

IN THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

CASE NO.: 4D2024-1059

CONDOMINIUM ASSOCIATION OF GOLF VILLAS, II, INC.,

Appellant,

vs.

FLORIDA INSURANCE GUARANTY ASSOCIATION, INC.,
(as statutory successor to American Capital Assurance Corp.),

Appellee.

On appeal from the Nineteenth Judicial Circuit
Court in and for St. Lucie County, Florida

L.T. CASE NO.: 562022CA001919

**ANSWER BRIEF OF APPELLEE,
FLORIDA INSURANCE GUARANTEE ASSOCIATION, INC.**

BRETTON C. ALBRECHT, ESQ.
Kubicki Draper, P.A.
110 E. Broward Blvd., Suite 1400
Fort Lauderdale FL 33301
Phone: (305) 982-6796
E-Service (only):
bca-kd@kubickidraper.com
Counsel for Appellee

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STATEMENT OF THE CASE AND FACTS

A. Introduction.

Defendant/Appellee, the Florida Insurance Guaranty Association (“FIGA” or “Defendant”), seeks affirmance of the final summary judgment entered in its favor and against Plaintiff/Appellant, the Condominium Association of Golf Villas, II, Inc. (“Plaintiff” or “Golf Villas”). [R.2460-67, 2510-11].¹ FIGA stands in the shoes of the Insolvent Insurer, American Capital Assurance Corp. (“AmCap” or “Insolvent Insurer”). [R.13-168].

It is undisputed Plaintiff filed this lawsuit more than 5 years after the Hurricane Irma date of loss. The trial court found the action time-barred, both by the Policy’s 5-year limit to sue and by the 5-year limit on contract claims in §95.11(2)(b)&(e), because, for example, under §631.57(1)(b), FIGA is vested with “all” the rights and defenses of the Insolvent Insurer, as if the insurer had not become insolvent. The court rejected Plaintiff’s argument that this conflicted with the shorter 1-year limit to sue under the FIGA Act and its position that the 1-year period extends the time to sue. The court also rejected Plaintiff’s claim that FIGA should be estopped from raising a limitations defense in this case. [R.2460-67, 2510-22]. FIGA

¹ The Record on Appeal is cited as “R.,” followed by the page numbers.

maintains the trial court's decision is correct and the summary judgment in its favor should be affirmed.

B. The AmCap Policy and Plaintiff's Hurricane Irma Claim.

This case arises from a claim for property damage made by Plaintiff, Golf Villas, under a Commercial Package Policy of insurance issued by the Insolvent Insurer, AmCap, which had a policy period of March 19, 2017, to March 19, 2018 ("Policy"). [R.13-168]. The Policy declarations list 14 buildings, plus a clubhouse or pool cabana, for this property located in Port St. Lucie, Florida. [R.14-15, 25-31, 989-93].

Golf Villas gave first notice of loss to AmCap on September 8, 2020. [R.1693]. Golf Villas claimed the property had widespread damage from Hurricane Irma, which had occurred almost 3 years earlier on or about September 10, 2017. [R.14-15].

The AmCap Policy contains a number of terms, conditions, limitations, exclusions, and endorsements. [R.23-144]. For example, it has a 3% per-building, calendar-year hurricane deductible. [R.28-29, 108-12]. In addition, the Policy's "Duties In The Event Of Loss Or Damage" provisions set forth a number of post-loss obligations the insured must comply with as a condition precedent to any recovery, including the following: Golf Villas must give AmCap "prompt notice" of any loss, it must

provide a description of the loss “[a]s soon as possible,” it must take all reasonable steps to protect the property from further damage and keep a record of those expenses, it must permit inspection of the property and provide requested documentation, it must cooperate with the investigation, and upon request it must submit a sworn proof of loss and to an examination under oath, among other duties, as further stated in the Policy. [R.34-35, 101, 139-40]. The Policy’s “Legal Action Against Us” clause prohibits the filing of any lawsuit against AmCap unless there has been full compliance with the Policy terms and conditions. [R.47, 49, 58, 69].

That same clause imposes an express time limit on the right to file a lawsuit against AmCap on any property damage claim. [R.47, 49, 58, 69]. The suit limitation is modified by an endorsement which increases the time-limit from 2 years to 5 years. [R.49, 69]. As modified by endorsement, the Policy thus provides as follows:

D. LEGAL ACTION AGAINST US

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all of the terms of this Coverage Part; and

. . . .

[2.] Legal action against us involving direct physical loss or damage to property must be brought within 5 years from the date the loss occurs.

[R.47, 49, 58, 69].

When Golf Villas first reported this claim to AmCap in September 2020, it claimed all the buildings had extensive damage totaling millions of dollars, allegedly from Hurricane Irma in September 2017. [R.14-15, 309-312]. However, Golf Villas admitted it did not notice or suspect there was any such damage, until years later when a public adjuster suggested making a Hurricane Irma claim, which Golf Villas did. [See R.310, 1127, 2345-49].

AmCap did not just take the public adjuster's word for it; rather, AmCap exercised its contractual right and duty to investigate, including inspecting the property and its buildings. [R.1693-98, 2347-48]. AmCap also sent a reservation of rights letter based on grounds which included Golf Villas' failure to provide prompt notice of loss as required by the Policy. [R.1693-98]. That same letter, dated September 9, 2020, requested that Golf Villas provide relevant documents and a sworn proof of loss ("SPOL"). [R.1693-98]. In November 2020, Golf Villas submitted an SPOL summarily claiming \$2,980,514.49; AmCap then requested an examination under oath ("EUO"). [R.146, 1701, 2347-48].

Golf Villas did not produce any documents until January 2021. [R.16, 2348]. The EUO was then held in February 2021. [R.16, 2348]. AmCap

was still in the process of finalizing its claim decision in April 2021, when insolvency proceedings were initiated by the Florida Department of Financial Services (“DFS”), Case No. 21-CA-641 (Fla. 2nd Jud. Cir. Ct., Leon) (“Insolvency Case”). [R.16-17, 148-63, 1126-27].

The Consent Order adjudicating AmCap insolvent was entered on April 14, 2021. [R.148-63]. The Consent Order set a 6-month deadline to make a claim with DFS, meaning by October 14, 2021, and it also imposed a mandatory stay. [R.159]. The automatic stay permanently enjoined the “commencement or continuation” of any action against AmCap, “**except claims as provided for under chapter 631,**”—i.e., it did not prohibit the commencement or continuation of any action brought under the FIGA Act. [R.162-63 (emphasis added)].

FIGA sent Golf Villas a First Contact Letter, dated July 22, 2021, which advised of the insolvency and stated in relevant part:

. . . . Please be aware, under Florida Statute §631.68, the deadline for settlement or filing suit against the insured of an insolvent insurance company or the Florida Insurance Guaranty Association is within one year after the deadline for filing claims or any extension thereof, with the Receiver of the insolvent insurance company. The Receiver’s deadline for this company is **10/14/2021**. **However, the applicable statute of limitations under Florida Statute §95.11, may shorten the time period.**

Please be advised your statute of limitations to file legal action may be impacted by Section 95.11(2)(b) and Section 95.11(3)(a), Florida Statutes. *Peoples v. FIGA*, 313 So.2d 40 (Fla. 2nd DCA 1975), *rehearing denied*. *State Farm Mutual Automobile Insurance Company v. Lee*, 678 So.2d 818 (Fla. 1996). **If you have any questions regarding your legal rights, please consult your attorney.**

No claim will be considered by the Florida Insurance Guaranty Association regarding this company after 10/14/22.

[R.1123, 1703, 1705-10 (emphasis added)].

In September 2021, after receiving FIGA's First Contact Letter, Golf Villas timely submitted a claim for this loss with DFS. [R.166, 2349].

In October 2021, the court in the Insolvency Case extended the time to file a claim with DFS for AmCap matters, until April 14, 2022. [R.1712].

Also in October 2021, DFS and FIGA filed a joint motion in the Insolvency Case to extend the 6-month stay provided for by §631.67 of the FIGA Act, "to permit FIGA to make a proper defense[,] in cases where AmCap was a party or was obligated to defend a party. [R.1784-87]. This joint motion was granted by an agreed order which specified that the "stay of all proceedings against FIGA" or "against any insured of AmCap" "**will expire on February 14, 2022.**" [R.1714, 1782 (emphasis added)].

When the temporary stay under §631.67 expired in February 2022, Golf Villas still had almost 7 months to file a lawsuit on this Hurricane Irma claim, before the 5-year period expired in September 2022.² [See R.1714].

C. Golf Villas' Lawsuit Against FIGA.

Golf Villas filed this lawsuit against FIGA on October 13, 2022, which was more than 5 years after Hurricane Irma in September 2017. [R.13-168]. The complaint has a single count, “**Count I: Breach of Contract.**” [R.13-20]. Therein, Golf Villas alleges that FIGA “has stepped into the shoes” of AmCap, and it asserts that FIGA’s failure to pay the claimed damages is “**a breach of contract and a breach of FIGA’s statutory duties.**” [R.18-19 (emphasis added)]. The complaint thus asserts a combined contractual and statutory claim against FIGA, both rooted in the Policy contract, which was attached to the complaint. [R.18-20, 23-144].

