 610, 612 (Fla. 1956) (emphasis added).

I. COPE HAS NO APPLICATION TO SUITS AGAINST FIGA FOR FAILURE TO PAY "COVERED CLAIMS".

In her Initial Brief, Rosen highlighted the significant distinctions between insurance bad faith claims and FIGA suits rendering the logic of Cope inapplicable in the FIGA context. (I.B. pp. 24-28). Chief among these were: (1) the nature of a FIGA suit, as a direct (and not derivative) action brought by a claimant to enforce FIGA's statutory obligations; and (2) the release provision contained in §631.191, Fla. Stats. (1997).

FIGA concedes that a judgment holder against one of its insureds has a direct action against it "as the insurer's successor in interest to enforce payment up to the limits of coverage." (A.B.

pp. 26-27; 32, n. 8). See generally Pink Star Corp. v. United Fire Ins. Co., 546 So. 2d 1085 (Fla. 3d DCA 1989) (judgment gives claimant standing to sue). FIGA argues that the form of judgment Rosen procured constitutes a "release" rather than a binding stipulation a la Cunningham. Cunningham v. Standard Guaranty Ins. Co., 630 So. 2d 179 (Fla. 1994). FIGA's argument simply makes no sense.

In United Services Auto. Ass'n v. Jennings, 731 So. 2d 1258 (Fla. 1999), decided after summary judgment was rendered here, the claimant and the insured executed a settlement agreement that actually released all of the claims against the insured "in exchange for a right to pursue a third-party bad-faith claim." This Court rejected the insurer's argument that the Plaintiff's claim was barred, and held that the insurer read Cunningham too narrowly. It wrote that Cunningham

> [a]pproved a procedure in which the parties could avoid the time and expense of going through a trial to obtain a final judgment. In following that procedure, the parties agree and the court's recognize that a stipulated final judgment has the same force and effect as a final judgment reached through the usual judicial labor of a trial when the parties agree that it shall. Id. at 1260. (Emphasis added).

This argument applies with even more force here. At the time the parties settled, FIGA knew that at least one count in the Complaint against its insured was covered. (Allen depo. p. 43). The settlement negotiations were conducted out in the open with, at

a minimum, FIGA's knowledge, and the agreement stated in at least three places that it would not impair Rosen's right to pursue a lawsuit against FIGA. (R. Vol. I, p. 163, ¶2; 165, ¶7, 174, ¶28).[2] This Court is not bound to extend Kelly v. Williams, 411 So. 2d 902 (Fla. 5th DCA), rev. den., 419 So. 2d 1198 (Fla. 1982) (a split decision of the Fifth District) or Cope to FIGA cases, particularly where FIGA can offer no sound legal or public policy reasons to thwart the parties intent. Even in the bad faith context, other courts have held a covenant not to execute to constitute a binding and enforceable contract, and – not a release. See Red Giant Oil Co. v. Lawlor, 528 N.W. 2d 524 (Iowa 1995) (analyzing cases on all sides of the issue and holding that the contract line of authority was the more persuasive.).

FIGA's statutory analysis is likewise flawed. According to FIGA, the release provision of section 631.193, Fla. Stats., has nothing to do with the issues in this case because "the Receiver and FIGA are not the same legal entity." (A.B. p. 18). This

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[2] FIGA cannot explain or reconcile its position that it "consistently refused to comment on the terms of any agreement." (A.B. p. 5), with defense counsel Tharp's testimony that he was representing both the insured and FIGA when he signed the settlement agreement. (Tharp. Depo. p. 12). FIGA acknowledged, moreover, that the agreement signed required Rosen to sue FIGA "in its home venue of Duval County" (A.B. p. 9) – a provision which only benefitted FIGA, not its insured. Since FIGA now apparently stipulates that "it would have made no difference in the outcome of this case if, in fact, the Walton Lantaff firm was representing FIGA" (A.B. p. 36), this Court can presume this was the case for purposes of this appeal. This would render FIGA bound by the judgment. See Martino v. Florida Ins. Guaranty Ass'n, 383 So. 2d 942 (Fla. 3d DCA 1980)

interpretation ignores the statutory relationship between these parties, and omits certain key provisions of the statutory claims procedure.

