

**IN THE FIRST DISTRICT COURT OF APPEAL
TALLAHASSEE, STATE OF FLORIDA**

CASE NO.: 1D24-0796

FLORIDA INSURANCE GUARANTY
ASSOCIATION (FIGA),

Appellant,

v.

JOSEPH and JACQULYN RICHARDSON,

Appellees.

APPELLANT'S INITIAL BRIEF

An Appeal from a Final Order Enforcing Settlement

L.T. No.: 2021-CA-003042
Honorable Amy Broderson

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PREFATORY STATEMENT

Throughout this brief, Appellant, FLORIDA INSURANCE GUARANTY ASSOCIATION, will be referred to as FIGA. During the litigation of this case, the Richardsons' insurer, FedNat Insurance Company, was declared insolvent and FIGA was activated as the statutory guarantor for the covered claims arising under the FedNat policies. The now-insolvent insurer will be referred to as "FedNat" or "the insurer." Appellees will be referred to as "Plaintiffs" or "Appellees."

Citations to the record on appeal will be: (R#).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal, pursuant to Florida Constitution, Article V, section 4(b)(1) and Rule 9.030(b)(1)(A), Fla. R. App. P. because this is an appeal from a final order. An order enforcing a settlement agreement and requiring FIGA to pay to Plaintiffs the entire amount of the pre-insolvency settlement agreement, “within ten (10) days of the execution of this order,” (R171-74) constitutes a final order because there is no further judicial labor to be done, save enforcement of the order. *See generally, Atrium Med. Corp. v. MSP Recovery Claims, Series, LLC*, 367 So.3d 573, 574-75 (Fla. 3rd DCA 2023) (“A final judgment is one which ends the litigation between the parties and disposes of all issues involved such that no further action by the court will be necessary.”) (quoting *Caufield v. Cantele*, 837 So. 2d 371, 375 (Fla. 2002)); *M.M. v. Fla. Dep’t of Child. & Fams.*, 189 So. 3d 134, 137 (Fla. 2016) (“[a]n appeal from a final order is appropriate when judicial labor has ended.”); *S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97, 99 (Fla. 1974)(“[T]he test employed by the appellate court to determine finality of an order, judgment or decree is whether the order in question

constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected."); *Raymond James & Assoc. v. Godshall*, 851 So.2d 879, 880 (Fla. 1st DCA 2003) ("...an order is final and a plenary appeal may be taken when "the order ...constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the court.")

STATEMENT OF THE CASE AND OF THE FACTS

FIGA appeals the Trial Court's order which violates §631.70, Fla. Stat. (2022)¹ by compelling FIGA to pay that portion of a pre-insolvency settlement agreement that was specifically identified as "statutory fees," even though FIGA never denied any portion of the claim. (R118-31;171-74)

STATEMENT OF THE FACTS

In 2020, Joseph and Jaquelyn Richardson's home located at 6075 Yellow Rose Drive in Pensacola, Florida, was covered by a policy of property insurance issued by FedNat Insurance Company. (R7-10) The Richardsons, together with their roofing contractor, RRCA Roofing & Construction, ("RRCA") alleged their home was damaged as a result of an April 23, 2020 "water damage and hail" event, and they presented a claim for damages to FedNat. (R7-10;117) FedNat accepted the claim as one that was covered by the policy and assigned Claim Number HO05203323 to this incident. According to

¹ Because the FedNat insolvency occurred in 2022, all references to the FIGA Act or any provisions thereof are to the 2022 version of the statute, unless stated otherwise. *De la Fuente v. Fla. Ins. Guar. Ass'n*,

the complaint, FedNat paid some damages to them on this claim. (R7-10)

The Richardsons and RRCA presented a second claim to FedNat, alleging the home sustained damage by a covered peril on August 15, 2020, and FedNat assigned Claim Number HO05203323747 to this claim. (R117) The Richardsons and RRCA presented a third claim to FedNat, alleging the home sustained damage from a covered peril on September 15, 2020, and FedNat assigned Claim Number HO0520332935 to this third claim. (R11;117) No further information regarding these latter two claims is contained in the record on appeal.

STATEMENT OF THE CASE

A. Initiating the Lawsuit

When FedNat did not pay the Richardsons the amount they claimed would compensate them for their losses, they filed this lawsuit against FedNat for the April 2020 date of loss only. (R7-10) In the complaint filed in this action, Plaintiffs made the following allegations:

15. Defendant afforded coverage for the claim.

16. Defendant paid policy benefits on the claim after making reductions based on policy provisions.

17. Through its payment on the claim, Defendant admitted liability for the loss.

(R9) The complaint also alleged Plaintiffs had been obligated to hire an attorney for this action and they were entitled to fees pursuant to §627.428, Fla. Stat. (R9)

Before FedNat filed an answer to the complaint, the parties reached a settlement agreement, and Plaintiffs filed a Notice of Settlement. (R16) However, within two months of the notice, FedNat was declared insolvent, and the case was stayed pursuant to the FIGA Act. (R17-39)

On April 6, 2023, Plaintiffs moved to substitute FIGA as a defendant in this action. (R40-41) This motion was served on former counsel for FedNat. (R41) As evidenced by the email address listed in the certificate of service, the attorney for FedNat used a “fednat.com” email address, signifying he was an employee of the now-defunct insurer. (R41) The motion was also served on the Florida Department of Financial Services, Division of Rehabilitation and Liquidation. (R41) Though FIGA has a designated agent for service of process listed on www.sunbiz.org, the motion was not served on FIGA. (R41)

The Trial Court granted Plaintiffs' motion by order dated May 10, 2023. (R42) That order states it was served on "Counsel of Record." (R42) There is nothing in the record to suggest it was served on FIGA.

B. Motion to Enforce Settlement

On the same date the Trial Court added FIGA as a party to the action, Plaintiffs filed a Motion to Enforce Global Settlement. (R43-53) This motion was served on FedNat's counsel at a "fednat.com" email address and to the Receiver, but nothing indicates it was served on FIGA. (R47)

The Motion to Enforce contained the following allegations:

2. During the pendency of litigation, the parties globally settled the instant matter on August 4, 2022. *See* Ex. A – Settlement correspondence dated August 4, 2022.

(R43) The August 4, 2022, correspondence was an email thread between FedNat's counsel and Plaintiffs' counsel which contained nothing more than the following statement, "This confirms we are globally resolved for \$62,900 for this matter. Thanks." (R48) Plaintiffs did not file the actual settlement agreement.