Instead of serving process on FIGA’s Registered Agent as required by §631.57(2)(c), Fla. Stat. [R.1210], on the same day suit was filed, Golf Villas’ attorney emailed a copy of the complaint to FIGA’s desk adjuster; however, the adjuster replied that he was not authorized to accept or waive

² That is, even assuming *arguendo* Golf Villas was correct the temporary stay meant it “couldn’t have” filed suit, as it argued below [R.1998, 2002-03]; although FIGA’s position was that any action filed during the stay would just be stayed, as further discussed herein below. [R.1638 & n.1].

service of process, and so Golf Villas would need to serve FIGA through the proper channels. [R.1129-30, 1149-50].

Golf Villas then waited over 60 days before serving process on the Registered Agent's office on December 21, 2022, right before the Holidays. [R.181]. On January 11, 2023, when FIGA's response to the complaint was just one-day late, Golf Villas moved for a clerk's default. [R.172-73]. Shortly after the clerk's default was granted [R.175], Golf Villas moved for entry of final default judgment in the amount of \$3,044,658.00. [R.176-79]. Golf Villas' amount affidavit admitted that the \$100 FIGA Act deductible applied, but ignored the Policy's 3% per-building hurricane deductible. [R.28-29, 309-11, 488]. The trial court denied Plaintiff's motion for default final judgment after FIGA appeared and objected to it shortly before (and at) the hearing held February 2, 2023. [R.1107-30, 1153, 1155, 1215]. Thereafter, the clerk's default was vacated. [R.1216].

FIGA moved to dismiss Plaintiff's claim, arguing that it was clear on the face of the complaint and attached Policy that this action is time-barred, under both the Policy's 5-year suit limitation and the 5-year limit in §95.11(2)(b)&(e), Fla. Stat. [R.1176, 1193-1206]. In opposing dismissal, Golf Villas asserted that 1-year time limit to file suit under the FIGA Act, found in §631.68 and §95.11(5), negated the 5-year limitations period, such

that only the 1-year period applied, even if the longer statute of limitations expired during the year following insolvency. [R.1298-1308].

Golf Villas also argued that FIGA was estopped from raising the statute of limitations as a defense, by virtue of the language and information provided to all insureds with claims involving an insolvent insurer. [R.1306-07, 1370-75]. Specifically, Golf Villas argued that FIGA could not rely on the 5-year limit to sue when the First Contact Letter cited the 1-year limit in §631.68 and had ended by stating no claims would be considered after October 14, 2022. [R.1306-07, 1370-75]. Golf Villas argued this language was misleading, even though the same letter had warned the deadline to file a lawsuit may be “**shortened**” or “**impacted**” by the statutes of limitation in §95.11(2)&(3), Fla. Stat. [R.1306-07, 1370-71 (emphasis added)]. Golf Villas further argued it was unfair that, after the DFS claim extension, the public information posted on FIGA’s website provided that “**per [§]631.68,**” the deadline for “settling a claim or filing suit,” was “April 14, 2023.” [R.1306-07, 1372-75 (emphasis added)].

At the hearing on FIGA’s motion to dismiss [R.19860-2009], Golf Villas added one more argument, claiming it allegedly “**couldn’t have**” filed a lawsuit on this claim within 5 years, due to the insolvency and stay, which its counsel claimed “**prevented my client from suing FIGA[,]**” because

“that stay took us all the way past the five year deadline[,]” which was incorrect since the stay ended about 7 months before the 5 years expired. [R.1714, 1998, 2002-03 (emphasis added)].

In response, FIGA explained why Golf Villas’ arguments were without merit and should not avoid dismissal. [R.1376-97, 1986-94, 2006-08]. At one point during the hearing, while discussing the estoppel issue, the trial court asked whether FIGA’s First Contact Letter was attached to the complaint, and the court was informed that it was not attached. [R.1994]. FIGA argued this should not prevent dismissal because Golf Villas’ estoppel claim was facially without merit. [R.1376-96, 1991-94].

At the close of the hearing, the trial court reserved ruling. [R.2008-09]. The court then entered an order which simply said, “Defendant’s Motion to Dismiss is DENIED[.]” [R.1404]. Accordingly, FIGA’s Answer and Affirmative Defenses raised the 5-year time-bar among its defenses. [R.1414-19, 1448-70].

Golf Villas moved to strike the limitations defense, arguing the court had already ruled on it by virtue of the order denying FIGA’s motion to dismiss. [R.1422-32, 1513-52, 2015, 2018-19]. In response, FIGA reminded the court its order had simply denied dismissal without reaching the merits of the time bar, and, furthermore, Golf Villas had opposed

dismissal by raising estoppel as an avoidance and citing alleged evidence outside four-corners of the complaint. [R.2020-21].

The trial court denied Golf Villas' motion to strike FIGA's limitations defense. [R.1580-82]. In reply to the affirmative defenses, Golf Villas pled estoppel in avoidance of the time-bar. [R.1594-96].

D. Proceedings on FIGA's Motion for Summary Judgment.

FIGA moved for final summary judgment, arguing this action is barred by the 5-year limitations period set forth in both the Policy and §95.11(2), Fla. Stat. [R.1637-1714, 1972-2049]. FIGA's motion emphasized that as a statutorily-created safety net, its obligations are strictly limited by the FIGA Act. [R.1627-73]. The FIGA Act, in turn, makes the Policy a primary basis for defining and limiting FIGA's liability; for example, FIGA is only liable for "covered claims," which means those within the "coverage" and "limitations" of the Policy. [R.1650-73]. In addition, the Act vests FIGA with "all" of the "rights" and "defenses" of the Insolvent Insurer, "as if the insurer had not become insolvent." [R.1650-53]. FIGA argued this must include the right to defend based on applicable time limits to file a lawsuit—whether those time limits are set by the Policy, or by statute, or both. [R.1650-58].

FIGA further argued the shorter 1-year limit in §631.68 and §95.11(5), does not extend the 5-year limit just because they are different time

periods. [R.1650-65]. FIGA explained that the 1 year and 5 year periods were not inconsistent, but, rather, could be reconciled; they were not mutually exclusive as Golf Villas claimed. [R.1650-65]. FIGA also highlighted case law recognizing that the purpose of the 1-year limit is to shorten the time to file a lawsuit under the FIGA Act. [R.1650-65]. The purpose of the shorter limitations period was not to extend the time to sue, nor was it meant to revive an expired cause of action. [R.1650-65].

In opposing Golf Villas' estoppel claim, FIGA's motion explained that §95.11(2)(e), in particular, is a statute of repose, which is significant since estoppel cannot avoid a statute of repose. [R.1658-73]. FIGA argued this also supported its position that the 5-year repose period in §95.11(2)(e), cannot be extended by the 1-year limit in the FIGA Act, as repose periods generally cannot be extended. [R.1658-73]. Finally, FIGA argued Golf Villas could not prove the elements of estoppel in any event. [R.1658-73].

In response, Golf Villas argued that only the 1-year statute of limitations applied to its claim and the 5-year statute of limitations was irrelevant. [R.1715-35]. Golf Villas also persisted in asserting that the trial court had already ruled on the merits of the limitations defense just because dismissal was denied, and that it allegedly "couldn't have" filed suit within 5 years due to the insolvency and resulting stay. [R.1725-31; see

also R.1998, 2002-03]. Notably, Golf Villas' Response totally failed to address the 5-year suit limitation in the Policy. [R.1715-35]. In addition, Golf Villas did not seek to defeat FIGA's motion by offering any evidence to support its claim that FIGA was estopped from raising the limitations defense; instead, Golf Villas argued that estoppel was irrelevant to the legal issue of whether the action was time-barred. [R.1731-34].

In reply, FIGA further addressed these issues and explained why Golf Villas was wrong on all points. [R.1972-2049].

At the summary judgment hearing, the parties presented arguments in line with their written submissions (discussed above), and the trial court reserved ruling. [R.2574-93]. The trial court ultimately sided with FIGA's position and entered an order granting FIGA's motion for summary judgment. [R.2460-67, 2510]. The trial court found that Golf Villas' action was time-barred because it was not filed within 5 years after the date of loss, as required by the Policy and §95.11(2)(b)&(e). [R.2462-67].

The trial court recognized that the 5-year limitations period in the Policy and statute did not conflict with the 1-year limitation to sue contained in the FIGA Act. [R.2462-66]. The court found it was clear from provisions like §631.57(1)(b), that "if AmCap had a defense, then FIGA could step into their shoes and have the same defenses." [R.2464]. The court observed

that to hold otherwise would mean insureds could file suit more than 5 years after the date of loss simply because their insurer became insolvent.

[R.2464-65]. The court concluded:

In applying the reasoning of aforementioned cases to the instant case, if the Plaintiff cannot sue the original defendant (AmCap), they cannot sue FIGA. It is undisputed that the date of loss occurred September 10, 2017, and that the policy limits legal actions to occur within five (5) years of that date (September 10, 2022). The Plaintiff filed the operative Complaint on October 13, 2022. This filing date surpasses **both** the expiration of the statute of limitations **and** policy confines. **If AmCap was not insolvent, then Plaintiff would not be able to file suit against it.** See Florida Statute §631.57.