When an insurer is liquidated, the Department of Insurance as receiver takes possession of its assets and proceeds to conduct the business of the insurer. §631.141(5), Fla. Stats. (1997). In order to pursue FIGA as the statutory successor of the insurer, a claimant is required to file a proof of claim form, as a condition precedent with the receiver. §631.181(1)(a),(2)(a), Fla. Stats. (1997). There is <u>no</u> separate claim form filed with FIGA, as FIGA strongly implies (A.B. p. 20, n. 6). By operation of law, "Notice of claims to the receiver as liquidator of the insolvent insurer <u>shall be deemed notice to the association [FIGA] or its agent...</u>." §631.58, Fla. Stats. (1997) (emphasis added). It is this key provision of the statute which is noticeably <u>absent</u> from FIGA's answer brief.

The receiver's duty to cooperate with FIGA includes periodic release of all claims filed against it directly to FIGA. §631.395, Fla. Stats. (1997); 631.58(3)(d), Fla. Stats. (1997). A FIGA claimant must then file suit against the insured or the guaranty association within one year of the time for filing claims with the receiver. §631.68, Fla. Stats. (1997); 95.11(5)(d), Fla. Stats. (1997). This claims procedure "constitutes the exclusive means for obtaining payment of a claims from the receivership estate." §631.153, Fla. Stat. (1997).

According to FIGA, it "can only be obligated to pay a claim that its insured is legally obligated to pay." (A.B. p. 32). The statutory scheme, however, ensures that once a claim is filed with the receiver, the insured can never be "legally obligated to pay" the claimant to the extent of original policy limits, while FIGA remains so obligated by statute to the extent of its $300,000 limit for "covered claims." §631.193, Fla. Stat. (1997). Thus, section 631.193, Fla. Stats. (1997) has everything to do with this case. By operation of law, AB law firm was released from its obligation to pay Mrs. Rosen up to the $1 million dollar policy limits of the insolvent insurer, the moment she filed her claim. See Queen v. Clearwater Electric Inc., 555 So. 2d 1262 (Fla. 2d DCA 1989); Rubenstein v. Saldariagga, 699 So. 2d 754 (Fla. 4th DCA 1997).[3] However, FIGA remained statutorily liable to pay Mrs. Rosen's "covered claims." §631.193, Fla. Stats. (1997). The entire statutory scheme, which must be construed as a whole, see St. Mary's Hospital, Inc. v. Phillipe, 2000 WL 854258, 25 Fla. L. Wkly. S501 (Fla. 2000), renders the logic of Cope inapplicable in the FIGA context.

FIGA next argues that Mrs. Rosen "elected her remedy" by filing a claim (A.B. p. 19). The "election" to which FIGA refers is between an automatic release and statutory coverage, or no coverage at all, since the only alternative that a claimant has to

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[3] The claim was valued at $1,000,000 by Mrs. Rosen (R. Vol. I, pp. 76-78), thus giving the insured a full release.

filing a claim in the receivership estate and the statutory release of rights against the insured is to treat the tortfeasor as though it were uninsured and proceed against it directly. See generally Queen v. Clearwater Electric Co., 555 So. 2d at 1266 n. 5. The only beneficiary of the latter election is FIGA and its member insurers, who escape affording coverage of any kind, when the insured paid a premium for its own and the claimant's protection. FIGA affords no "safety net" to a claimant who is forced to "elect" no coverage.

In sum, the First District Court of Appeal held that it was barred from reaching the merits of Mrs. Rosen's claim by virtue of Cope. It is respectfully submitted the District Court misapplied Cope in extending it to the FIGA context, and that its decision is in derogation of the entire statutory scheme, and contravenes sound public policy favoring both settlement and the protection of FIGA claimants. The District Court decision should accordingly be quashed.

The remaining legal issues regarding statutory interpretation and FIGA's breach of its duty to defend are interrelated and will be dealt with accordingly.

II. FIGA'S DEDUCTION OF ITS OWN DEFENSE COSTS FROM THE AMOUNT DUE AND PAYABLE ON "COVERED CLAIMS" IS CONTRARY TO THE STATUTORY LANGUAGE AND PURPOSE OF THE FLORIDA INSURANCE GUARANTY ASSOCIATION ACT, §631.50, *ET SEQ.* FLA. STATS. (1997).