In the motion, Plaintiffs also alleged the "clear and unambiguous settlement correspondence" showed FedNat had

agreed to settle for a “**global** settlement amount of \$62,900.” (R43) (emphasis in original). Plaintiffs also alleged they did not request payment pursuant to section 627.428 as part of the settlement agreement. (R44) In addition, Plaintiffs alleged the estimates for the damages to the home were in excess of \$80,000. (R44) (There is no evidence in the record to substantiate this allegation.) Finally, Plaintiffs asserted FedNat requested a breakdown of the settlement funds after reaching the compromised global settlement. (R44) Plaintiffs presented legal argument in support of their motion to enforce, arguing that because FIGA was “deemed the insurer,” it “has the same obligation to pay the settlement as did FEDNAT, the prior defendant.” (R44)

Before FIGA entered an appearance (i.e., FIGA had no counsel of record), the Trial Court granted Plaintiffs’ Motion to Enforce, directing FIGA to pay the full settlement within 30 days of the order. (R54) This order was marked as served to “Counsel of Record.” (R54) The record shows Plaintiffs’ counsel made some attempts to deliver the orders to FIGA; however, none of those steps were legal service on FIGA and nothing in the record shows FIGA had any actual notice of the settlement agreement or the Court’s order on same. (R57-66)

On August 15, 2023, Plaintiffs filed a Motion to Compel Defendant's compliance with the July 6 order and sought sanctions. (R55-64) The certificate of service on this motion again listed FedNat's counsel at "fednat.com" and the Receiver but did not indicate FIGA was served with the motion. (R57) The motion also attached some emails as follows:

7/7/2023 email from Tishan Morales (paralegal at GED Lawyers) to "nclaim@agfgroup.org" attaching the order on the motion to enforce. There is no claim number in the subject line or body of the email. (R60)

7/7/2023 automated mailbox reply email from "figaclaimsworkflow@agfgroup.org" to Tishan Morales confirming the original email had been received. (R61)

7/13/2023 "green card" showing a Bonnie Smith had signed for a letter addressed to FIGA at a PO Box in Tallahassee. (R62)

8/8/2023 email from David Shaheen to nclaim@agfgroup.org, figaclaimsworkflow@agfgroup.org, and jfakhoury@fednat.com again requesting compliance with the July 2023 order. This email did not have a claim number in either the subject line or body of the email. (R63)

8/8/2023 auto-reply from the workflow mailbox (R65)

On September 20, 2023, Plaintiffs filed a document described as "delivery confirmation to Defendant regarding Plaintiffs' Motion to Enforce Global Settlement hearing currently set for September 22,

2023.”² (R65) Attached to the notice was a post office proof of delivery to an unknown address in Tallahassee on September 11, 2023. (R66) The contents of whatever was delivered on September 11, 2023, were not identified in the court file. It is unknown if any claim number was contained in whatever was delivered to the Tallahassee address.

On September 22, 2023, the Trial Court entered an order following a hearing held on September 22, 2023. (R67) In the order, the Trial Court reserved ruling on Plaintiffs’ Motion to Compel Compliance, recognized FIGA’s substitution as Defendant, directed Plaintiffs to file an Amended Complaint with a new case style referencing FIGA as the defendant, and stating, “Upon service, FIGA will have twenty (20) days to respond to Plaintiff’s Amended Complaint.” (R67) Service of this order was again sent to “All Counsel of Record.” (R67)

C. The Amended Complaint

Plaintiffs filed an Amended Complaint on the same date as the order. (R68-71) The only change to the allegations was the caption. In the Amended Complaint, Plaintiffs alleged they were entitled to

² The only “Defendant” in that pleading is FedNat Insurance Company. (R65)

fees pursuant to §627.428, Fla. Stat. (R71) FIGA timely filed a response to the Amended Complaint, admitting FedNat had insured the property, had not denied the claim, and had paid a part of the claim. (R72-73)

D. The Second Motion to Enforce

On November 10, 2023, Plaintiffs again moved to enforce the “Global Settlement” entered into with FedNat. (R79-88) The only evidence filed in support of the motion was the August 4, 2022, email from Mr. Shaheen to Mr. Fakhoury confirming a “global” settlement was reached. (R86) Plaintiffs also filed an order from another case, signed by the same trial judge, requiring FIGA to pay a pre-insolvency settlement agreement and a May 2023 order in Palm Beach County granting a motion to enforce a pre-insolvency settlement agreement. (R87-89)

On December 18, 2023, FIGA moved to set aside the July 6, 2023, Order Granting Plaintiffs’ Motion to Enforce Global Settlement. (R90-150) In support of this motion, FIGA pointed out that the supporting email was written solely by Plaintiffs’ counsel and did not reflect any negotiations between the parties. (R92)

In addition, FIGA noted the settlement agreement references three dates of loss, and an agreement to pay “new money” allocated as follows:

- a. FORTY THOUSAND DOLLARS AND ZERO CENTS (\$40,000.00) payable to RRCA ROOFING & CONSTRUCTION, ***pursuant to coverage A.***
- b. SEVEN THOUSAND FIVE HUNDRED DOLLARS AND ZERO CENTS (\$7,500.00) payable to JOSEPH RICHARDSON and JACQULYN RICHARDSON and SPECIALIZED LOAN SERVICING, LLC, ***pursuant to Coverage A;*** and
- c. FIFTEEN THOUSAND FOUR HUNDRED DOLLARS AND ZERO CENTS (\$15,400.00) payable to GED LAWYERS ***for statutory attorney’s fees and costs.***

(R118) (emphases added)

As part of the agreement to globally resolve all three claims, Plaintiffs released FedNat from all liability for the three dates of loss.

(R117-31) The release also included the following paragraph:

15. This Release contains the entire terms of the settlement between the Parties with respect to the matters set forth herein. There are no oral or written agreements, representations or inducements of any kind between the Parties with respect to the settlement that are not contained in this Release. This Release may only be altered or amended, in whole or in part, by a written instrument setting forth such changes as mutually agreed to by all of the Parties;”

(R121)

On January 29, 2024, Plaintiffs' counsel filed a Motion for Entitlement to Fees and Costs pursuant to §57.105, Fla. Stat. (R151-64) In support of this motion, Plaintiffs' counsel filed an affidavit in which he attested that the settlement was "global." Attached to the affidavit was an email from former FedNat counsel stating:

Hi David,

This was a global settlement. Our practice at FedNat was to negotiate settlements on a global basis, and then, plaintiff's counsel would then send us instructions on how to allocate that settlement after it was reached.

(R161) In the affidavit, Plaintiffs' counsel also testified the parties reached an agreement on the single amount to be paid, and then provided instructions on how to allocate the money. (R157-58)

On January 31, 2024, FIGA withdrew its motion to Set Aside the Order Granting Plaintiff's Motion to Enforce. (R165)

E. The Court's Order on the Motion to Enforce

On February 29, 2024, the Trial Court entered an Order again Granting Plaintiffs' Motion to Enforce and also finding Defendant should be sanctioned pursuant to §57.105, Fla. Stat. (R168-69). The order including a finding as to the parties' intent for a global settlement and further stated:

2. Defendant shall pay, within ten (10) days of the execution of this order:

- a. The global settlement amount of \$62,900;
- b. Interest on the \$62,900 for the five-hundred seventy-four days since the date of settlement.

(R168) The court also found FIGA's defense was not supported by the material facts and granted the motion for sanctions, retaining jurisdiction to determine the amount of fees, costs, and interest incurred in the action. (R168-69) There was no court reporter at the hearing on these motions. From this Final Order, FIGA timely appeals. (R170-82)

SUMMARY OF THE ARGUMENT

I.

The final order must be reversed, because the terms violate the FIGA Act and ignore the Legislative limitations on FIGA's payment obligations by ordering FIGA to pay that portion of the settlement that had been expressly identified as "statutory fees." The Legislature has expressly concluded FIGA should not have any obligation to pay "statutory fees" incurred in litigation unless FIGA has denied a covered claim by affirmative action. §631.70, Fla. Stat. (2020). Here, the parties' settlement agreement unambiguously identified a portion

of the payment as “statutory fees.” The Trial Court’s ruling ignored this plain, unambiguous language of the parties’ contract, and in doing so, violated Florida’s fundamental rules of contract interpretation and is thus clear legal error.

