In the Supreme Court of Florida

CASE NO.: SC12-157

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

ROBIN CURRAN,

Respondent.

ON DISCRETIONARY REVIEW FROM THE FLORIDA FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

Respectfully submitted,

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A. Beginning at the beginning - which should also have been the end

Both Respondent Robin Curran and *amicus* The Florida Justice Association ("FJA") point the Court to a starting point *after* the beginning. Their briefs tacitly seek to have the Court fast-forward past the conduct of the insured and her lawyer in filing this lawsuit ***knowing*** that she had not given her auto insurer its contractually agreed upon chance to evaluate her condition through a medical examination. Petitioner submits that a fair analysis begins at the beginning.

The beginning was this. After an initial flurry of e-mails, objections, and conditions from Ms. Curran and her counsel as to the medical examination requested by State Farm, the parties agreed upon Dr. Uricchio - a doctor who had also been recommended by Ms. Curran's own treating physician[1] (R3, p 493),

[1] Respondent's Answer Brief chides State Farm for drawing on the record on appeal for its facts, a misplaced scolding since this case is here for plenary review on a question certified to be of great public importance and a certified conflict. And, despite *saying* that the parties are confined to the facts set out in the Fifth District majority opinion, Respondent departs frequently into use of record facts - such as the deep reach down to the trial court's not entirely proper remarks about taking "judicial notice" that Dr. Uricchio is an orthopedic surgeon "used by insurance companies for compulsory medical examinations[.]" (Answer Brief, p 2 n 2). Leaving aside this unauthorized 'judicial notice,' the actual record facts are that - far from the confines of litigation and plaintiff/defense slants - Ms. Curran testified that her own treating physician had recommended that she see Dr. Uricchio. (R3, p 493). Respondent is unfair in its footnote 2 attempt to discredit State Farm's selection of an examining physician.

agreed upon the transportation, agreed upon the attendees and non-attendees, and agreed upon the date of September 12, 2007. Nonetheless, Ms. Curran and her lawyer proceeded instead to file a lawsuit on September 10, 2007, two days before the scheduled examination, and Ms. Curran did not go to the examination. Why? Ms. Curran had contracted to give the insurer a chance to evaluate any injuries for which she might seek money under the policy; the examination was all arranged; and the circumstances clearly warranted an examination.

After all, Ms. Curran's accident had occurred more than a year previously, in June of 2006. It was a relatively minor rear-end accident that happened as Ms. Curran and the driver behind her were beginning to move forward after their light turned green. (R1, p 101; R3, p 560). X-rays taken immediately afterwards were negative, showing that Ms. Curran had not broken any bones in the accident. (R1, p 174; R3, p 478). It was not until thirteen months later, towards the end of July of 2007, that Ms. Curran came forward with a bodily injury claim for UM benefits - now represented by a lawyer whose demand letter said that Ms. Curran had developed Reflex Sympathetic Dystrophy ("RSD"), and that her claim was worth $3.2 million to $3.5 million. (R1, pp 131, 180). The lawyer gave State Farm 30 days to pay $100,000, the policy's UM limits, for the claim. (R1, pp 131, 180).

The first thing that State Farm needed to do - or that anyone to whom such a demand might be made would need to do - was to get some measure of the injury

for which the $100,000 was being demanded. Just such a plain, down-to-earth need for information was contemplated long ago in the drafting of policies that have UM coverage for bodily injuries. So, the policies have a provision allowing the insurer to get medical examinations when an insured makes a claim for bodily injury.

The policies also have "no action clauses" that were designed to give the insurers the chance to pay claims that their investigations revealed should be paid *without litigation*. The policy here says: "There is no right of action against us ... until all the terms of this policy have been met[.]" (R2, p 315). Not many obligations are imposed on insureds by policy terms, but the obligations that are imposed are designed to get full and accurate information about a claim into the insurer's hands so that a reasoned, independent evaluation can be made. *See, e.g., USF & G Co. v. Romay*, 744 So.2d 467, 471 n. 4 (Fla. 3d DCA 1999) ("[t]he nature of the post-loss obligations is merely to provide the insurer with an independent means by which to determine the amount of loss, as opposed to relying solely on the representations of the insured"). When post-loss obligations are complied with so that insurers have the necessary information about a claim, the insurers are in a position to pay claims without litigation.