FIGA blithely states that "[g]uaranty association statutes are not intended to be interpreted so as always to give the maximum coverage to a claimant." (A.B. p. 17). The Florida legislature has expressly stated otherwise, mandating that the statute be "liberally construed" to effect its statutory purposes of protecting insured and claimants. §631.53, Fla. Stats. (1997). The only case FIGA cites for the proposition that liberal construction has been "rejected," Florida Ins. Guaranty Ass'n v. Cole, 573 So. 2d 868 (Fla. 2d DCA 1990), rev. den., 584 So. 2d 997 (Fla. 1991) (A.B. pp. 22-23) flatly negates FIGA's argument.

In Cole, the Second District wrote that the FIGA statute "must be liberally construed to effect its purpose, including avoiding financial loss to claimants or policyholders. §§631.51 and 631.53, Fla. Stat. (1985)." FIGA v. Cole, 573 So. 2d at 870 (emphasis added). What was "rejected" in Cole was FIGA's argument that, under an "occurrence" policy, there could only be one statutory "covered claim" arising out of a single accident – not matter how many deaths or injuries resulted. Terming this proposal "to be overly narrow," the Second District wrote that:

> There is nothing in the statute which would suggest that multiple, unrelated parties should be obligated to file a single claim merely because they or their family member

> were injured or killed in a single accident. Each injured person would seem to have a 'covered claim' which arises out of and is within the coverage. So long as the statutory claims do not exceed the insurance policy's limit of liability for one occurrence, the per person approach to the definition of a statutory claim would appear to be the fairest method to accomplish the purposes of the Florida Insurance Guaranty Association Act. Id. 870 (emphasis added).

In the Cole case, there was only one death. Thus, there was only one claim, no matter the number of survivors, because survivors claim derivatively. Cole is entirely in Rosen's favor.

Succinctly stated, FIGA's strict construction of the FIGA Act is in derogation of the statute, and has no legal support. Where FIGA is exempt from paying claims, the legislature has not hesitated to say so. See §631.57(1)(b), 631.66, 631.70, Fla. Stats. (1997).[4]

Turning to the merits of this case, the parties agree that FIGA "can be liable for breach of a contractual duty to defend where the policy requires a defense in addition to indemnity," and that FIGA's duty to defend terminated when the policy limits were exhausted. The parties disagree on two issues. First, whether FIGA's policy limits were exhausted by its payment of $261,000 of

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[4] In Washington Insurance Guaranty Ass'n (WIGA) v. Ramsey, 922 P.2d 237 (Alaska 1996), the Alaska Supreme Court rejected WIGA's argument that the general immunity provision of the Washington statute, RCW 48.32.150 (identical to §631.66, Fla. Stat) immunized WIGA from a claim for refusal to settle. This issue is not before the Court at this time, and is noted here only because of FIGA's argument at pp. 17-18 of its Answer Brief, which claims blanket immunity.

its own defense costs and only $39,000 in indemnity after Rumger/Manatee became insolvent. Second, if not, what was the effect of FIGA's unequivocal pronouncement to its insured that it would have to fend for itself after the exhaustion of the $300,000 limits inclusive of its own defense costs. (Sam Allen depo. 35-36, 39).[5]

It is respectfully submitted that FIGA's interpretation is at odds with the policy language, construed *in pari materia* with the FIGA Act, as well as the liberal construction in favor of coverage accorded both. The declining balance policy stated that "claims expenses" are included "within the limits shown in the declaration," i.e. $1,000,000 dollars. The "most we will pay" provision likewise states that "the maximum we will pay for all claims and claims expenses will not exceed the limit shown in the Declarations as "Aggregate,'" i.e., $1,000,000, not $300,000. Thus, even after FIGA's takeover of the insolvent insurer, under the policy, claims expenses were still to be deducted from "the limits shown in the declarations," or $1,000,000. At best, FIGA's

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[5] Contrary to suggestion, there was nothing "speculative" about this pronouncement. (A.B. p. 41). Whatever FIGA's internal discussions were with its own counsel, it unequivocally told the insured law firm it would have to defend itself once the $300,000 "FIGA cap" was exhausted by its own defense costs. (Allen depo. pp. 39-40). FIGA also attempts to minimize the impact of this appeal, with its suggestion that declining balance policies are "relatively rare" (A.B. p. 37). That is likewise not the case. See In re Louisiana World Exposition, Inc., 832 F.2d 1391, 1398 (5th Cir. 1987). This Court can also take judicial notice of the size of Rumger Insurance Company, which previously insured attorneys around the state.

only argument is that the policy is ambiguous – an argument that still leads to a construction of the policy against FIGA.