In addition, simply because the parties do not negotiate a specific fee amount does not mean the settlement does not include statutory fees. Under Florida law, every settlement after suit in a property insurance claim obligates the insurer to pay statutory fees. *Johnson v. Omega*, 200 So.3d 1207, 1215 (Fla. 2016). Thus, all settlements of property insurance claims incorporate, directly or indirectly, the statutory fees that would otherwise be awarded. In many cases, the terms of the settlement are silent on what portion was for statutory fees. However, in this case, the parties expressly recognized the statutory fees that were part of the settlement. The Trial Judge erred in ignoring the parties’ own language clearly identifying the payment for statutory fees and ordering FIGA to pay those fees, in violation of the FIGA Act.

II.

The Trial Judge, without concluding the settlement agreement was ambiguous, nonetheless considered parol evidence to determine

the intent of the parties regarding the settlement. Going outside the terms of an unambiguous contract in order to ascertain the parties' intent is a direct violation of Florida's basic rules of contract interpretation, and thus clear legal error. To make matters worse, this parol evidence would necessarily have been presented at a hearing that was not noticed as an evidentiary hearing. That is a direct violation of FIGA's' due process rights.

III.

Even if this Court determines the Trial Court's interpretation of the settlement terms is not reversible error, that portion of the order that requires FIGA to pay interest from August 2022 through to the present, is a direct violation of section 631.57, which states, "In no event shall the association be liable for any penalties or interest." §631.57(1)(b), Fla. Stat. (2022). FIGA cannot pay interest on a settlement that occurred more than a year before FIGA was even a properly served party in the action. Thus, even if the Court affirms that FIGA owes the entire settlement, assessment of interest must be vacated.

STANDARD OF REVIEW

Because settlement agreements are contractual, a Trial Court's interpretation of a settlement agreement is a matter of law subject to a *de novo* standard of review. *Casto v. First Coast Cardiovascular Inst., P.A.*, --- So.3d ---, 2022 Fla. App. LEXIS 9198 *6 (Fla. 1st DCA Dec. 30, 2022) (“we review *de novo* a trial court's interpretation of a contract insofar as the interpretation drives the fee determination.”); *Fla. First Financial Services v. Edwards*, 350 So.3d 820 (Fla. 1st DCA 2022) (when determination of entitlement to fees depends on interpretation of a contractual provision, an appellate court reviews the order *de novo*.)

The Trial Court's interpretation of statutes is likewise reviewed under the *de novo* standard. *Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 961 So. 2d 328, 331 (Fla. 2007); see *Found. Health v. Westside EKG Assoc.*, 944 So. 2d 188, 193-94 (Fla. 2006) (noting that the standard of review for questions of statutory interpretation is *de novo*); *Fla. Ins. Guar. Ass'n v. Reyes*, 303 So.3d 1248 (Fla. 2nd DCA 2020) (applying *de novo* standard to review trial court's interpretation of the FIGA

Act). Thus, to the extent the ruling depends on an interpretation of statute, the standard of review is *de novo*.

ARGUMENT ON APPEAL

FIGA appeals the Final Order of the Trial Court for three reasons: 1) it requires FIGA to pay statutory fees, in violation of §631.70; 2) it relies parol evidence of the parties' intent where the agreement was not ambiguous; and 3) it requires FIGA to pay interest on the settlement, in violation of §631.57(1)(b), Fla. Stat. (2020).

I. PURSUANT TO THE FIGA ACT AND SUPREME COURT RULINGS, FIGA IS PROHIBITED FROM PAYING THE PORTION OF THE SETTLEMENT AGREEMENT WHICH THE PARTIES HAVE DESIGNATED AS "STATUTORY FEES," BECAUSE THEY ARE NOT "COVERED CLAIMS."

As explained below, the Florida Legislature has determined FIGA cannot pay amounts that are not "Covered Claims;" the Florida Supreme Court has Held Statutory Fees are not "Covered Claims;" thus, FIGA cannot be required to pay that portion of the parties' settlement agreement which they expressly agreed were "statutory fees."

A. THE LEGISLATURE HAS EXPRESSLY AND UNAMBIGUOUSLY DETERMINED FIGA'S PAYMENT OBLIGATIONS ARE LIMITED TO "COVERED CLAIMS."

The Florida Insurance Guaranty Association Act [hereinafter “FIGA Act”] was enacted in 1970. Ch. 70-20, §§ 1-19, Laws of Fla. and can be found in Part II of Chapter 631, §§631.50 – 631.70, Fla. Stat. (2022). The dominant purposes of the FIGA Act are: (a) 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; (b) to “[c]reate a nonprofit corporation to administer and supervise the operation of such association;” and (c) to “[a]ssess the cost of such protection among insurers.” § 631.51(a), (c), and (d), Fla. Stat. (2022) (emphasis added).

While FIGA was clearly intended to pay certain “covered claims” to protect insureds and certain third-party claimants, FIGA was never intended to take on all of the liabilities of insolvent insurers. FIGA is purely a creature of statute, whose obligations are strictly limited. The extent of FIGA’s payment obligations is detailed in the terms of the statute creating the association. *de la Fuente v. Fla. Ins. Guar. Ass’n*, 202 So.3d 396 (Fla. 2016).

Some of the limitations on the obligations for which FIGA may be held responsible, include: (1) FIGA is only “obligated to the extent

of the *covered claims*” under the policy § 631.57(1)(a) 1, Fla. Stat. (2022) (emphasis added); (2) the maximum amount payable on a “covered claim” under a residential property insurance policy is limited by a statutory cap of \$500,000, § 631.57(1)(a)2, Fla. Stat. (2022); (3) “[i]n no event” is FIGA liable for an amount in excess of the obligation of the insolvent insurer under the policy from which the claims arises,” § 631.57(1)(a)3, Fla. Stat. (2022); (4) “[i]n no event shall the association be liable for penalties or interest, “§ 631.57(1)(b) Fla. Stat. (2022). In discussing the limitations on FIGA’s obligations, the Third District Court of Appeal aptly observed, “[s]ince, absent Chapter 631, FIGA would not exist and there would be no effective remedy to recover on *any* claims whatever against insolvent insurers, there can be no constitutional infirmity in the Legislature’s decision to limit those newly-created rights.” *Fernandez v. Florida Ins. Guar. Ass’n*, 383 So. 2d 974, 976 (Fla. 3d DCA 1980) (emphasis added).

Thus, simply because the settlement was an obligation for FedNat does not make it an obligation for FIGA. Rather, as discussed in more detail below, the parties’ plain and unambiguous language stating a part of the settlement was for “statutory fees” places that

portion of the settlement outside the scope of a “covered claim” and thus outside of the legislature’s limits on FIGA’s ability to pay.