So when, as here, a demand is made for $100,000 for a bodily injury, the insurer needs to be able to call upon its insured's post-loss obligations to at least *verify* the injury before handing over so much money. The need for verification is

particularly apparent where, as here, the injury is first reported well after an accident, and is not physically observable in the way of missing limbs or fractured bones or paralysis. State Farm made the request for the medical examination as provided in the policy, but Ms. Curran and her lawyer filed suit instead of complying with the request. (R1, pp 101-104). They advised State Farm instead to use court procedural rules to obtain information about Ms. Curran's medical condition. (R2, p 362).

Such was the beginning. Having just come forward more than a year after the accident with a demand that $100,000 be paid for a medical condition, RSD[2], of which State Farm had before never been notified, Ms. Curran and her lawyer stood at a crossroads. They had the choice of going ahead with the agreed-upon examination by Dr. Uricchio or they could decide to breach Ms. Curran's obligation and not afford State Farm a medical examination.

Ms. Curran and her lawyer chose to breach the policy requirement as to the requested examination, and chose to breach the policy's "no action" clause. Those deliberate choices have now required massive expenditures of time by a trial court, a venire panel, a jury, lawyers for both sides, the judges of the Fifth District, and

[2] Any Google search of RSD (also known as Chronic Regional Pain Syndrome) will confirm, as noted e.g., on www.aboutrsd.com, that "it is difficult to diagnose and often requires excluding other conditions that produce similar symptoms. A thorough history and neurological examination is of utmost importance."

now the Justices of this Court. Ms. Curran and her lawyer had only to go to the examination instead of purposefully breaching and then clawing around in the court system for years asking various levels of courts to find reasons to excuse the deliberate breach.

There is much commentary in the briefs of Respondent and *amicus* FJA about a procedural step they suggest that *State Farm* could have taken as a means for addressing Ms. Curran's intentional breach of her contract, to wit, moving to abate the suit once it was filed. Respondent and *amicus* have offered no commentary, on the other hand, as to why Ms. Curran deliberately breached to begin with, or why abstaining from breach is not the answer to this whole mountain-out-of-a-molehill problem she has created. Neither do Respondent and *amicus* offer any commentary on procedural steps that *Ms. Curran* could have taken, such as filing a voluntary dismissal without prejudice or filing a motion to abate herself.

Case law precedent also offered another option to Ms. Curran, in the form of an *appropriate* course of action that was taken by another insured who questioned his obligation to submit to a medical examination in *Kay v. Aetna Cas. & Sur. Co*., 152 So. 2d 198 (Fla. 3d DCA 1963). In *Kay*, the insured at least had a reason for seeking to avoid the requested medical examination - a gastrointestinal X-ray series - his doctors had told him that the X-rays could be harmful to him. He accordingly filed a declaratory relief action, asking for a declaration that he not be

required to submit to the X-ray series. After an evidentiary hearing, the lower court found that the insurer's request for the X-ray series was reasonable, and that the insured had breached the policy by refusing to submit to the requested testing. On appeal, the Third District affirmed the trial court's finding that the requested testing was reasonable, but held that the insured should be given the opportunity to submit to the testing because he had correctly used the Declaratory Judgments Act ***to avoid breaching his contract***:

> By filing his complaint for declaratory decree the plaintiff sought a legal ruling as to whether he was required to submit to the examination in question. His refusal to submit to the examination prior to such ruling was based upon the advice of his physicians that such an examination would be harmful to him. This course of action, taken to avoid a breach of his insurance contract, should not result in his being precluded from now complying with the terms of said contract by submitting to said examination. The purpose of the Declaratory Judgments Act would be defeated in a large measure if this result were not reached.

152 So. 2d at 199-200.

Here, Ms. Curran had ***no*** reason for not going to the requested medical examination. In fact, she and her lawyer had ***agreed*** to the who, where, and when details. Yet, Ms. Curran did not go through with the examination before filing suit. She did nothing to try to avoid a breach, including by filing the declaratory judgment action that the *Kay* decision had held would allow her to avoid forfeiture.