Rosen's interpretation, in contrast, is in accord with both the statutory language and the underlying public policy. Pursuant to §631.57(1)(a)(2), Fla. Stats. (1997), the $300,000 statutory cap applies solely to FIGA's obligation to pay indemnity. The statutory definition on a "covered claim" excludes defense costs, which are instead treated as "expenses in handling claims." §631.54(3)(5), Fla. Stats. (1995). So too, under §631.193, when Rosen filed her claim, the insured was automatically released up to the amount of the original policy limits, or $1,000,000. Thus, it is entirely consistent, as well as reasonable and fair, to continue to deduct claims expenses from this same limit shown in the declarations even after an insurer's insolvency. Since $1,000,000 minus $461,000 (total defense costs) still left $539,000 (or another $239,000 available for defense costs under the policy before the $300,000 FIGA cap was even reached), at the time FIGA told its insured that its policy limits were "almost exhausted" (A.B. pp. 9-10), it still had the full amount of $300,000 available for coverage.[6]

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[6] FIGA's citation to Bankers Trust Co. v. Old Republic Ins. Co., 7 F.3d 93 (7th Cir. 1993) is likewise perplexing, since in the context of a non-wasting policy, the Court rejected Imperial Insurance Co.'s argument that its obligation to defend ended after the exhaustion of a payment towards a judgment, and included its own defense costs. Indeed, the Court observed that Imperial had adopted this view nationwide and "So far, it has lost every time." Id. at 94.

It was not FIGA's defense under a reservation of rights which constituted the act of abandonment or breach. It was FIGA's contraction of coverage by refusal to pay the full, applicable $300,000 limits available to Mrs. Rosen's claim. On this issue, Arizona Property & Casualty Ins. Guaranty Fund v. Helme, 153 Ariz. 129, 735 P.2d 451, 459 (Ariz. 1987) (en banc) is directly on point in holding that a Guaranty Association "abandons" its insured when it anticipatorily repudiates its contractual obligations to its insured based upon an incorrect interpretation of the contract.[7] See also 4 Corbin on Contracts §968 at 881. (1951 ed.) (Citing "ample authority that an action lies at once for anticipatory repudiation by an insurer.").

FIGA's tender of §39,000, instead of $300,000 in payment of Mrs. Rosen's claim was thus ineffective to terminate its duty to defend its insured. It freed the insured to protect itself, and

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[7] FIGA's interpretation of Arizona law is also incorrect. Ariz. Rev. Stats. §20-661(3), which the Arizona Supreme Court interpreted in Helme, defined a "covered claim" the same as §631.54(3), Fla. Stats. (1997). A "Damron agreement," under Arizona law, Damron v. Sledge, 105 Ariz. 151, 460 P. 2d 997 (Ariz. 1969), is clearly the same as a Coblentz agreement, which Florida, as well as other jurisdictions, recognizes. See Florida Ins. Guaranty Ass'n v. Ali, 609 So. 2d 654 (Fla. 3d DCA 1992). FIGA further cites Cunningham v. Goettl Air Conditioning, Inc., 194 Ariz 242, 980 P.2d 495 (Ariz. Ct. App. 1997) (A.B. p. 43), when that case was vacated by the Arizona Supreme Court. See 194 Ariz. 236, 980 P.2d 489 (Ariz. 1999). In accord with Rosen's argument in Point I, in vacating the District Court's Cunningham decision, the Arizona Supreme Court held that a covenant to execute did not constitute a release, and did not extinguish the Plaintiff's claim. Id. at 494. The Court invalidated certain buy-back provisions in the parties' agreement, which are not present here.

should have precluded FIGA from contesting <u>the form</u> of the parties' settlement and stipulated judgment. <u>See</u> <u>Hagen v. Aetna Casualty & Surety Co.</u>, 675 So. 2d 963 (Fla. 5th DCA), <u>rev. den.</u>, 683 So. 2d 483 (Fla. 1996); <u>First American Title Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, PA.</u>, 695 So. 2d 475, 477 (Fla. 3d DCA 1997). FIGA could not disclaim as "collusive" or "excessive" a settlement agreement entered by its own counsel, and by its terms, each and every claim – <u>including the covered claim</u> -- was settled for the full $300,000 amount. Accordingly, if this Court agrees with Rosen's interpretation of the policy and statutes, nothing remains to be litigated on remand, and the District Court's decision should be quashed with directions to enter judgment in Rosen's favor.