[R.2465-66 (emphasis added)].

The trial court rejected Golf Villas' argument that the Consent Order in the Insolvency Case acted as both a prohibition on filing this lawsuit and an extension of the time to sue. [R.2466]. The court observed that the Consent Order said no such thing, and, regardless, the stay expired several months before the 5-year statutory and contractual limitations periods expired. [R.2466]. The court also reiterated the role of the Policy:

The operative policy between Plaintiff and AmCap clearly contained a provision that required all legal action to be pursued within five (5) years after date of loss. Further, "The FIGA Act limits the liability of FIGA and bestows upon FIGA all policy defenses as well as any defenses available under common law."

Fla. Ins. Guar. Ass'n v. Smothers, 65 So.2d 541, 542 (Fla. 4th DCA 2011).

[R.2466]. Thus, nothing about the Insolvency, Consent Order, or related stay of litigation could avoid FIGA's limitations defense. [See R.2466]. Finally, the trial court agreed with FIGA that Plaintiff's estoppel claim based on the First Contact Letter and website printout was legally insufficient to avoid FIGA's entitlement to final summary judgment. [R.2466-67].

The trial court entered final judgment in accordance with its order granting FIGA's summary judgment motion, and this appeal followed. [R.2510-11, 2514-29].

SUMMARY OF THE ARGUMENT

The trial court correctly entered final summary judgment for FIGA based on the 5-year time-limit to sue, set both by the Policy and by §95.11(2)(b)&(e), Fla. Stat. This does not conflict with the shorter 1-year limit to sue under the FIGA Act set forth in §631.68 & §95.11(5)(d), Fla. Stat. All of the relevant provisions can and must be read together as a whole and applied per their plain language. The statutes at issue are not mutually exclusive or conflicting like Plaintiff claims.

To accept Plaintiff's arguments would require rewriting the relevant statutes and adding terms, which is not allowed. A prime example is §631.57(1)(b), which gives FIGA "all" the "rights" and "defenses" of AmCap,

“as if the insurer had not become insolvent.” Plaintiff construes this statute to mean “all” defenses except those based on time limits to sue the Insolvent Insurer—but that is not what the statute says.

Plaintiff is also wrong when it argues the purpose of the shorter 1 year limitations period is to extend the time to sue after an insurer becomes insolvent. To the contrary, the case law is clear the purpose of §631.68 is **to shorten** the time to bring an action under the FIGA Act, even if the longer limitations period has not expired.

The trial court was right to reject Plaintiff’s arguments. The court correctly found that the Consent Order in the Insolvency Case did not prohibit filing this action, nor did it extend the underlying 5-year statute of limitations like Plaintiff claimed. Finally, the trial court correctly determined that FIGA was not estopped from raising the limitations defense. Affirmance is required.

STANDARD OF REVIEW

The entry of summary judgment is reviewed *de novo*. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126, 130 (Fla. 2000); Landers v. Milton, 370 So.2d 368, 370 (Fla. 1979). Summary judgment is warranted where, as here, the material facts are undisputed and the issue depends on the interpretation of statutes and/or insurance policies, which

are likewise matters of law reviewed *de novo*. See Fla. R. Civ. P. 1.510(c); Hogg v. Villages of Bloomingdale I Homeowners Ass'n, 357 So.3d 1271, 1274 (Fla. 2d DCA 2023); United Auto. Ins. Co. v. Lauderhill Med. Ctr. LLC, 350 So.3d 754, 755-56 (Fla. 4th DCA 2022); Inlet Colony, LLC v. Martindale, 340 So.3d 492, 494 (Fla. 4th DCA 2022); Fox v. Madsen, 12 So.3d 1261, 1262 (Fla. 4th DCA 2009).

The defense summary judgment should be affirmed if there is any basis in the record to sustain the trial court's decision. Dade Cnty. Sch. Bd. v. Radio Station WQBA, 731 So.2d 638, 644 (Fla. 1999); Abraham v. Universal Ins. Co. of N. Am., 120 So.3d 114, 115 (Fla. 4th DCA 2013); Valero v. FIGA, 59 So.3d 1166, 1168 (Fla. 4th DCA 2011).

ARGUMENT

- I. **THE TRIAL COURT CORRECTLY HELD PLAINTIFF'S ACTION IS TIME-BARRED BY THE POLICY'S 5-YEAR TIME LIMIT TO FILE SUIT AGAINST THE INSURER AND BY THE STATUTORY 5-YEAR TIME LIMIT FOR BRINGING SUITS BASED ON A CONTRACT CONTAINED IN §95.11(2)(B)&(E), AND, FURTHERMORE, THESE LIMITATION PERIODS DO NOT CONFLICT WITH THE SHORTER 1-YEAR LIMIT IN §631.68 AND §95.11(5)(D).³**

The material facts are undisputed: Plaintiff filed this action more than 5 years after Hurricane Irma, but less than 1 year after the Receiver's claim deadline in the Insolvency Case. The trial court held Plaintiff's action is

³ "Issue I" of FIGA's Answer Brief responds to "Issues I & II" of the Initial Brief, as the issues are inextricably intertwined. [See Initial Brief, pp.13-44].

barred as a matter of law by the 5-year limit to sue set both by the Policy and by §95.11(2)(b)&(e). The court found this did not conflict with the shorter 1-year limit to sue under the FIGA Act contained in §631.68 and §95.11(5)(d). The trial court's decision is correct and should be affirmed.

This is clear from a plain reading of these statutes, together with other key provisions, like §631.57(1)(b), which vests FIGA with "all" defenses AmCap could have raised. That must mean FIGA can defend based on time limits to file a lawsuit. Thus, the pertinent provisions operate in tandem to shorten to no more than 1 year, the time for bringing an action under the FIGA Act, even if the longer underlying statute of limitations, repose period, and/or Policy suit limitation has not yet expired.

In seeking reversal, Plaintiff's overarching contention is that only the shorter 1-year limitations period applies. Plaintiff also claims the purpose of the 1-year limit is to extend the time to file a lawsuit after an insurer's insolvency. Plaintiff asserts the other statutes cited by FIGA are irrelevant. In making such arguments, Plaintiff ignores the Policy's 5-year suit limit.

To explain why Plaintiff's arguments are without merit, FIGA will analyze: **(A)** FIGA's history and purpose, **(B)** key rules of construction, **(C)** the Policy's 5-year suit limitation, **(D)** the 5-year statutory limit, and **(E)** why there is no conflict with the shorter 1-year limit in the FIGA Act.

A. Under the FIGA Act, the Policy defines and limits the scope of FIGA’s liability.

The place to start is the beginning. The Florida Legislature created FIGA in 1970 as a public non-profit corporation, “**providing a limited statutory safety net for the insured[,]**” upon an insurer’s insolvency. de la Fuente v. FIGA, 202 So.3d 396, 402 (Fla. 2016) (emphasis added); FIGA v. Devon Neighborhood Ass'n, 67 So.3d 187, 189 (Fla. 2011). Upon insolvency, FIGA steps into the shoes of the insolvent insurer, to the extent of its obligation on covered claims, as defined by the Act. de la Fuente, 202 So.3d at 401-02; Jones v. FIGA, 908 So.2d 435, 439, 442-43 (Fla. 2005).

Although the FIGA Act aims to protect insureds whose carriers become insolvent, at the same time, “the full gamut of a defunct insurance company's liabilities was not intended to be shifted onto FIGA.” Devon Neighborhood Ass'n, 67 So.3d at 189-90 (quoting FIGA v. Olympus Ass'n, 34 So.3d 791, 794 (Fla. 4th DCA 2010)); see also de la Fuente, 202 So.3d at 401 (same, and observing that insureds have “no vested right to a future government bailout”); FIGA v. Bernard, 140 So.3d 1023, 1033 (Fla. 1st DCA 2014) (“[T]he FIGA Act exists as a matter of legislative grace[.]”); FIGA v. Smothers, 65 So.3d 541, 542 (Fla. 4th DCA 2011) (“Chapter 631 was designed to manage, but not bankrupt the statute's funding and payment mechanism.”).

To that end, under the FIGA Act, the Policy defines and limits FIGA's obligations after an insurer's insolvency, and the FIGA Act itself further limits FIGA's obligation to insureds. de la Fuente, 202 So.3d at 405 ("FIGA assumes no contractual duties absent statutory direction."); Jones, 908 So.2d at 454 (explaining that FIGA's liability is "directly linked" to the policy). For example, §631.57 defining FIGA's "powers and duties" provides: "**In no event** shall [FIGA] be obligated to the policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises." §631.57(1)(a)4., Fla. Stat. (2020) (emphasis added).⁴ Section 631.57 further provides that FIGA shall:

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.