As stated in *Fla. Ins. Guar. Ass’n, Inc. v. Devon Neighborhood Ass’n, Inc.*, 67 So.3d 187, 189-90 (Fla. 2011):

FIGA is a public, nonprofit corporation created by statute to provide a mechanism for payment of covered claims under certain classes of insurance policies issued by insurers which have become insolvent. See § 631.51, Fla. Stat. (2010); *O’Malley v. Fla. Ins. Guar. Ass’n*, 257 So.2d 9, 10 (Fla. 1971). ... *Jones v. Fla. Ins. Guar. Ass’n*, 908 So.2d 435, 442 (Fla. 2005); see § 631.54(3), Fla. Stat. (2010) (defining “covered claim”); § 631.57, Fla. Stat. (2010) (stating scope of FIGA’s powers and duties). “FIGA is strictly a creature of statute.” *Fla. Ins. Guar. Ass’n v. All the Way with Bill Vernay, Inc.*, 864 So.2d 1126, 1129 (Fla. 2d DCA 2003). “Thus, ‘the statutory language defines the extent of FIGA’s obligations. FIGA is not responsible for claims against an insurer that do not fall within FIGA’s statutory obligations.’ ” *Fla. Ins. Guar. Ass’n v. Petty*, 44 So.3d 1191, 1194 (Fla. 2d DCA 2010) (*quoting All the Way with Bill Vernay, Inc.*, 864 So.2d at 1130), review granted, 53 So.3d 230 (Fla. 2011). The FIGA act is expressly designed to protect the insured, rather than the insurance industry. See *Jones*, 908 So.2d at 442. However, “the full gamut of a defunct insurance company’s liabilities was not intended to be shifted onto FIGA.” *Fla. Ins. Guar. Ass’n, Inc. v. Olympus Ass’n, Inc.*, 34 So.3d 791, 794 (Fla. 4th DCA 2010) (*quoting Williams v. Fla. Ins. Guar. Ass’n, Inc.*, 549 So.2d 253, 254 (Fla. 5th DCA 1989)).

In 2016, the Supreme Court reaffirmed these principles in *de la Fuente*. After reciting the above language from *Devon*, the *de la Fuente* court emphasized that the statutory language “defines the extent of

FIGA's obligations" and that "the Florida legislature – not the insurance policy – determines what coverage, if any, FIGA provides..." *de la Fuente*, 202 So.3d at 403-04. The *de la Fuente* court then stated that though section 631.53 states the Act should be "liberally construed" to accomplish the purposes of the Act, "this does not mean that the Court may ignore the plain meaning of the statutes defining FIGA's statutory obligations." *Id.* at 404.

It only makes sense that the Legislature sought to limit FIGA's payment obligations, given that it is not the member insurers, but the entire insurance-purchasing public in Florida that ultimately bears the burden of the costs incurred by FIGA in paying claims under the FIGA Act. As the Fifth District aptly observed in *Williams*:

If FIGA had been intended to be a successor in *all* regards to an insolvent insurer's obligations and liabilities to a policyholder, such limiting language would not be necessary. The legislature could simply have made FIGA a statutory successor to defunct insurance companies. *No doubt because it was intended that the claims preserved for payment by Chapter 631 would be manageable and not bankrupt the statute's funding and payment mechanism, it was necessary to limit them not only as to total amount, but also as to substance-covered claims under existing policies.*

Williams v. Florida Ins. Guar. Ass'n, Inc., 549 So. 2d 253, 254 (Fla. 5th DCA 1989) (emphasis added). Thus, any argument that FIGA simply

steps into the shoes of the insolvent carrier and must pay all obligations of the insolvent carrier is incorrect. More importantly, as discussed *infra*, that portion of the settlement that obligates the insurer to pay statutory fees is not a FIGA obligation.

B. THE SUPREME COURT HAS EXPRESSLY AND UNAMBIGUOUSLY HELD AN INSURED CANNOT COMPEL FIGA TO PAY THE PORTION OF A PRE-INSOLVENCY SETTLEMENT DESIGNATED FOR STATUTORY FEES.

In 2012, the Florida Supreme Court applied the legislature's limitation on FIGA's payment obligations to a pre-insolvency settlement between an insurer and insured. In *Petty v. Fla. Ins. Guar. Ass'n, Inc.*, 80 So.3d 313 (Fla. 2012), the Supreme Court resolved conflicting District Court rulings, and clearly showed FIGA was NOT liable for that component of a pre-insolvency settlement that was for statutory fees.

1. *The Conflicting DCA Opinions*

In *Fla. Ins. Guar. Ass'n v. Soto*, 979 So.2d 964 (Fla. 3rd DCA 2008), the insured brought an action against her insurer seeking payment after her car was stolen. After suit was filed, she reached a settlement agreement with the insurer requiring them to pay her a fixed sum for the car. The parties also agreed the insurer owed the

statutory fees, but the amount of the fees would be determined by the court. *Id.* at 965. Before the amount of the fee could be determined, the insurer was declared insolvent, and FIGA was substituted as the defendant in the action. The insured then demanded FIGA was obligated to satisfy the settlement agreement, including the obligation to pay statutory fees. *Id.* The trial court agreed, and FIGA appealed.

The Third District affirmed the trial court, reasoning that fees pursuant to section 627.428 are “an implicit part of all insurance policies of the kind involved here.” *Id.* at 966 (*citing State Farm Fire & Cas. Co. v. Palma*, 629 So.2d 830, 832 (Fla. 1993)). Thus, the “stipulated but unpaid” fees were a “covered claim” that must be paid by FIGA. *Id.* The Third District expressly rejected the notion that FIGA could accept one part of a settlement agreement and reject the balance, stating it “would not be fair and would not further FIGA’s mandate under subsection 631.51(1)” *Id.* at 967.

A few years later, Diane Petty brought an action against her property insurer to compel appraisal of hurricane damage to her home. *Fla. Ins. Guar. Ass’n, Inc. v. Petty*, 44 So.3d 1191 (Fla. 2nd DCA 2010). After the post-suit appraisal resulted in additional payments

from the insurer, the insured moved for attorney's fees, pursuant to §627.428, Fla. Stat. (2007). The insurer and insured agreed the insured was entitled to fees, but before the amount of the fees could be established, the insurer was declared insolvent. The insured then demanded FIGA pay the insurer's obligation for statutory fees pursuant to section 627.428. *Id.* Bound by the *Soto* decision, the trial court granted the fee award and FIGA appealed.

The Second District disagreed with the Third District's conclusion that implicit fees were "within coverage" of the policy, stating:

the fact that 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.' ”

Petty, 44 So.3d at 1194. The Second District reversed the trial court ruling, certified conflict with *Soto*, and clearly concluded FIGA could reject that portion of a pre-insolvency settlement agreement that was for statutory fees that FIGA did not owe.

2. *Supreme Court Resolution*

Petty sought review in the Florida Supreme Court. The Florida Supreme Court agreed with the Second District's analysis and

disapproved of the Third District's ruling. *Petty v. Fla. Ins. Guar. Ass'n, Inc.*, 80 So.3d 313 (Fla. 2012). The Supreme Court first ruled statutory fees are not a "covered claim," because they are not within coverage of the policy, stating:

There is a clear difference between an obligation to pay fees that is imposed by operation of law upon a party due to its behavior under the insurance contract and an obligation imposed upon a party by an express provision for which the party contracted. Section 627.428(1) imposes the obligation to pay a fee award upon an insurer that has wrongfully contested an insured's valid claim. It does not alter the coverage provisions of the insurance contract itself.

Petty, 80 So.3d at 317. In doing so, the Supreme Court clearly and undisputedly determined the FIGA Act limited FIGA's payment obligations such that FIGA could not be made to pay the statutory fee component of a pre-insolvency settlement agreement. In short, *de la Fuente* clearly established that if the record shows (by the parties' own express terms) a portion of the settlement is for statutory fees, FIGA does not have to pay that portion of the settlement.

In other words, courts cannot alter the legislature's clear design to protect the limited funds of an insolvent estate by compelling FIGA to pay for amounts that are not "covered claims."