At the time that Ms. Curran and her lawyer made their decision to breach two contract terms by not attending the requested and scheduled medical examination

and by filing suit without having met that policy condition, there were two Florida appellate decisions directly on point holding that these actions would result in a forfeiture of the UM policy benefits she sought. *De Ferrari v. Government Employees Ins. Co.,* 613 So. 2d 101 (Fla. 3d DCA 1993) and *Kazouris v. Government Employees Ins. Co.,* 706 So. 2d 960 (Fla. 5th DCA 1998).

In *De Ferrari,* an insured seeking UM benefits refused, through her attorney, to attend a medical examination requested by her auto insurer. The auto policy had a provision much like that involved in the instant case, stating: "The injured person will submit to examination by doctors chosen by us, at our expense, as we may reasonably require." 613 So. 2d at 102. When the insured filed suit without attending the requested examination, the insurer raised her failure to comply with the policy condition as an affirmative defense, and moved for summary judgment. The Third District affirmed the trial court's grant of the summary judgment:

> Considering the insured's actions [in not attending the requested examination] and the clear language of the instant policy, we conclude that the insurer was entitled to the summary judgment ordered in its favor. The requested I.M.E. was in no way unreasonable in terms of location, frequency, or type of examination requested. * * * ***Submission to the reasonably requested I.M.E. was a condition precedent to coverage. [cites omitted]. Considering the insured's unreasonable refusal to submit to the examination, the trial court properly concluded that De Ferrari could not maintain her action.***

613 So. 2d at 103. The *De Ferrari* plaintiff made the same argument that Ms. Curran makes here, to wit, that the issue as to the consequences of her breach

should be analyzed under *Bankers Ins. Co. v. Macias*, 475 So. 2d 1216 (Fla. 1985) to consider whether the insurer had been prejudiced. The argument was rejected:

> We conclude that prejudice is not at issue when an insurer's reasonable request for an I.M.E. is refused by an insured. The *Macias* case in no way created a new duty to establish prejudice, where none previously existed. Here, the insured failed to meet a condition precedent to coverage and accordingly [the insurer's] motion for summary judgment was properly granted.

De Ferrari, supra, 613 So. 2d at 103.[3] The Fifth District adopted *De Ferrari* in its *Kazouris* decision:

> The issue in this case is whether the insurer can insist on an independent medical examination when the insured makes a claim under uninsured motorist coverage. We adopt the analysis of *De Ferrari* *** and affirm.

706 So. 2d at 960. The *De Ferrari* and *Kazouris* decisions were very much in line with the general law on this subject. *See, e.g.*, 2 Auto. Liability Ins. 4th §26:17:

> **§ 26:17. Insured's duty to comply with compulsory medical examination (CME) requirements**
>
> Standard Automobile Liability Insurance policies generally contain a requirement that the insured, or anyone seeking coverage under the policy, submit to physical or medical examinations by physicians selected by the insurer as directed by the insurer and at its expense. [cites omitted]. The CME requirement is analogous to the requirement for an

[3] The Fifth District *en banc* majority opinion attempted to distinguish *De Ferrari*, saying that it was unclear from the opinion whether the claims involved were for UM benefits or PIP benefits or both. In fact, however, the *De Ferrari* Court was very clear on that point, saying in the first sentence of the opinion: "On *** motion for rehearing and request for clarification, we revise in part our opinion of October 13, 1992 solely to clarify that the instant action sought uninsured motorist benefits only." 613 So. 2d at 101.

> examination under oath and is deemed a condition precedent to suit and to the recovery of benefits under the policy where the policy so provides [cites omitted] and, as distinct from the cooperation clause, does not require the insurer to show that it was prejudiced by the breach.

And, although the Fifth District's majority opinion herein and the briefs of Respondent and *amicus* mistakenly say that nothing in the State Farm policy provided that UM benefits would be forfeited if an insured breached the policy by filing suit without submitting to a requested examination, this Court has long since recognized that a "no action" clause itself sets forfeiture as the consequence for an insured's breach of a policy condition requiring submission to an examination prior to filing suit. In *Southern Home Ins. Co. v. Putnal,* 49 So. 922 (Fla. 1909), this Court held that an insured's refusal to comply with a policy condition requiring an examination under oath "will preclude the insured from recovering upon the policy, where it provides that no suit can be maintained until[4] after a compliance with such condition." 49 So. at 932. *See also Orozco v. State Farm Mut. Auto. Ins. Co.*, 360 F. Supp. 223 (S.D. Fla. 1972), *aff'd,* 480 F.2d 923 (5th Cir. 1973).