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

The term "covered claim," is also defined in relation to the Policy. It means an unpaid claim "which arises out of and is within the coverage, and

⁴ The 2021 amendments to the FIGA Act became effective in June 2021. See Ch. 21-51 (§48) & Ch. 21-104 (§20), laws of Fla. As a result, the 2020 version of the FIGA Act applies, because it was still in effect when AmCap was adjudicated insolvent on April 14, 2021. See de la Fuente, 202 So.3d at 405 (holding version of FIGA Act in effect on date of insolvency controls). For purposes of the issues in this appeal, the material portions of the Act were unchanged by the 2021 amendments. Nevertheless, all citations herein are to the 2020 version of the FIGA Act.

not in excess of, the applicable limits of an insurance policy to which this part applies[.]” §631.54(4), Fla. Stat. “Covered claim” is then narrowed to fully exclude some types of claims (e.g., certain subrogation claims), and to restrict the amount and method of payment for sinkhole claims. See §631.54(4)(a)-(c), Fla. Stat. For instance, “[a]ny amount payable for a sinkhole loss,” is excluded from the term “covered claim,” except to the extent allowed for testing and actual repairs, up to policy limits. See §631.54(4)(c), Fla. Stat. This illustrates how FIGA’s obligations under the Policy are further restricted by the Act.

Thus, the FIGA Act applies together with the Policy. As the Florida Supreme Court has explained:

FIGA's responsibility and liability is directly linked to the insolvent insurer's contractual obligations. . . . As the Act makes clear, FIGA's liability must be adjudged from the perspective of the insurer's obligation under the policy giving rise to the claim. The Act does not allow for an award of an amount in excess of the policy provisions.

Jones, 908 So.2d at 454 (emphasis added); see also Petty v. FIGA, 80 So.3d 313, 315-17 (Fla. 2012) (holding that where policy did not expressly “provide coverage for a [§]627.428(1) fee award, it is not a covered claim” under the FIGA Act); FIGA v. Reyes, 303 So.3d 1248, 1252 (Fla. 2d DCA 2020) (“[T]he FIGA statute protects insureds for covered claims, **not all**

claims.” (bold in original)); FIGA v. All The Way With Bill Vernay, Inc., 864 So.2d 1126, 1130 (Fla. 2d DCA 2003) (“Under the plain language of the statute [§631.54], to be a covered claim, the claim must both ‘arise out of’ the insurance policy and be ‘within the coverage of’ the insurance policy.”).⁵

Accordingly, Plaintiff’s action is both statutory and contractual. The Policy and all relevant statutory provisions must be considered, which is what the trial court correctly did. Plaintiff cannot take a “tunnel vision” view that ignores one or the other.

B. The Policy and all relevant statutes must be read together.

Plaintiff argues that only the 1-year time limit for bringing suit against FIGA contained in §631.68 & §95.11(5)(d), Fla. Stat., applies in this case because, per §631.53, the FIGA Act should be liberally construed, and also because specific statutes generally control over more general ones. These cannons can be considered, but so must the other rules of construction.

⁵ As another example, the FIGA Act does not alter Policy limits, but it does set a cap on damages, such that FIGA is not liable for any amount in excess of \$300,000, nor is it liable for attorney’s fees or interest to the same extent as an insurance company. See Jones, 908 So.2d at 453-54 (“While \$300,000 is the upper bound [as a statutory cap], FIGA is only obligated to the same extent as the insurer under the policy.”); see also §631.57(1)(a)2.&(1)(a)4., Fla. Stat. Similarly, the Act does not negate the Policy deductible, rather, the two apply concurrently, such that the deductible for a FIGA claim is the total of the \$100 FIGA deductible, plus the Policy deductible (if any). See Bernard, 140 So.3d at 1026-27 & n.2 (recognizing judgment had reductions for “applicable policy deductible and statutory FIGA deductible”); see also §631.57(1)(a)2.&(6), Fla. Stat.

The plain language of a statute or contract is always the place to start. See Tsuji v. Fleet, 366 So.3d 1020, 1025 (Fla. 2023) (“first step” in statutory construction is to examine what Legislature said based on plain meaning of words used); Raymond James Fin. Servs. v. Phillips, 126 So.3d 186, 190 (Fla. 2013) (legislative intent is determined “first and foremost” from the statute's text); Petty, 80 So.3d 313, 316 &n.2 (“[S]tatutory construction begins with the plain meaning[.]”); see also Allstate Ins. Co. v. Revival Chiro., LLC, 385 So.3d 107, 113 (Fla. 2024) (interpreting statutes and policy contract starts with plain language analysis); Parrish v. State Farm Fla. Ins. Co., 356 So.3d 771, 774-76 (Fla. 2023) (same).

A legislative directive to “liberally” interpret a statute does not empower courts to construe unambiguous statutes in a way that would ignore the words used. Knowles v. Beverly Enters.-Fla., Inc., 898 So.2d 1, 7-9 (Fla. 2004); see also de la Fuente, 202 So. 3d at 404 (directive in §631.53 that FIGA Act should “be liberally construed” to effect the purposes in §631.51, “does not mean that the Court may ignore the plain meaning of the statutes defining FIGA's statutory obligations.”).

Courts cannot add or delete terms or rewrite parts they may wish were phrased differently. Coates v. R.J. Reynolds Tobacco Co., 365 So.3d 353, 354 (Fla. 2023) (“[W]e do not add words to a statute in the guise of

interpreting it.”); Westpark Pres. Homeowners Ass'n v. Pulte Home Corp., 365 So.3d 391, 395 (Fla. 2d DCA 2023) (“It is not within the power of the judicial branch to change the statute's language.”); All The Way With Bill Vernay, Inc., 864 So.2d at 1131 (“[W]e are powerless to rewrite either chapter 631 or the insurance policy provisions[.]”).

When multiple statutes are at issue, they must be read together as a whole, reconciled if at all possible, and furthermore:

“There must be a hopeless inconsistency before rules of construction are applied to defeat the plain language of one of the statutes.”

Knowles, 898 So.2d at 9 (emphasis added; quoting citation omitted); see also Revival Chiro., LLC, 385 So.3d at 113 (“[S]tatutes and contracts cannot be viewed in isolation from the full textual context[.]”); Allstate Ins. Co. v. Rush, 777 So.2d 1027, 1032 (Fla. 4th DCA 2000) (“[P]rovisions of an act are to be read as consistent with one another rather than in conflict, if there is any reasonable basis for consistency.”); see also L.S. v. State, 346 So.3d 42, 45 (Fla. 4th DCA 2022) (same).

As a result, a more specific statute will not override a more general provision unless the two actually conflict and cannot be harmonized. Florida Police Benev. Ass'n, Inc. v. Dep't of Agric. & Consumer Servs., 574 So.2d 120, 123 (Fla. 1991) (rule that specific statutes may control, “is never

applied unless there is hopeless inconsistency between the general and the specific statutes.”); DMB Inv. Tr. v. Islamorada, Vill. of Islands, 225 So.3d 312, 317 (Fla. 3d DCA 2017) (where two ordinances could be harmonized, more specific ordinance did not control over the more general provision); 1321 Whitfield, LLC v. Silverman, 67 So.3d 435, 436-37 (Fla. 2d DCA 2011) (rejecting argument that more specific service of process statute controlled over general provision, as courts must reconcile seemingly disparate provisions unless there is a “hopeless inconsistency”).

Plaintiff’s position that only the 1-year limit in §631.68 and §95.11(5)(d) can be considered violates these principles by urging this Court to ignore other statutory and contractual time limitations that apply to Plaintiff’s claim. However, all relevant statutes and policy provisions can and must be read together as a whole, applied per their plain terms, and harmonized. They should not be construed in a way that ignores some provisions and rewrites others—or in a way that expands FIGA’s liability beyond that of the insolvent insurer under the Policy.

C. The Policy’s 5-year suit limitation.

Even assuming, solely for the sake of argument, that there is a conflict between the statutes of limitation, regardless, Plaintiff’s action is still barred by the Policy’s 5-year suit limitation. At no point in the litigation did

Plaintiff address this issue; nor did it explain why the trial court, and this Court, should ignore the terms of the Policy that forms the basis for Plaintiff's claim. The summary judgment must be affirmed at the outset based on the Policy's 5-year suit limitation.

1. Plaintiff failed to preserve any arguments on this issue.

Plaintiff cannot raise new arguments on appeal, nor can it seek reversal on grounds never argued below. Assuming *arguendo* any points in the Initial Brief could be viewed as targeting the Policy's 5-year limitation on filing suit, any such arguments are unpreserved. See Aills v. Boemi, 29 So. 3d 1105, 1108-10 (Fla. 2010).⁶

The closest Plaintiff gets to discussing the Policy's 5-year limit on filing suit is found in a single paragraph, buried in Issue III. [Initial Brief, p.45]. There, Plaintiff concedes the Policy requires legal action to be brought against AmCap within 5 years, but then argues, for the first time: "However, that assumes AmCap is *solvent* for five years following the date of loss." Id. (italics in original). In other words, Plaintiff argues that after insolvency, only the 1-year limitation in the FIGA Act applies, even though FIGA is statutorily entitled to raise any defense that AmCap could have

⁶ Similarly, Plaintiff cannot add new arguments on this point for the first time in the Reply Brief. See, e.g., J.A.B. Enters. v. Gibbons, 596 So.2d 1247, 1250 (Fla. 4th DCA 1992).

raised had it not become insolvent. In addition to being unpreserved, Plaintiff's argument is also wrong on the merits.