C. THE PLAIN AND UNAMBIGUOUS TERMS OF THE RELEASE SHOW THE SETTLEMENT INCLUDED STATUTORY FEES WHICH FIGA CANNOT PAY.

That principle applies here. While the negotiations between the parties' counsel are not contained in the record, the Settlement Agreement signed by Plaintiffs and their contractor contains the terms upon which the parties agreed. (R117-123) The Settlement Agreement lays out what claims were being resolved, how much was being paid to resolve them, what coverage provisions would apply, and what portion of the settlement was not under a coverage provision but represented a "statutory fee." No party in the court below suggested the Settlement Agreement was ambiguous in any way. The Court did not find the Settlement Agreement was ambiguous. Thus, the Court was not free to disregard the terms of the agreement and should have enforced the settlement exactly as drafted. As discussed below, \$15,400 was specifically designated as "statutory fees," and is not an obligation FIGA can pay.

Florida follows the American Rule that each party bears its own attorney's fees unless a contract or statute provides otherwise. *Price v. Tyler*, 890 So.2d 246 (Fla. 2004). In this first party action for benefits under an insurance policy, Plaintiffs specifically pled

entitlement to fees under section 627.428. (R9) And the law is clear that virtually every time an insurer agrees to pay more money after suit is filed, it owes statutory fees to the insured. *See e.g., Johnson v. Omega Ins. Co.*, 200 So.3d 1207, 1215 (Fla. 2016) (settlement of a previously denied claim entitles insured to attorney's fees pursuant to §627.428); *Pepper's Steel & Alloys, Inc. v. U.S.*, 850 So.2d 462, 465 (Fla. 2003) (attorneys' fees shall be awarded against the insurer when settlement operates as confession of judgment); *DeLeon v. Great Am. Assur. Co.*, 78 So.3d 585 (Fla. 3rd DCA 2011); *Beverly v. State Farm Florida Ins. Co.*, 50 So. 3d 628, 633 (Fla. 2d DCA 2010) ("[A]n insurer's post-suit payment of additional policy proceeds entitles the insured to section 627.428 attorney's fees."); *Fla. Rock & Tank Lines, inc. v. Continental Ins. Co.*, 399 So.2d 122 (Fla. 1st DCA 1981). Thus, the settlement agreement's reference to "statutory fees" can only be a reference to fees awarded under section 627.428.

Settlement agreements are governed by contract law. *Basner v. Bergdoll*, 284 So.3d 1122, 1123 (Fla. 1st DCA 2019) (The interpretation of settlement agreements is governed by contract law); *Gira v. Wolfe*, 115 So. 3d 414, 417 (Fla. 2d DCA 2014); *Williams v. Ingram*, 605 So.2d 890 (Fla. 1st DCA 1992) ("Settlement agreements

are to be interpreted and governed by the law of contracts.”) (*quoting Don L. Tullis and Assocs., Inc. v. Benge*, 473 So. 2d 1384 (Fla. 1st DCA 1985)). And under longstanding contract law, the Trial Court was not free to ignore the parties’ own language in the settlement agreement, clearly stating that \$15,400 was the amount of statutory fees included in the global payment of \$62,900.

Here, the record is clear: the parties agreed to “globally” resolve **all** the claims Plaintiffs presented: damages from April 2020, damages from August 2020, damages from September 2020, statutory attorney’s fees, statutory interest, statutory costs and even extra-contractual or bad faith damages. (R117-23) Clearly FedNat did not want to defend two additional lawsuits, pay additional taxable costs, deal with an attorney’s fee hearing, or open up a bad faith claim by settling without including all existing and potential claims. The parties negotiated a resolution to every element of the claim – including Plaintiffs’ claim for statutory fees.

Simply because FedNat allowed Plaintiffs and their counsel to acknowledge and specify what portion of the award was recoverable under section 627.428 does not make the settlement agreement any less global nor does it make the fees any less statutory. Plaintiffs

could have specified that all amounts of the settlement should be paid under Coverage A, because the attorney was simply taking a percentage of the *insured's* recovery under a contingency fee. Instead, Plaintiffs opted to limit the amount paid under their policy by identifying \$15,400 as “statutory fees” so it would not reduce their available policy limits.³ There is nothing to indicate FedNat dictated the category of these payments. Accordingly, the record shows a clear and unambiguous agreement that this payment was for statutory fees. As discussed below, this Court should not alter the terms of an unambiguous settlement agreement.

In *Board of Regents v. Rowsey*, 320 So.3d 954 (Fla. 2nd DCA 2021) the Second District addressed a dispute between the parties to a settlement agreement that required an employee to turn over documents in return for payment of money from the employer. The parties disputed the scope of the documents that had to be turned over and the amount the employer was obligated to pay. *Id.* at 958-60.

³As explained in *Petty, supra*, statutory attorney’s fees are not “within coverage” of the policy. Accordingly, they are not subject to the policy limits.

After reaffirming its obligation to give effect to the plain and ordinary meaning of the settlement agreement's terms, the Second District reversed the Trial Court's ruling that had relied on testimony from the employee as to his viewpoint on the meaning of the terms. *Id.* at 959-60. The Second District stated it was improper to rely on the outside evidence to alter the terms that were not ambiguous. *Id.* at 960. The court specifically stated, "Assertions of the improbability that [the employee] had obligated himself" to undertake a search for documents outside of his possession and control were "belied by the plain language of the agreement he entered into." *Id.* at 961. In other words, it was irrelevant if the employee said he would not have agreed to such an expansive undertaking. The employee had signed an unambiguous agreement that required that undertaking and so he was obligated to perform under the agreement.

In short, the Second District concluded the trial court erred in looking at the employee's testimony rather than the language of the settlement agreement. *Id.* (citing, *Lincare Holdings, Inc. v. Ford*, 307 So. 3d 905, 910 (Fla. 2d DCA 2020) ("Where contracts are clear and unambiguous, they should be interpreted as written, and the court can give them no other meaning." (quoting *Khosrow Maleki, P.A. v.*

M.A. Hajianpour, M.D., P.A., 771 So. 2d 628, 631 (Fla. 4th DCA 2000)); *Famiglio v. Famiglio*, 279 So. 3d 736, 740 (Fla. 2d DCA 2019) ("[I]t is never the role of the court to rewrite a contract to make it more reasonable for one of the parties,' or, in the guise of interpretation, relieve a contracting party from the consequences of a bad bargain. . . .") (further citations omitted).

The settlement agreement in this case, like the agreement in *Rowsey*, is not ambiguous. It clearly requires FedNat to pay \$47,500 under Coverage A to the insureds and other affiliated parties, and \$15,400 outside of the policy coverages to the attorneys for the statutory fees to which the settlement entitled them. (R117-23) There is nothing ambiguous about those provisions and nothing else in the agreement creates an ambiguity or conflict by stating anything differently. There was nothing in the agreement that supports the conclusion that the \$15,400 was for anything other than statutory fees.

Since statutory fees are not within coverage of the policy, they are not a covered claim, and FIGA is not permitted to pay those fees. The Court erred in compelling FIGA to do so and must be reversed.

II. THE TRIAL COURT ERRED IN CONSIDERING PAROL EVIDENCE AT A NON-EVIDENTIARY HEARING, TO EXPLAIN, MODIFY, OR ALTER THE UNAMBIGUOUS SETTLEMENT AGREEMENT.