III. FIGA IS RESPONSIBLE FOR CLAIMANT'S ATTORNEYS FEES IN PURSUING HER CLAIM AND SUCH FEES ARE NOT INCLUDED IN THE $300,000 CAP AVAILABLE FOR "COVERED CLAIMS."

Legislative intent is gleaned first from statutory language, with courts avoiding readings of a statute which render any particular part of the statute meaningless. <u>Golf Channel v. Jenkins</u>, 752 So. 2d 561 (Fla. 2000); <u>Forsythe v. Longboat Key Beach Erosion Control District</u>, 604 So. 2d 452, 456 (Fla. 1992). Moreover, related statutory provisions are read *in pari materia*. <u>St. Mary's Hospital, Inc. v. Philippe</u>, 2000 WL 854258, 25 Fla. L. Wkly. S501 (Fla. 2000); <u>Golf Channel v. Jenkins</u>, 752 So. 2d at 564.

Not one of the three cases FIGA cites as "controlling" is a

FIGA case, let alone purports to interpret §631.70, Fla. Stats. (1997). See Wilder v. Wright, 278 So. 2d 1 (Fla. 1973); Roberts v. Carter, 350 So. 2d 78 (Fla. 1977); Industrial Fire & Casualty Ins. Co. v. Prygrocki, 422 So. 2d 314 (Fla. 1982) (A.B. p. 48). They deal exclusively with section 627.428, which speaks in terms of attorneys fees for "insureds, omnibus insureds and named beneficiaries." In contrast, the FIGA Act speaks in terms of preventing financial loss to "claimants or policyholders." §§631.51(1), 631.60(1), 631.61(1), Fla. Stats. (1997) (emphasis added).

As cases around the country recognize, an interpretation of the Insurance Guaranty Ass'n Act which equates a "clamant" with an "insured" would render an essential term of the statute meaningless. See e.g. New Hampshire Insurance Guaranty Ass'n v. Pitco Frialator, Inc., 142 N.H. 573, 705 A. 2d 1190 (N.H. 1998) (and cases collected). This is no less true in the context of attorneys fees, than with other pertinent provisions of the statute.

FIGA has no authority for the proposition that it "has even less responsibility for fees than its predecessor insurer would have had." (A.B. p. 48). In Zinke-Smith, Inc. v. Florida Ins. Guaranty Ass'n, Inc., 304 So. 2d 507 (Fla. 4th DCA 1974), cert. denied, 315 So. 2d 469 (Fla. 1975), the Fourth District concluded that the legal effect of the FIGA Act was to make FIGA an insurer on a covered claim and render §627.428 applicable to FIGA. FIGA's

response is that passage of §631.70 "legislatively overrules" Zinke-Smith, (A.B. p. 49). Once again, this argument is devoid of authority. The Fourth District gave no rationale for its subsequent determination that fees were not recoverable in Florida Ins. Guaranty Ass'n v. Jacques, 643 So. 2d 101, 102 (Fla. 4th DCA 1994) – let alone the "legislative overruling" analysis urged here by FIGA.

A key feature of the FIGA Act is that a "claimant," as well as an insureds may press a covered claim. The statutory language of Section 631.70, recognizes that attorneys fees attach "to any claim" when FIGA denies, by affirmative action, the claim or "any portion thereof." Since the FIGA Act was enacted after §627.428, and used different terms to describe the class of persons protected, this interpretation is the only one which harmonizes all provisions of the statute and "comports with the principle of statutory construction that remedial statutes should be liberally construed...." See Golf Channel v. Jenkins, 752 So. 2d at 565.

CONCLUSION

It is respectfully submitted that the First District's decision should be quashed with directions to enter summary judgment in Rosen's favor on remand, together with an award of attorneys fees in addition to the full amount of Rosen's covered claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this ___ day of October, 2000.

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