2. FIGA has the right to rely on the Policy's 5-year suit limit.

Suits against FIGA are based on the insolvent insurer's policy, and FIGA's liability to the insured is limited by both the Policy and the FIGA Act. See §631.57(1)(a)4.&(1)(b), Fla. Stat. FIGA is only liable for "covered claims," which, in turn, generally means those within the coverage and limitations of the Policy. See §631.54(4), Fla. Stat. The Act further narrows FIGA's obligations by imposing added restrictions, like setting damage caps and other such examples noted herein above. See Jones, 908 So. 2d at 453-54; see also §631.57(1)(a)2. & (1)(a)4., Fla. Stat.

Thus, the FIGA Act works in tandem with the Policy. As this Court recognized in Smothers:

The FIGA Act limits the liability of FIGA and bestows upon FIGA all policy defenses as well as any defenses available under common law. §631.57(1)(b), Fla. Stat. (2008). In no event is FIGA obligated to a policyholder or claimant in an amount in excess of the statutory maximum or in excess of the obligation of the insolvent insurer under the policy from which the claim arises.

Smothers, 65 So.3d at 542-43 (emphasis added). Section 631.57(1)(b), cited in Smothers, expressly vests FIGA with "**all** rights, duties, **defenses**, and obligations of the insolvent insurer **as if the insurer had not become**

insolvent.” §631.57(1)(b), Fla. Stat. (emphasis added). This is contrary to Plaintiff’s claim that only AmCap can rely on Policy-based defenses.

Case law has further recognized that FIGA’s entitlement to raise to “all” defenses available to the insolvent insurer refers not just to “coverage” defenses, but it also extends to other types of defenses, including other Policy-based defenses. Smothers, 65 So.3d at 542-43; FIGA v. Somerset Homeowners Ass'n, 83 So.3d 850, 851-53 (Fla. 4th DCA 2011) (FIGA had right to enforce policy’s payment terms requiring actual repairs as a condition precedent to recovering full replacement cost value awarded in appraisal); Olympus Ass'n, 34 So.3d at 792-96 & n.1 (recognizing FIGA raised 36 affirmative defenses and holding trial court erred by entering judgment for full appraisal award without deciding FIGA’s defenses disputing coverage for certain elements of loss); FIGA v. Castilla, 18 So.3d 703, 703-05 (Fla. 4th DCA 2009) (recognizing FIGA could enforce policy conditions precedent to suit, including EUO and appraisal requirements; observing FIGA’s pleadings included policy-based defenses like these; and holding FIGA did not waive its right to compel appraisal); see also Whistler's Park, Inc. v. FIGA, 90 So.3d 841, 841-47 (Fla. 5th DCA 2012) (holding FIGA can defend based on failure to comply with policy’s EUO requirement, but reversing defense summary judgment where EUO was

never scheduled, so there was no refusal to attend and no prejudice); FIGA v. Revoredo, 698 So.2d 890, 890-93 (Fla. 3d DCA 1997) (holding liability policy's exclusions barred coverage for employee's negligence claim, and, thus, recognizing FIGA's can defend based on policy exclusions).

Accordingly, FIGA can rely on the provision in AmCap's Policy requiring that any action on a property damage claim must be brought within 5 years after the date of loss.

3. The Policy's 5-year suit limit bars this action.

The Policy requires legal action on a property damage claim "must be brought within 5 years from the date the loss occurs." [R.47, 49, 58, 69]. This mirrors the 5-year statute of limitations or repose on property insurance claims in §95.11(2)(b)&(e). The Policy thus expressly incorporates the 5-year statutory limit, making it a binding contractual term.

Policy terms like this have long been recognized nationwide; in fact, contractual suit limitations were generally acceptable even at common law. See Hosp. Support Servs., Ltd. v. Kemper Group, Inc., 889 F.2d 1311, 1316 (3d Cir. 1989) (holding action was time-barred by policy's 1-year suit limitation which was valid under Pennsylvania law; and recognizing such clauses were enforceable at common law); see also Merchants' Mut. Ins. Co. v. Lacroix, 35 Tex. 249, 261 (Tex. 1872) (fire policy's requirement that

any lawsuit be filed within 1 year of the loss was valid and enforceable) (citing Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 387 (1868) (same)).

Florida courts have enforced contractual limitations periods, where, as here, they do not shorten the underlying statute of limitations. See Guarantee Tr. Life Ins. Co. v. Fundora, 343 So.2d 71, 72 (Fla. 3d DCA 1977) (affirming defense summary judgment enforcing 3-year limit to sue set forth in disability policy); see also Burroughs Corp. v. Suntogs of Miami, Inc., 472 So.2d 1166, 1168-69 (Fla. 1985) (upholding 2-year suit limit in commercial contract where same was valid under law of state selected by choice of law clause); cf. Goldberg v. Universal Prop. & Cas. Ins. Co., 302 So.3d 919, 921 (Fla. 4th DCA 2020) (affirming defense summary judgment on dwelling claim, including based on policy's no action clause and 3-year limit for making supplemental claims).

Other jurisdictions have likewise upheld contractual suit limits. See Leftwich v. State Farm Ins. Co., 22-10213, 2023 WL 5607885, at *2 (11th Cir. Aug. 30, 2023) (under Georgia law, policy's 1-year limit to sue was enforceable and barred late-filed action against insurer); A+ Restorations, Inc. v. Liberty Mut. Fire Ins. Co., 714 Fed. Appx. 923, 926 (11th Cir. 2017) (same, also under Georgia law); B.S.C. Holding, Inc. v. Lexington Ins. Co., 625 Fed. Appx. 906, 908-13 (10th Cir. 2015) (applying Kansas law and

affirming dismissal of action brought under commercial property policy based on policy's 1-year suit limitation); Harrington v. Am. Econ. Ins. Co., 131 Fed. Appx. 573, 573-74 (9th Cir. 2005) (under Oregon law, action was barred by policy's 2-year suit limit, which was a valid limitation on recovery under business-owners' insurance); Harris v. Hanover Fire Ins. Co., 425 F.2d 1168, 1169 (5th Cir. 1970) (under Texas law, action was "barred by both the Texas statutory limitation of four years as well as by the contractual limitation of two years and one day after discovery of the 'occurrence,' the hailstorm."); Joe E. Freund, Inc. v. Ins. Co. of N. Am., 370 F.2d 924 (5th Cir. 1967) (inland marine policy's 1-year limit to sue was valid under Louisiana law).

Nothing in the FIGA Act can reasonably be read to nullify the Policy's 5-year suit-limitation. To the contrary, the Act limits FIGA's liability to the terms of the Policy and expressly permits FIGA to raise "all" defenses AmCap could have raised. Therefore, Plaintiff's action is barred by the Policy's 5-year period to sue.

D. The 5-year statutory limit also bars this lawsuit.

Plaintiff's action is also barred by the 5-year statute of limitations and/or repose set forth in §95.11(2)(b)&(e). As the trial court correctly found, since Plaintiff could not have sued AmCap, it cannot sue FIGA.

1. FIGA has the right to rely on the 5-year statutory limit.

Plaintiff argues that FIGA cannot defend based on the 5-year statutory limit in §95.11(2)(b)&(e) applicable to contract actions. [Initial Brief, pp.13-38]. According to Plaintiff: “The only ‘defenses’ made part of §631.57 are those within the definition of ‘covered claim’ under the applicable insurance policy.” [Initial Brief, p.34]. Plaintiff insists FIGA’s defenses cannot include any underlying statute of limitations that AmCap could have raised. Plaintiff argues that FIGA is instead limited to raising coverage defenses or contesting causation and/or the amount of damages. [See Initial Brief, pp.33-39].

Plaintiff bases this contention on de la Fuente. But that is **not** what the Court there held. Rather, de la Fuente simply held the definition of “covered claim” in effect at the time of insolvency is controlling, and, further, the applicable definition—specifically, the part adding special restrictions for sinkhole claims in §631.54(4)(c)—means sinkhole claims (only) cannot be appraised. de la Fuente, 202 So.3d at 398-406. Thus, de la Fuente did not construe §631.54(4) in a way that would restrict the “all” defenses wording in §631.57(1)(b); in fact, the decision did not even address §631.57(1)(b).

Moreover, nothing in §631.57(1)(b) limits FIGA’s available defenses as Plaintiff suggests. If the Legislature intended to limit FIGA to only those defenses involving the scope of coverage, lack of a covered claim, or contesting causation or damages, it would have said so. If that is what the Legislature meant, then §631.57(1)(b) would stop at saying FIGA is “deemed the insurer to the extent of its obligations on the covered claims”—but it does not end there. It goes on to specify that FIGA “shall have “all rights, duties, defenses, and obligations of the insolvent insurer as if the insurer had not become insolvent.” §631.57(1)(b), Fla. Stat. (emphasis added). Plaintiff’s position renders the underscored segment meaningless, contrary to established principles of statutory construction.