A. THE TRIAL COURT IMPROPERLY CONSIDERED PAROL EVIDENCE

Despite the clear statement in the settlement agreement that the \$15,400 was for “*statutory fees*,” Plaintiffs’ counsel repeatedly argued the fees were not “statutory fees,” because the settlement was a “global” settlement” and the amount of the fees were not specifically negotiated. (R43-44;79-80;151-58) To support this argument, counsel referenced his own viewpoint of the settlement and memory of the negotiations and later filed an email of FedNat’s former counsel attesting to the “global” nature of the settlement. (R161-62). The Trial Court concluded the settlement was “global” in requiring FIGA to pay the full amount, rather than the amount specified under the policy coverages.⁴ (R168-69) The only basis for this conclusion would be counsel’s arguments and affidavit and the unauthenticated email of FedNat’s counsel.

⁴ As discussed above, the “global” nature of the settlement does not determine whether the fees are a percentage of the insured’s coverages, or an amount owed pursuant to the statute.

However, as explained in *Rowsey, supra*, consideration of such extrinsic evidence is improper unless there is an ambiguity in the contract. *Rowsey*, 320 So.3d at 960 (citing *Duval Motors Co. v. Rogers*, 73 So. 3d 261, 265 (Fla. 1st DCA 2011) (“The rule prohibits the use of parol evidence “to contradict, vary, defeat, or modify *a complete and unambiguous* written instrument, or to charge, add to, or subtract from it, or affect its construction.”)(emphasis added)). This court agrees with this principle. *Duval Motors Co., supra* (As a general rule, evidence outside the contract language, which is known as parol evidence, may be considered only when the contract language contains a latent ambiguity.)

In addition to a clear statement identifying the \$15,400 as “statutory fees,” the settlement agreement contains a merger clause expressly stating that it is the entire agreement of the parties and that there were no other promises to Plaintiffs other than that contained in the agreement. (R117-23). Accordingly, the only way for the Trial Court to have concluded that the “statutory fees” were not “statutory fees” was for the Court to have considered extrinsic or parol evidence. However, because there was no latent ambiguity in this agreement, consideration of such parol evidence was error.

The parol evidence rule is a substantive rule of law. Reduced to its essence, the rule holds that a written document intended by the parties to be the final embodiment of their agreement may not be contradicted, modified, or varied by parol evidence. *King v. Bray*, 867 So.2d 1224 (Fla. 5th DCA 2004); *see also, Everglade Lumber Co. v. Nettleton Lumber Co.*, 111 Fla. 333, 149 So. 736, 738 (1933)(The concept of integration is based on a presumption that the parties to a written contract intended that writing "to be the sole expositor of their agreement."); *The Florida Bar v. Frederick*, 756 So.2d 79 (Fla. 2000); *Sears v. James Talcott, Inc.*, 174 So.2d 776, 778 (Fla. 2nd DCA 1965)("The parol evidence rule serves as a shield to protect a valid, complete and unambiguous written instrument from any verbal assault that would contradict, add to, or subtract from it, or affect its construction.").

Because the law presumes that the parties, by making a writing on the subject, intended the writing to be the sole statement of their agreement, the party seeking to introduce parol evidence must establish that the document is ambiguous and in need of interpretation. *King, supra; Frederick; Laboratory Corp. of Am. v. McKown*, 829 So.2d 311 (Fla. 5th DCA 2002). Here, the express terms

of the agreement state that there are no agreements outside of those stated in the written document (frequently known as a merger or integration clause, BLACK'S LAW DICTIONARY, 813 (7th ed. 1999)). (R121) Although the existence of a merger clause does not per se establish that the integration of the agreement is total, a merger clause is a highly persuasive statement that the parties intended the agreement to be totally integrated and generally works to prevent a party from introducing parol evidence. *Jenkins v. Eckerd Corp.*, 913 So.2d 43, 53 (Fla. 1st DCA 2005) (citations omitted).

As evidenced by the *Rowsey* case discussed above, the parol evidence rule applies to settlement agreements. *Rowsey*, 320 So.3d at 960-63; *University of Miami v. Francois*, 76 So.3d 360 (Fla. 3rd DCA 2011); *Johnson v. Gulf County*, 26 So.3d 33 (Fla. 1st DCA 2009); *Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 52 (Fla. 1st DCA 2005) ("If a contract provision is 'clear and unambiguous' a court may not consider extrinsic or 'parol' evidence to change the plain meaning set forth in the contract.").

This Court has ruled that only latent ambiguities can be clarified with parol evidence. *Levitan v. Dancaescu*, 347 So.3d 485, 489 (Fla. 1st DCA 2022) ("As a general rule, evidence outside the

contract language, which is known as parol evidence, may be considered only when the contract language contains a latent ambiguity."); *Taylor v. Taylor*, 1 So.3d 348, 350-51 (Fla. 1st DCA 2009) ("When the terms of a contract are ambiguous, parol evidence is admissible to "explain, clarify or elucidate" the ambiguous terms.... However, a trial court should not admit parol evidence until it first determines that the terms of a contract are ambiguous. ... In the absence of an ambiguity on the face of a contract, it is well settled that the actual language used in the contract is the best evidence of the intent of the parties, and the plain meaning of that language controls.") (citations omitted); *Western World, Inc. v. Dansby*, 566 So.2d 866 (Fla. 1st DCA 1990).

In this case, the settlement agreement clearly states the fee portion is for "statutory fees." As explained above, a "global" settlement can include payment of statutory fees, so the focus on whether the settlement is "global" or "divisional" is misplaced. The Trial Court did not identify any aspect of the agreement that was patently ambiguous or any unknown circumstances that created a latent ambiguity. Thus, to consider the parol evidence proffered by Plaintiffs was improper.

B. FIGA WAS DENIED DUE PROCESS WHEN THE TRIAL COURT CONSIDERED PAROL EVIDENCE AT A NON-EVIDENTIARY HEARING

The record on appeal reflects the Court held several hearings on Plaintiffs' efforts to enforce the settlement. (R5-6) None of these hearings were evidentiary hearings. As discussed above, it is possible, the Trial Court agreed the agreement called for payment of statutory fees and is simply in violation of the FIGA Act. However, if the Trial Court was relying on counsel's statements about the parties' intentions or the affidavit of counsel with the email from former defense counsel attached, to conclude no part of the settlement agreement represented "statutory fees," this would necessarily require the Court to consider counsel's testimony (whether in person or via affidavit) and the attachment to the affidavit.

To the extent the Court considered such evidence at a hearing that was not noticed as an evidentiary hearing, this has denied FIGA its due process rights. *See Star Cas. Ins. Co. v. Gables Ins. Recovery, Inc.*, 326 So.3d 813, 815 (Fla. 3rd DCA 2021) (where contract contained latent ambiguity, it was necessary for trial court to conduct evidentiary hearing to consider parol evidence); *see also, Commercial Cap. Res., LLC v. Giovannetti*, 955 So. 2d 1151, 1153 (Fla. 3d DCA

2007) (holding "where the wording of an agreement is ambiguous, its interpretation involves questions of fact, precluding summary disposition and requiring an evidentiary hearing") (quotation omitted); *Brickell Fin. Servs. - Motor Club, Inc. v. Road Transp., LLC*, 298 So. 3d 62, 67 (Fla. 4th DCA 2020) (same); *Taylor v. Taylor*, 183 So.3d 1121 (Fla. 5th DCA 2015) (remanding dispute over marital settlement agreement for trial court to conduct evidentiary hearing for presentation of parol evidence).