So, as the insured and her lawyer stood at the crossroads at the beginning, they had a clear (and entirely commonplace) policy provision that required attendance at the requested medical examination. They also had clear law holding

[4] Respondent has suggested that the word "until" merely suspends the insured's right to sue until the condition is met, and that accordingly bringing the suit before meeting the condition only makes the suit *premature.* This Court plainly said otherwise in *Southern Home Ins. Co. v. Putnal.*

that the consequence of filing suit without submitting to the requested examination would forfeit any right to the UM benefits. That law was itself part of the parties' insurance contract under long established Florida law. *Schekter v. Michael,* 184 So. 2d 641 (Fla. 1966)("The law is a part of every contract made in this State"); *Fla. Power Corp. v. City of Casselberry*, 793 So. 2d 1174 (Fla. 5th DCA 2001)(laws existing at time of entering contract become a part of it).

Ms. Curran and her lawyer could have made the right choice and complied with the contract, as her contract and the law so clearly required. Instead, Ms. Curran and her lawyer, fully on notice of the policy terms and of the law, calculatedly chose to breach the contract. They filed the lawsuit that has now come before this Court. In the vein of the fabled youth who murdered both his parents and then flung himself on the mercy of the court as an orphan, Ms. Curran and her lawyer have ever since been asking the courts to change the law so that Ms. Curran can get the contract benefits despite her intentional breach; *and* have State Farm pay her attorney's fees for this unnecessary litigation; *and* be permitted to pursue State Farm for extra-contractual recoveries. But, as this Court said in *Putnal*: "If the plaintiff saw fit to stand upon his rights as he conceived them to exist and to refuse to submit to the requested examination and bring his action, he must be held to have done so at his peril." 49 So. at 933.

The initial panel decision from the Fifth District decided the case rightly, and

based on the established law. The *en banc* majority decision, on the other hand, departed radically from the law, not least in pronouncing this self-engineered problem of Ms. Curran and her lawyer to be a question of great public importance. It is not. *Putnal* established that insureds must comply with policy provisions that require submission to examinations so that their insurers can gather the necessary information to evaluate their claims. That decision also established that filing a suit without compliance despite a 'no action' clause will forfeit the policy benefits. Because that law is so clear and easy to follow, few insureds have seen fit to test it "at their peril," as this Court warned in *Putnal*. One insured did so in *De Ferrari* in 1993, and was given the same, plain answer. The last attempt was in *Kazouris* in 1998, with the peremptory answer that *De Ferrari* correctly reflects the law.

The existing law is plain and requires no revision. It sends a straightforward message to insureds: If your policy requires you to submit to an examination before filing suit, do it because the provision serves a good and reasonable purpose and because you will not get the insurance benefits if you don't. Simple as that.

There are, in short, no hordes of claimants in Florida who need new law to be created on this subject, either because the current law is too difficult to understand[5]

[5] Even the most zealous advocates for first-party insurance claimants can state this plain condition set by insurance contract law, and the forfeiture consequences if it is not met. *See* D. Pettinato, *Examinations Under Oath: How to Prevent Your Client's Claim From Being Lost Forever,* 2008 Ann. AAJ-CLE 1519.

or because it is too harsh. For as many UM claims as are made in Florida every year, clearly insureds are not having any difficulty in attending requested medical examinations. That there are only two appellate decisions as to refusals to attend such examinations in the last 20 years, the last one being 15 years ago, is telling both as to the ease of compliance and the lack of any abuses needing correction.

It is just here that Ms. Curran and her lawyer made their own decision to derail the medical examination at the last minute and file suit instead. The self-evident reason was that they were afraid that if State Farm got the requested examination, it might in fact pay the UM limits thus shutting off all access to attorney's fees and to the extra-contractual recoveries that were the real goal, as evidenced by their filing of their § 624.155 Civil Remedy Notice (R1, p 180) just a month after re-surfacing and demanding the UM limits and before State Farm had any opportunity to verify the claimed RSD. But, their reasons are not really important. The point is that Ms. Curran and her lawyer are just on a self-serving bender of their own that does not present a question of great public importance.