The Legislature’s decision to broadly vest FIGA with “**all**” defenses cannot be ignored. See Advisory Opinion to Governor re Implementation of Amendment 4, 288 So.3d 1070, 1072-75, 1078-83 (Fla. 2020) (phrase in amendment restoring voting rights upon completion of “all terms of sentence” broadly included “all” obligations, not just durational periods); Florida State Racing Comm’n v. McLaughlin, 102 So.2d 574, 575-76 (Fla. 1958) (statute that disallowed one “racing plant” within 100 miles of another clearly meant all types of horse and dog racing, as “racing plant” included all such racing types and: **“The use by the Legislature of the**

comprehensive term indicates an intent to include everything embraced within the term.” (emphasis added)); Auto-Owners Ins. Co. v. Conquest, 658 So.2d 928, 929 (Fla. 1995) (third-party bad faith claims can be brought under §624.155, as Legislature broadly said “Any person” can bring the action, so it intended the right for “all persons”); City of Clearwater v. BayEsplanade.com, LLC, 251 So.3d 249, 250-55 (Fla. 2d DCA 2018) (quitclaim deed of “all lands” included submerged lands, as “[a]ll means all and not some, or a part or a portion, or a few” (emphasis added; quoting citation omitted)); Young v. State, 719 So.2d 1010, 1011 (Fla. 4th DCA 1998) (“Any defendant” is “all-inclusive language requiring no statutory interpretation.” (italics in original)); Dade City v. Simpson, 290 So.2d 530, 531 (Fla. 2d DCA 1974) (“The term ‘all roads’ is not one of art. When used in a written instrument to delineate or describe certain parcels of lands it has a clear, unequivocal common meaning.”).

The broad wording in §631.57(1)(b) must be applied to mean what it says—namely, FIGA has “all” the defenses AmCap would have had, as if AmCap had not become insolvent. That is what §631.57(1)(b) plainly says. It does not say “all” defenses except those based on underlying statutes of limitations. By arguing otherwise, Plaintiff is the one impermissibly attempting to rewrite the statute in its favor.

2. The 5-year statutory limit clearly bars this action.

In its order, the trial court recognized that “§95.11(2)(b) provides a five-year statute of limitations on insurance claims[,]” and “§95.11(2)(e)” provides this period “begins running on the date of loss.” [R.2464].⁷

Thus, there is a definitive 5-year limit to sue on a property damage claim, with the time running from the date of loss. See §95.11(2)(b)&(e), Fla. Stat.; New Laxmi v. Rockhill Ins. Co., 22-23421-CIV, 2023 WL 2799885, at *1-4 (S.D. Fla. Feb. 28, 2023) (dismissing plaintiff’s action on Hurricane Irma claim, as it was filed more than 5 years after loss date and therefore was time-barred by §95.11(2)(e)); see also Donovan v. Fla. Peninsula Ins. Co., 147 So.3d 566, 567-69 & n.2 (Fla. 4th DCA 2014) (explaining that the 5-year limit to sue on insurance claims under (2)(b) runs from when the action accrued, and (2)(e) was added in 2011 to provide this period runs from date of loss in a property insurance claim).

Plaintiff does not deny that it filed this action more than 5 years after Hurricane Irma. Instead, Plaintiff claims FIGA has no right to rely on the 5-

⁷ FIGA’s motion focused on §95.11(2)(e), which FIGA maintains is a repose period. Since the trial court held FIGA can defend based on the 5-year limit in both §95.11(2)(b)&(e), affirmance is required if either of these two subsections affords FIGA a valid limitations defense, regardless of whether (2)(e) is a repose period (further discussed below). In other words, the decision must be affirmed if there is any basis in the record to support it. See Radio Station WQBA, 731 So.2d at 644; Abraham, 120 So.3d at 115; Valero, 59 So.3d at 1168.

year statutory limit. However, as just explained, FIGA has the right to rely on any defense AmCap could have raised, which must include defenses based on the underlying statute of limitations.

In fact, this Court and at least one other have held FIGA has the right to defend based on an underlying statute of limitations that would have barred the action if it had been filed against the insolvent insurer and/or its insured. Troso v. FIGA, 538 So.2d 103, 104-05 (Fla. 4th DCA 1989); Peoples v. FIGA, 313 So.2d 40, 41 (Fla. 2d DCA 1975).

Plaintiff attempts to distinguish Troso and Peoples on the ground that both cases involved third-party liability claims. That distinction makes no difference and does not change the fact that both cases upheld FIGA's statute of limitations defense. See Queen v. Clearwater Elec., Inc., 555 So.2d 1262, 1265-66 (Fla. 2d DCA 1989) (rejecting any such distinction as applied to §631.68, especially since non-joinder statute usually forbids suing the insurer directly in a liability case, and, thus, holding the shortened limit in §631.68 bars any action not filed against the insured "and/or" FIGA within the 1-year period).

In Peoples, after an auto accident in November 1968, the claimant filed his first lawsuit in 1970, against both tortfeasor Fry and his liability

insurer.⁸ Peoples, 313 So.2d at 41. While the case was pending, the insurer became insolvent. Id. The case was later dismissed for lack of prosecution—not for failure to join an indispensable party as Plaintiff suggests. Id. No lawsuit was pending when FIGA was appointed as successor to the insolvent insurer. Id. In November 1972, after the insolvency,⁹ the 4-year statute of limitations on negligence expired. Id. In December 1972, the claimant refiled the same lawsuit against Fry and FIGA, in the insolvent insurer’s stead. Id. The Second District held the action against both defendants was barred by the 4-year statute of limitations, explaining that FIGA “stands precisely in the same shoes” as the insolvent insurer, which would only be liable if Fry were liable;

⁸ Peoples predated the non-joinder statute prohibiting suit against the tortfeasor’s liability insurer until after suit against the tortfeasor was concluded, which was enacted in 1976. See §627.4136, Fla. Stat.

⁹ FIGA requests judicial notice of the fact that the insurer in Peoples, First American Insurance Co., was adjudicated insolvent on February 23, 1971. See <https://www.myfloridacfo.com/division/receiver/companies/detail/014> (last visited September 2024). It is submitted judicial notice is appropriate given that Plaintiff made no effort to distinguish Peoples (or Troso) in the trial court. See Falls v. Nat’l Env’tl Prods., 665 So.2d 320, 321 (Fla. 4th DCA 1995) (“[A] court should take judicial notice of other actions filed which bear a relationship to the case at bar.”). If this request is granted, then Peoples also refutes Plaintiff’s assertion that an underlying statute of limitations only bars an action against FIGA if it expires before the insolvency; because the 4-year limit at issue in Peoples did not expire until after the insolvency. [Initial Brief, p.42]. Regardless, the same conclusion can be reached on the face of the Troso decision, discussed next.

therefore, because the action was time-barred as to Fry, it was also time-barred as to FIGA. Id.

In Troso, this Court likewise held the action against FIGA was barred by the 4-year negligence statute of limitations. Troso, 538 So. 2d at 104-05. The action there was filed post-insolvency directly against FIGA (which would have made the shorter 1-year limit a non-issue). See id. At that time, the 4-year period had not yet expired Id. The trial court denied FIGA's motion to dismiss for failure to include the insured as a defendant, but ordered the claimant to amend to add the insured. Id. However, by the time the complaint was amended to add the insured, the 4-year period had expired. Id. This Court held the amended complaint did not relate back, and, thus, the action was barred by the statute of limitations. Id. This Court emphasized: "Since appellants are legally barred from pursuing the insured, no action may now be maintained against FIGA." Id. at 105.

It makes no difference that Troso and Peoples were decided in the third-party liability context. Both cases demonstrate that FIGA has the right to defend based on the longer underlying statute of limitations, even if the longer limit did not expire until after the insolvency. Thus, FIGA is entitled to defend based on any statute of limitations or repose that would have barred Plaintiff's action against AmCap. Since Plaintiff's action against AmCap is

time-barred, the action against FIGA is time-barred. See §95.11(2)(b)&(e), Fla. Stat.; 631.54(4), Fla. Stat.; §631.57(1)(a)&(1)(b), Fla. Stat.; Troso, 538 So.2d at 104-05; Peoples, 313 So.2d at 41.

3. The conclusion is further confirmed by the fact that §95.11(2)(e) is a statute of repose.

As the foregoing makes clear, Plaintiff's action is barred by the 5-year statutory limit in §95.11(2)(b)&(e), regardless of whether (2)(e) is a "statute of repose" or a "statute of limitations." Still, if this Court agrees that §95.11(2)(e) is a statute of repose, it would further confirm Plaintiff's action is time-barred, because statutes of repose extinguish the right of action.¹⁰

In Donovan this Court found that §95.11(2)(e) sets a repose period. Donovan, 147 So.3d at 567-68 &n.2. This Court explained (2)(e) was enacted in 2011 to provide "the limitations period in an action for breach of property insurance contract began running from the *date of loss*." Id. at 567 (italics in original). Thus, this Court concluded (2)(e) set a repose period on property insurance claims because "**it provides for a particular event that starts the limitations period running.**" Id. at 568 &n.2 (emphasis added).