Since an evidentiary hearing is required for consideration of parol evidence and since none of the hearings were noticed as evidentiary hearings, but it appears the Trial Court relied on parol evidence, FIGA's due process rights were clearly violated. *See e.g., Paylan v. Office of the State Attorney*, 310 So.3d 459, 460 (Fla. 2nd DCA 2020) (litigant denied due process where trial court scheduled case management conference at which the court took evidence to decide the merits of the petition); *Messing v. Nieradka*, 230 So.3d 962, 965 (Fla. 2nd DCA 2017) (a party's due process right to notice is violated when a trial court takes evidence at a hearing not noticed as an evidentiary hearing) *Lapciuc v. Lapciuc*, 275 So.3d 242, 245 (Fla. 3rd DCA 2019) ("the granting of relief, which is not sought by the

notice of hearing or which expands the scope of a hearing and decides matters not noticed for hearing, violates due process.")

To the extent the Trial Court considered testimony of counsel, counsel's affidavit, or the email from former defense counsel at hearings that were not noticed as evidentiary hearings, the order must be vacated and remanded for new proceedings.

III. THE TRIAL COURT'S ORDER REQUIRING FIGA TO PAY INTEREST IS IN DIRECT VIOLATION OF THE LEGISLATURE'S PROHIBITION ON PENALTIES AND INTEREST AGAINST FIGA

A. THE FIGA ACT PLAINLY PROHIBITS AN ORDER REQUIRING FIGA TO PAY INTEREST AND MUST BE ENFORCED ACCORDING TO ITS PLAIN AND UNAMBIGUOUS TERMS.

The question of whether FIGA can be liable for interest is clearly addressed in the FIGA Act. Thus, we turn to the oft-repeated standards applicable to statutory interpretation. As most recently stated by this Court in *University of Fla. Bd. of Trustees v. Browning*, 2024 Fla. App. LEXIS 2462, *9 (Fla. Apr. 3, 2024), statute must be given its plain and obvious meaning when its language is unambiguous, and courts may not extend, modify, or limit the statute's express terms or its reasonable implications. (*quoting Searcy, Denney, Scarola, Barnhart & Shipley v. State*, 209 So.3d

1181, 1189 (Fla. 2017)). *See also, Steele v. Comm’r of Social Security*, 2024 Fla. LEXIS 259, *6 (Fla. Feb. 15, 2024) (“As expressed in our cases involving statutory interpretation, we are committed to the supremacy-of-text principle—that is, “[t]he words of a governing text are of paramount concern” to us, and “what they convey, in their context, is what the text means.”) (*citing Coates v. R.J. Reynolds Tobacco Co.*, 365 So. 3d 353, 354 (Fla. 2023) (alteration in original)); *Acosta v. Richter*, 671 So. 2d 149, 153 (Fla. 1996) (“the polestar of statutory construction [is the] plain meaning of the statute at issue.”)

The FIGA Act, like the uniform act upon which it is based, has contained a prohibition on assessing penalties and interest against FIGA for decades (if not since inception), stating:

§ 631.57. Powers and duties of the association.

(1) The association shall:

(b) Be deemed the insurer to the extent of its obligation on the covered claims, and, to such extent, shall have all rights, duties, defenses, and obligations of the insolvent insurer as if the insurer had not become insolvent. ***In no event shall the association be liable for any penalties or interest.***

§631.57(1)(b), Fla. Stat. (2022) (emphasis added).

There can be little doubt that the term “in no event” is clear and unambiguous, since Florida courts have concluded this statutory

prohibition prevents awards of pre-judgment interest against FIGA. See, e.g., *Fla. Ins. Guar. Ass'n v. Gustinger*, 390 So. 2d 420, 421 (Fla. 3d DCA 1980) (reversing award of interest against FIGA running from date of compensation award against insurer, which occurred prior to insurer's insolvency); *FIGA v. R.V.M.P. Corp.*, 874 F.2d 1528, 1532 (11th Cir. 1989) (reversing award of prejudgment interest assessed against FIGA in a declaratory judgment action to assess FIGA's coverage liability); *Fla. Ins. Guar. Ass'n v. Jacques*, 643 So. 2d 101, 103 (Fla. 4th DCA 1994) ("Any interest sought before the trial court enter[s] judgment against FIGA constitutes prejudgment interest as to FIGA" and is not permitted under the Act); *Fla. Cmty. Health Ctr. v. Ross*, 590 So. 2d 1037 (Fla. 1st DCA 1991) (reversing the award of penalties and interest on compensation claims against FIGA where the Association presumably had been handling the claims for some period of time); *NCNB Nat'l Bank of Fla. v. Fla. Ins. Guar. Ass'n*, 541 So. 2d 728, 731 (Fla. 1st DCA 1989) (holding that the FIGA Act precluded assessment of interest accrued from the time the claims for unearned premiums arose); *Carballo v. Warren Mfg. Co.*, 407 So. 2d 603, 607 (Fla. 1st DCA 1981) (striking award of prejudgment interest in worker's compensation case).

This prohibition makes complete sense because the inherent delay caused by the insolvency has nothing to do with FIGA and everything to do with the insolvency process and/or the insolvent carrier. FIGA is only activated for the covered claims after the soon-to-be-insolvent carrier floundered and scrambled for funds. Once the carrier is found to be insolvent, there is an automatic stay to allow FIGA to actually get the carrier's files and begin to assess the status of the claims. Simply due to limits on FIGA's resources, FIGA is not even **aware of** unsatisfied pre-insolvency settlements until its claims personnel can work their way through the thousands of claims that are dumped on FIGA at the time of insolvency.

Thus, the FIGA Act prevents anyone from penalizing FIGA with interest accruing prior to the time FIGA has any control over payment. Despite this longstanding line of cases and the plain and unambiguous language of the statute, the Trial Court nonetheless ordered FIGA to pay pre-judgment interest **accruing from the date of settlement**. The record contains no evidence that FIGA had any knowledge about the settlement prior to late 2023. The certificates of service and the filings in the case clearly reflect that neither Plaintiff

nor the Court was actually transmitting documents to FIGA prior to September 2023. (R54-66)

For this reason, the Trial Court's Order must be reversed and remanded with instructions to remove any requirement for FIGA to pay interest on the settlement.

B. THE SUPREME COURT OPINION IN *JONES* DOES NOT SUPPORT THE TRIAL COURT'S RULING AND CANNOT BE THE BASIS FOR AFFIRMANCE

Appellant recognizes the Florida Supreme Court allowed an award of interest against FIGA in *Jones v. Fla. Ins. Guar. Ass'n*, 908 So.2d 435 (Fla. 2005). However, *Jones* does not control this case for two reasons: 1) *Jones* is so factually distinguishable, it is inapposite here; and 2) even assuming *arguendo*, *Jones* provides guidance here, it does not support the Trial Court's ruling.

1. Jones is So Factually and Procedurally Distinguishable from the Instant Action It Provides No Support for the Court's Ruling

Jones started as a wrongful death action arising from a motor vehicle accident caused by the driver of a vehicle owned by Michael Pratt, who was insured by Dealers Insurance Company at the time of the accident. *Jones*, 908 So.2d at 438-39. Dealers later became insolvent, and FIGA was activated for the covered claims. For reasons

not relevant here, FIGA refused to provide a defense to the wrongful death action and a \$75 million default judgment was entered against Pratt. *Id.* at 439.