For whatever reasons, the Fifth District *en banc* majority travelled far afield from this specific case to create generalized questions about whether a showing of prejudice should be required as to all breaches by insureds of all types of policy conditions, precedent and subsequent, and whether an insured's breach of policy conditions should be deferred as a defense that will not even be considered until

the insured has moved on to a subsequent bad faith suit. But, those questions are not presented here. Ms. Curran and her lawyer decided to take a gamble in pursuit of rewards for themselves. The public is not involved, and their private gamble does not require a revamping of settled law that is functioning smoothly for everyone else. Neither is there a reason to digress into general consideration of policy conditions and burdens of proof on prejudice in *this* case, when no other types of cases are before the Court and the only record facts here involve the refusal to attend a medical examination required by the terms of a UM policy.

Ms. Curran should just have begun by going to her medical examination. When she and her lawyer consciously chose to breach instead and file suit - acts that the law decreed would result in a forfeiture - that should have been the end, just as the initial Fifth District panel decision held in accord with *De Ferrari* and *Kazouris*.[6]

[6] In fact, the record reflects that, but for being intentionally cut off at the pass, State Farm's pre-suit medical examination would have confirmed the RSD diagnosis. As Ms. Curran's lawyer told the jury in opening, Dr. Uricchio did, in fact, agree that she had RSD. (R 11, pp 409-410). Although Ms. Curran's lawyer had continued to interpose obstacles to the Uricchio examination for over a year after the lawsuit was filed in September of 2007 (R 1, pp 194,195-199; R 2, p 369; R 3, pp 525-529, 576-584), State Farm was finally permitted to obtain the examination by Dr. Uricchio in November of 2008 after which State Farm made a proposal for settlement tendering the policy limits right away. (R 4, p 632). Ms. Curran's lawyer had long since made it clear, however, that they were not looking for the $100,000 policy limits. Not long after winning the summary judgment proceedings in March 2008, Ms. Curran's counsel filed a proposal for settlement

B. Response to other comments in the briefs of Respondent and *amicus*

Respondent says that Petitioner did not comply with pleading requirements as to specificity in alleging breach of a condition precedent. This is not true. Petitioner's affirmative defense stated: "Plaintiff refused to attend scheduled medical examination(s) as required by the subject policy[.]" (R1, p 116).

Respondent inexplicably states that "not a single [case cited by State Farm] involves a UM policy provision for a CME." (Ans. Br., p 16). State Farm's cited cases include *De Ferrari* and *Kazouris*, both UM cases involving policy provisions for CMEs that are directly on point here.

Respondent and *amicus* FJA argue that State Farm made no showing of prejudice. But, not only does the law not require any such showing as to a refusal to provide an examination required by the policy, Respondent *never argued at trial or in the appellate briefing that State Farm had to make a showing of prejudice.* Moreover, the prejudice from attorney's fee statute § 627.428 alone is generated for an insurer every time a claim is moved from the contractual claims adjustment process into litigation. *Amicus* offers a lowball estimate of $1,000, but that estimate alone concedes prejudice, and certainly to an insurer when generated by every claim that goes into litigation. Further, and as detailed in the Initial Brief, the

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for $1 million, ten times the policy limits even though ***only*** the policy limits are at stake in a UM suit. (R 3, p 427).

greater - and *ipso facto* - prejudice is losing the contractual right to evaluate the claim before litigation so that there will be no litigation if it is determined that the claim should be paid, and it is paid.

CONCLUSION

Petitioner respectfully submits that the *en banc* majority opinion issued by the Fifth District should be disapproved, and that the initial panel decision should be adopted by this Court or the case remanded to the Fifth District with directions that the initial panel decision be reinstated.[7]

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[7] As set forth in the Initial Brief (p 42, n 15), if Petitioner is not entitled to a judgment in its favor on coverage, it should be given an opportunity to address the prejudice issue and the Fifth District should also be directed to consider State Farm's additional appellate points.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Reply Brief of Petitioner was sent by U.S. mail this 15th day of May, 2012 to: O. John Alpizar, Esquire, 1528 Palm Bay Road, North East, Palm Bay, Florida 32905; Marjorie Gadarian Graham, Esquire, 11211 Prosperity Farms Road, Suite D 129, Palm Beach Gardens, Florida 33410; and Gary M. Farmer, Sr., Esquire, Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, P.L., 425 North Andrews Avenue, Suite 2, Ft. Lauderdale, Florida 33301.

_____

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Reply Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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