¹⁰ The trial court declined to reach this issue, but this Court can and should. See, e.g., Radio Station WQBA, 731 So.2d at 644; Abraham, 120 So.3d at 115; Valero, 59 So.3d at 1168. In contrast, because Plaintiff did not address the statute of repose issue in the trial court, nor in the Initial Brief, they have waived the right to inject new arguments on this point for the first time in the Reply Brief. See, e.g., J.A.B. Enters., 596 So.2d at 1250.

This Court's recognition in Donovan that §95.11(2)(e) is a statute of repose remains highly persuasive, even though the principle holding was that the 2011 amendments adding (2)(e) were not retroactive. Id. at 568 &n.2. If this Court adheres to its conclusion in Donovan that §95.11(2)(e) is a statute of repose, it need look no further to hold the 5-year limit in §95.11(2)(e) cannot be negated or extended by the 1-year limit in §631.68 and §95.11(5)(d).¹¹ This is because a statute of repose sets an outer limit as an absolute bar, running from a specific point and beyond which the action is extinguished. See Tsuji, 366 So. 3d at 1027; National Auto Serv. Ctrs. v. F/R 550, LLC, 192 So.3d 498, 509-10 (Fla. 2d DCA 2016).

E. There is no conflict with the 1-year limit in §631.68 & §95.11(5)(d).

Plaintiff's overarching contention throughout the Initial Brief is that only the 1-year limit applies and the 5-year limit is irrelevant. Plaintiff bases this mainly on principles of statutory construction, like specific statutes

¹¹ As discussed herein, FIGA maintains the relevant statutory provisions can be read in harmony and are not conflicting. However, even if the statutes are viewed as conflicting (but they are not), the more recent statute "should prevail as the last expression of legislative intent." See McKendry v. State, 641 So.2d 45, 46 (Fla. 1994). Notably, §95.11(2)(e), enacted in 2011, is the more recent statute expressing the Legislature's intent to place a repose period on property insurance claims. In contrast, §631.68 was last amended in 1983, at the same time §95.11(5)(d) was enacted. See Ch. 83-38 (§§33-34), laws of Fla. (eff. 5/16/83). (Laws enacted prior to 1997 can be found on the State Archives' website, by clicking the link for "laws of Florida, 1845-1996," available at: <http://laws.flrules.org/>).

overriding general ones if there is a conflict. All such arguments are without merit because the relevant provisions do not truly conflict.

The 5-year statutory limit in §95.11(2)(b)&(e), does not conflict with the shortened 1-year limit in §631.68 and §95.11(5)(d), because: **(1)** FIGA's liability is limited by the terms and conditions in the Policy, which imposes a 5-year deadline within which an insured must file suit, and similar suit limitations have long been upheld, as further discussed herein above; and **(2)** FIGA is entitled to rely on any defense AmCap could have raised, which must include the expiration of underlying time-limits to sue whether set by the Policy, statute, or both, as also explained above.

Thus, the relevant statutes and Policy provisions apply concurrently. They operate in tandem to shorten the time to sue under the FIGA Act to no longer than 1 year after the Receiver's deadline, even if the underlying statute of limitations, repose period, and/or the time limit for bringing suit against the insurer has not yet expired.

This conclusion is fully consistent with the purpose of the 1-year limit. In the 53 years since §631.68 was enacted, no case has held the purpose of the 1-year limit is to extend the time to sue after an insolvency. Similarly, no Court has held that the 1-year limitation on actions against FIGA extends the underlying statute of limitations if the longer period expires

before or during the 1-year period for suing FIGA. Instead, the case law is clear that the purpose of the 1-year limit in §631.68 and §95.11(5)(d) is to shorten the time to bring an action under the FIGA Act. The trial court correctly rejected Plaintiff's arguments to the contrary.

Section 631.68, relied on by Plaintiff, was enacted in 1971, shortly after FIGA was created. See Ch.71-970 (§19), laws of Fla. It provides any covered claim that is not settled or sued upon within 1 year after the deadline for filing claims with the receiver of the insolvent insurer "shall thenceforth be barred as a claim against the [FIGA] and the insured." §631.68, Fla. Stat.

Section 631.68 was last amended in 1983, when the Legislature added the parallel 1-year provision in §95.11(5)(d). Before 1983, the 1-year limit in §631.68 did not apply to suits against insureds, meaning claimants had longer to sue insureds than to sue FIGA. The 1983 amendments made clear that actions against FIGA and/or its insureds must be filed within 1 year from the Receiver's claim deadline. Queen, 555 So.2d at 1265.

Thus, as Florida's courts have explained, the "**sole purpose**" of §631.68 and §95.11(5)(d), was "**narrowing** the period for bringing those claims[.]" Id. (emphasis added). The Florida Supreme Court expressly recognized this when holding these statutes constitutional:

[T]he district court ruled on the constitutionality of [§§]95.11(5)(d) and 631.68, Florida Statutes (1987), **insofar as the one-year limitation contained therein operates to shorten the four-year statute of limitations for a negligence action against an insured whose insurer has become insolvent.** We find the statutes constitutional

The **shortened** limitation statutes are part of the legislature's effort to protect both injured parties and previously insured persons when an insurance company becomes insolvent. . . . **To effectuate its intentions, the legislature found it necessary to limit the time for filing claims.** . . .

Blizzard v. W.H. Roof Co., 573 So.2d 334, 334-35 (Fla. 1991) (citations & footnotes omitted; emphasis added); see also Rubenstein v. Saldariagga, 699 So.2d 754 (Fla. 4th DCA 1997) (recognizing the “**shortened** statute of limitations” in §631.68 & §95.11(5)(d) were held constitutional); Blizzard v. W.H. Roof Co., 556 So.2d 1237, 1238 (Fla. 5th DCA 1990), approved, 573 So.2d 334 (“[T]here is no constitutional violation where a statute **merely shortens** the time period during which an action may be brought[.]”); Queen, 555 So.2d at 1265 (“**sole purpose**” of 1-year limit was “**narrowing** the period” to sue) (All Emphasis Added).

The shorter 1-year time limit for bringing suit advances the purpose of the FIGA Act because “the allowance of delinquent claims unduly prolongs the distribution of an insolvent insurer's assets to the detriment of other claimants[.]” See FIGA v. Garcia, 614 So.2d 684, 686 (Fla. 2d DCA 1993)

(holding 1-year limit in §631.68 and §95.11(5)(d) could not be extended by out-of-state receiver); see also Blizzard, 573 So.2d at 334-35.

Without question, the 1-year limit aims to shorten the time to bring an action under the FIGA Act. The purpose is not to extend the underlying statute of limitations. None of the cases Plaintiff cites on this point held otherwise (i.e., Gonzalez, Morrison, Mendoza, & Betancourt). [Initial Brief, pp.14-44]. Rather, in all of those cases, the longer 5-year limit had not expired when the lawsuit was filed. Those cases therefore support FIGA's position, not Plaintiff's. Moreover, as discussed above, this Court and at least one other have held FIGA can defend based on an underlying statute of limitations. Troso, 538 So. 2d at 104-05; Peoples, 313 So.2d at 41.

Accordingly, the trial court correctly held the relevant statutory provisions are not truly in conflict. They can and must be read together in harmony, reconciled, and applied per their plain language. The trial court's decision is right and should be affirmed.

II. THE TRIAL COURT CORRECTLY REJECTED PLAINTIFF'S ARGUMENTS THAT THE INSOLVENCY AND STAY PREVENTED THEM FROM FILING SUIT AND EXTENDED THE TIME TO SUE.¹²

The Initial Brief claims the trial court "erred" by finding Plaintiff "could have" or "should have" sued FIGA earlier. These arguments misconstrue

¹² "Issue II" in this Answer Brief responds to "Issue III" of the Initial Brief.

what the trial court ruled and why. The part of the trial court's order at issue stated in relevant part:

The Plaintiff's argument that the Consent Order both acted as a prohibition on filing the instant action and extended the statute of limitations is unpersuasive. First, a plain reading of the Consent Order indicates no such prohibition from filing the action sooner. Second, even assuming the Consent Order did so, the stay was lifted on February 14, 2022. . . .

[R.2466]. Thus, the trial court clearly rejected Plaintiff's argument that it was precluded from suing FIGA before the limitations period expired.

Plaintiff first made the "couldn't have" claim at the motion to dismiss hearing. [R.1998, 2002-03]. Plaintiff was clearly wrong on this, especially since the temporary stay ended long before the 5-year limitation period expired. [R.1714]. Although FIGA's motion for summary judgment specifically pointed out Plaintiff's error [R.1673], Plaintiff persisted in raising similar arguments in its response in opposition. [R.1725-31]. Accordingly, FIGA's Reply further explained why nothing about the insolvency or the related stay prevented Plaintiff from filing suit within the 5 year limitations period. [R1638 &n.1, 1673, 1978-80; see also R.1998, 2002-03].