Pratt then assigned his rights against Dealers and FIGA to Jones, who brought an action against FIGA, seeking to recover the full amount of the judgment, plus costs, interest, and attorneys fees. *Id.* at 439-40. FIGA defended against Jones' claims based on the coverage issues, but ultimately those were resolved against FIGA. *Id.* at 440-42. The trial court entered judgment against FIGA that was subject to the \$300,000 statutory cap, and also awarded statutory interest from the date of the entry of the judgment against Pratt. *Id.* at 441-42.

FIGA Appealed and this court reversed, finding that the immunity provision found in §631.66, Fla. Stat. (1995) did not permit a lawsuit against FIGA for its handling of a claim. *Fla. Ins. Guar. Ass'n v. Jones*, 847 So.2d 1020, 1022 (Fla. 1st DCA 2003). Jones then sought review in the Supreme Court.

On review, the Supreme Court disapproved of this court's ruling based on immunity language in the FIGA Act, *Jones v. Fla. Ins Guar. Ass'n*, 908 So.2d at 444-49, and agreed with the trial court that FIGA

could be sued directly when it fails to defend the insured. However, the Supreme Court disapproved of the trial court's decision that the damages against FIGA were limited by the statutory cap of \$300,000, rather than the \$25,000 Dealers Insurance policy limits. The *Jones* Court limited FIGA's obligations for Jones' damages to the policy limits, based on the plain language of section 631.57(1)(a)3. *Id.* at 453.

After reaching that decision, the Supreme Court then turned to Jones' request for interest accruing on the judgment against the insured. *Id.* at 455. The *Jones* court, in reliance on the *liability* policy's *supplementary payments provision*, concluded the pre-judgment interest was a "covered claim," because the supplementary payments provision stated Dealers Insurance would pay interest assessed against the insured. *Id.* The Supreme Court specifically stated:

The language in section 631.57 providing that "[i]n no event shall the association be liable for any penalties or interest," § 631.57(1)(b), does not undermine the conclusion that *FIGA is liable under the policy's supplementary payment coverage provision for interest accruing on an underlying judgment.*

Id. at 455 (emphasis added).

The Supreme Court distinguished an extensive list of cases that had ruled interest could not be assessed against FIGA under this statutory provision, by noting:

This line of cases does not, however, address or preclude the assessment of interest where, as here, the damages resulted from FIGA's abdication of its statutory and contractual duties, one of which was a supplementary payment coverage obligation to pay interest on judgments entered against the insured. To

908 So.2d at 455-56. Following that holding, the *Jones* court then concluded, in reliance on other district court rulings, that post-judgment interest accruing on any judgments entered directly against FIGA was also appropriate. *Id.*

As can be seen, *Jones* did not conclude FIGA could be responsible for pre-judgment interest in every case. *Jones* carefully kept its decision tailored to the facts of the case wherein there was a **liability** policy that expressly **obligated** the insurer to pay interest assessed against the insured under a supplementary payments provision. Where an insurer, tasked with the duty to provide a defense to the insured who is sued by a third party, has full control of the litigation and can reach a settlement at any time, it is only right that it also protect its insured from the costs associated with its

decision to forego settlement and pursue litigation. See *Gov't Employees Ins. Co. v. Macedo*, 228 So.3d 1111, 1115 (Fla. 2017) (“It follows that any cost or fee incurred as a result of GEICO exercising its authority and control is something that it intended to pay.”).

In contrast, here, the policy under which the Richardsons sought coverage is a **property** policy. This was not an action in which FIGA defended an insured; nor did FIGA have control over the litigation. The coverage for property damages does not contain a supplementary payments provision which covers items taxed against the insured in litigation with a third party, such as pre-judgment interest. And there is no provision in the property coverages that promises to pay interest to the insured when a disputed property claim is resolved. The FIGA Act clearly prohibits an award of interest and Florida case law clearly holds FIGA cannot be assessed pre-judgment interest, unless there is a supplementary payments provision that covers it.

Clearly, *Jones* is so completely distinguishable from the instant action (both factually and legally) it is entirely inapposite to this matter. This Court cannot rely on *Jones* to support the Trial Court’s order assessing pre-judgment interest against FIGA. The Order

directly violates the FIGA Act, and the assessment of interest must be vacated.

2. *There is no Judgment Against FIGA on which Post-Judgment Interest Could be Assessed.*

Even if this Court believes *Jones* provides guidance in this case (and it does not), it still does not support the Trial Court's Order. As noted above, *Jones* based its entire conclusion that FIGA was responsible for pre-judgment interest on an express policy provision requiring the insurer to pay pre-judgment interest. Since there is no such policy provision here, that portion of the opinion is entirely inapplicable.

Furthermore, *Jones* and other Florida cases may allow for **post-judgment** interest to be assessed against FIGA. However, this is not a case in which the Court ordered post-judgment interest. The Trial Court ordered FIGA to pay interest on the settlement from the date of the settlement in August 2022 – a full 13 months **BEFORE** FIGA was a party to this action.⁵ FIGA was ordered to pay that amount

⁵Though the trial court purported to make FIGA a party to the action, the record on appeal contains no evidence FIGA was ever served with the complaint. Nor do the filings from Plaintiff provide evidence that FIGA ever received notice of the proceedings in this case prior to September 2023. The documents in the record show counsel's

within ten days of the Court's order – so it was clearly not an assessment based on the order of enforcement. Thus, the Order in this case is clearly a violation of the statute and must be reversed.

CONCLUSION

The Order on Appeal should be reversed in its entirety. The Order violates the FIGA Act by compelling FIGA to pay statutory fees, which are not a “covered claim.” Describing the settlement as “global” does not mean the fees were not “statutory fees;” it simply means the parties were globally resolving all existing and potential claims and all damages and other expenses that could be recovered on them. The parties chose to specifically identify the \$15,400 as “statutory fees” outside of the policy coverages. The Trial Court erred in disregarding this plain and unambiguous provision of the settlement agreement.

To the extent the Trial Court relied on parol evidence in concluding the \$15,400 designated as “statutory fees” were not actually “statutory fees,” it was error to do so. Moreover, any such

ineffective efforts to reach or contact FIGA, but do not show actual notice. Plaintiffs' certificates of service continued to show service on FedNat's attorney (at an inoperable email address), and the Court's orders only reflect service on “counsel of record.” (R54-66) FIGA had no “counsel of record” until November 9, 2023, when the Answer to the Amended Complaint was filed.

parol evidence would have been adduced at a hearing that had not been identified as “evidentiary” and thus violates due process.

Finally, even if this Court decides FIGA should pay the \$15,400 portion of the settlement, that part of the Trial Court’s order that assesses interest against FIGA must be vacated as a clear violation of §631.57(1)(b), Fla. Stat. (2022).

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used throughout this brief is Bookman Old Style and at least 14 point or larger and that the brief complies with the requirements of the Florida Rules of Appellate Procedure.

/s/ Dorothy DiFiore

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished via electronic service to: Counsel for Plaintiff, **Chelsea T. Silvia, Esq.**, at csilvia@gedlawyers.com, pdlitlaw@gedlawyers.com, **David R. Shaheen, Esq.**, at dshaheen@gedlawyers.com, GED Lawyers, LLP, 7171 North Federal Highway, Boca Raton, FL 33487; Co-Counsel for Defendant, **Michelle L Hendrix, Esq.**, at mhendrix@florida-law.com, dwimmers@florida-law.com, Vernis & Bowling of Northwest Florida, P.A., 315 South Palafox Street, Pensacola, FL 32503; on June 28, 2024.

QUINTAIROS, PRIETO, WOOD & BOYER,
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