The Consent Order imposed a permanent automatic stay of the "commencement or continuation" of any action against AmCap, "**except claims as provided for under chapter 631[.]**" [R.162-63 (emphasis

added)]. Thus, it did not stay the filing of actions against FIGA. [R.162-63]. See §631.041(1)(a)&(1)(e), Fla. Stat. While any action filed against FIGA would be stayed under §631.67, there was no prohibition on filing the suit in the first instance. In any event, as the trial court recognized, the temporary stay under §631.67 ended long before the 5-year limitations period did. [R.2466; see also 1714].

Plaintiff's basis for claiming the trial court's ruling was error is unclear. The Initial Brief just says that §631.67 does not provide "authorization" to sue FIGA and that it "only addresses" proceedings where the insolvent insurer is a party or is obligated to defend. [Initial Brief, pp.44-45]. By this, Plaintiff may mean that §631.67 only applies to "pending" actions. Even if true, that would support FIGA's position, not Plaintiff's. In other words, even if §631.67 only stays "pending" actions, that would further refute Plaintiff's claim that they purportedly "couldn't have" filed this lawsuit within 5 years due to the stay.

Whatever Plaintiff's intended argument here, it makes no difference. The trial court correctly rejected Plaintiff's contention that the insolvency acted both to prevent them from filing this action and to extend the 5 years to file suit. Plaintiff has failed to show any basis for reversal.

III. THE TRIAL COURT CORRECTLY HELD PLAINTIFF'S ESTOPPEL CLAIM WAS LEGALLY INSUFFICIENT TO AVOID SUMMARY JUDGMENT BASED ON FIGA'S TIME-BAR DEFENSE.¹³

If this Court adheres to its conclusion in Donovan that §95.11(2)(e) is a repose period, that disposes of estoppel at the outset, as estoppel cannot avoid a statute of repose. See F/R 550, LLC, 192 So.3d at 513-14; Donovan, 147 So.3d at 567-68 &n.2.¹⁴ Regardless, the trial court correctly rejected Plaintiff's estoppel claim on the merits. In other words, the court correctly held estoppel cannot overcome FIGA's right to summary judgment based on the 5-year limit to sue set forth in the Policy and in §95.11(2)(b)&(e).

Surprisingly, Plaintiff's Response to FIGA's summary judgment motion did not offer any evidence, or arguments for that matter, supporting its allegation that FIGA was estopped from raising the statute of limitations as a defense to Plaintiff's claim. Instead, Plaintiff argued that its own estoppel defense was irrelevant since the statute of limitations issue is question of law. [R.1731-32, 1734-35]. In Reply, FIGA explained that if Plaintiff was dropping estoppel, that was fine; but if Plaintiff was still

¹³ "Issue III" in this Answer Brief responds to "Issue IV" of the Initial Brief.

¹⁴ As noted previously, the trial court did not reach whether (2)(e) is a statute of repose, but this Court can and should. See Radio Station WQBA, 731 So.2d at 644; Abraham, 120 So.3d at 115; Valero, 59 So.3d at 1168.

claiming estoppel, it was their burden to present evidence supporting the avoidance, and it had totally failed to do so. [R.1976-78].

Since Plaintiff clearly raised and even pled estoppel, it was entirely proper for the trial court to address the issue. [R.2466-67]. The trial court correctly recognized that because estoppel is an avoidance, Plaintiff had the initial burden to show the required elements. Landers, 370 So.2d at 370 (burden is on the “party seeking to escape the statute of limitations”). However, as the trial court observed, Plaintiff failed to offer anything that might create a genuine dispute of material fact on estoppel. [R.2466-67]. The trial court therefore held Plaintiff’s estoppel claim could not preclude summary judgment in FIGA’s favor. [R.2466-67]. Here again, the trial court’s ruling was correct.

The First Contact Letter and website printout were all Plaintiff ever offered to support its estoppel claim. Both are legally insufficient. The First Contact letter expressly warned Plaintiff the 1-year limit in §631.68 may be “**shortened**” and “**may be impacted by other provisions of 95.11[.]**” [R.1123, 1703 (emphasis added)]. From these warnings, Plaintiff was clearly on notice there were multiple statutes impacting the time to sue. The general information in that Letter, and on FIGA’s website, cannot

reasonably be read as giving legal advice, and certainly not on complex matters like statutes of limitations, repose periods, and/or Policy suit limits.

To be clear, FIGA made no misrepresentations. The general information in the Letter and on the website was factually accurate. Plaintiff's apparent misunderstanding of the information does not convert the statements into misrepresentations. Plaintiff cannot show justifiable reliance in any event. As a matter of law, it was not reasonable for Plaintiff to rely on (stop at) the general information, especially not given the clear warnings in the First Contact Letter. See, e.g., Watson Clinic, LLP v. Verzosa, 816 So. 2d 832, 834-35 (Fla. 2d DCA 2002); Lennar Homes v. Gabb Constr. Servs., 654 So.2d 649, 651-52 (Fla. 3d DCA 1995).

In sum, the trial court correctly held that Plaintiff's estoppel argument did not preclude summary judgment in FIGA's favor based on the time-bar. For these reasons, and all those further discussed herein above, affirmance is required.¹⁵

¹⁵ Plaintiff's Initial Brief, like its response opposing summary judgment, makes no effort to advocate the merits of its estoppel claim. Plaintiff therefore cannot do so in the Reply Brief. [Initial Brief, pp.46-50; R.1731-35]. J.A.B. Enters., 596 So.2d at 1250. Nevertheless, in an abundance of caution, FIGA hereby incorporates all of the arguments and authorities regarding estoppel in its motion for summary judgment and reply memorandum of law, as if set forth fully herein, in further support of affirming the trial court's decision. [R.1666-73, 1976-78].

CONCLUSION

Based on the foregoing facts and legal authorities, Appellee, the Florida Insurance Guaranty Association, respectfully requests this Court to affirm the final summary judgment entered in its favor below.

Respectfully submitted,

KUBICKI DRAPER, P.A.
Counsel for Appellee, FIGA
110 E. Broward Blvd., Suite 1400
Fort Lauderdale, FL 33301
Phone: (305) 982-6796
E-Service (only):
bca-kd@kubickidraper.com
Pamela.Verdejo@kubickidraper.com

By: /s/ Bretton Albrecht, Esq.
BRETTON C. ALBRECHT, ESQ.
Florida Bar No.: 29991
CARYN L. BELLUS, ESQ.
Florida Bar No.: 060445

AND

HINDA KLEIN, ESQ.
Florida Bar No.: 510815
Conroy Simberg
Co-Appellate Counsel for FIGA
3440 Hollywood Blvd., 2nd Floor
Hollywood, FL 33021
Phone: 954-961-1400
Eservice:
eservicehwdappl@conroysimberg.com
hklein@conroysimberg.com
srupprecht@conroysimberg.com

CERTIFICATE OF COMPLIANCE

In compliance with Fla. R. App. P. 9.210 & 9.045, counsel hereby certifies the size and style of type used in this brief are 14-point, Arial, and the word count is 11,430.

By: /s/Bretton C. Albrecht, Esq.
Bretton C. Albrecht, Esq.
Florida Bar No.: 029991

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY, that a true and correct copy of the foregoing was filed and served electronically via the Florida Courts E-Filing Portal to all counsel of record, as reflected on the attached service list, on this 9th day of October, 2024.

KUBICKI DRAPER, P.A.
Counsel for Appellee, FIGA
110 E. Broward Blvd., Suite 1400
Fort Lauderdale, FL 33301
Phone: (305) 982-6796
E-Service (only):
bca-kd@kubickidraper.com
Pamela.Verdejo@kubickidraper.com

By: /s/ Bretton Albrecht, Esq.
BRETTON C. ALBRECHT, ESQ.
Florida Bar No.: 29991
CARYN L. BELLUS, ESQ.
Florida Bar No.: 060445

AND

HINDA KLEIN, ESQ.
Florida Bar No.: 510815
Conroy Simberg
Co-Appellate Counsel for FIGA
3440 Hollywood Blvd., 2nd Floor
Hollywood, FL 33021
Phone: 954-961-1400
Eservice:
eservicehwdappl@conroysimberg.com
hklein@conroysimberg.com
srupprecht@conroysimberg.com

SERVICE LIST

Tracy L. Kramer, Esq.

Kyle Lakin, Esq.

John F. Lakin, Esq.

Lakin Law Firm LLC

8881 Southern Orchard Road N.

Davie, FL 33328

Phone: 877-587-5532

Attorneys for Plaintiff/Appellant

Eservice:

Tracy.Kramer@LakinsLaw.com

Kyle.Lakin@LakinsLaw.com

JLakin@LakinsLaw.com

Jill L. Aberbach, Esq.

Kameron Romaele, Esq.

KUBICKI DRAPER

110 E. Broward Blvd., Suite 1400

Fort Lauderdale, Florida 33301

Phone: (954) 713-2311

Trial Counsel for Defendant/Appellee

Eservice:

JLA-KD@kubickidraper.com

JLA@kubickidraper.com