

**IN THE SUPREME COURT
OF FLORIDA**

**CASE NO. SC12-1661
L.T. CASE NO. 5D10-2410**

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Maitland Supreme Court
BY

**FLORIDA INSURANCE GUARANTY
ASSOCIATION,**

Petitioner,

v.

**WHISTLER'S PARK, INC.,
a Florida corporation,**

Respondent.

**ANSWER BRIEF OF RESPONDENT, WHISTLER'S PARK, INC. ON
FLORIDA INSURANCE GUARANTY'S INITIAL BRIEF ON JURISDICTION**

Respectfully submitted by,

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PRELIMINARY STATEMENT

The instant appeal concerns the trial court's final judgment granting FIGA's Motion for Summary Judgment on the grounds that Whistler's Park failed to comply with necessary conditions precedent to filing its original lawsuit against Southern Family. The specific condition failure alleged by FIGA was Whistler's Park's failure to appear for an Examination Under Oath ("EUO") prior to the filing of a lawsuit against Southern Family.

Whistler's Park is a condominium complex located in Daytona Beach, Volusia County, Florida, consisting of two hundred twenty eight (228) condominium units in twenty four (24) condominium buildings, and other improvements.

On August 13, 2004, while the Southern Family Policy was in full force and effect, Hurricane Charley struck Whistler's Park. The Whistler's Park condominium buildings and other property sustained extensive damage due to the wind load caused by Hurricane Charley.

Southern Family first generally requested an EUO in August, 2005, one year after Hurricane Charley struck Whistler's Park. Counsels for Southern Family and Whistler's Park discussed the EUO but never exchanged dates and no EUO was ever actually set by Southern Family. Whistler's Park filed suit against Southern Family for breach of the insurance contract on December 21, 2005.

Southern Family went into receivership in June, 2006 and FIGA was appointed as its substitute in April, 2006. FIGA never requested an EUO, despite being allowed to do so. In fact, counsel for Plaintiff, Keith J. Lambdin, Esq., wrote to counsel for FIGA on January 15, 2007 advising that Mr. Ken Dixon was available for an EUO at any time. FIGA never responded to Whistler's Park's offer. Following FIGA's substitution for Southern Family, and nearly two years of litigation, FIGA filed a Petition for Declaratory Relief which requested, among other things, that the court declare that Whistler's Park had breached the Southern Family Insurance Policy by failing to appear for an EUO requested by Southern Family prior to the filing of the original lawsuit in December, 2005.

FIGA moved for a summary judgment on that issue on September 18, 2009. Whistler's Park responded on September 25, 2009. A hearing was held on FIGA's Motion for Summary Judgment on February 2, 2010. Finally, on April 19, 2010, the trial court granted FIGA's Motion for Summary Judgment, finding that Whistler's Park had failed to comply with conditions precedent. The trial court held that "[d]efendant's assignor did not sit for a requested examination under oath prior to the filing of the 2005 lawsuit." The trial court did not specifically hold that Whistler's Park had willfully not complied with the policy.

Whistler's Park appealed the summary judgment to the Fifth District Court of Appeals. Several days before oral argument, the Fifth District decided the case

State Farm Mutual Automobile Ins. Co. v. Curran, 83 So. 3d 793 (Fla. 5th DCA 2011) (en banc). In Curran the Court held that an insured's failure to appear for a compulsory medical examination pursuant to a pre-suit condition in the policy was not a violation of a condition precedent to recovery under the policy and that the insurer needed to show some form of prejudice due to the lack of examination.

Partly based on Curran the Fifth District determined that the trial court erred in granting FIGA's Motion for Summary Judgment that Whistler's Park's filing of a lawsuit prior to an EUO of its principal being conducted amounted to a breach of the insurance policy's conditions precedent and thus voided the policy benefits.

The Court found that FIGA did not ever actually schedule an EUO and that there was no explicit refusal of Banana Cay¹ or Whistler's Park to appear for an EUO, and thus, there could be no violations of conditions precedent or subsequent and that the right to recovery under the subject insurance policy could not be compromised.

SUMMARY OF THE ARGUMENT

The Fifth District's decision in the instant case does not conflict either with its own prior precedent or the precedent of the other circuits in the State of Florida.

¹ Banana Cay is Whistler's Park's predecessor in interest and all rights under the subject insurance policy were assigned from Banana Cay to Whistler's Park. The two corporations are identical, with Ken Dixon being the sole shareholder of both.

FIGA reads the Court's decision more broadly than its plain language in order to seek a second, undeserved, bite at the apple.

None of the established case law in Florida has been overturned or called into question by the Court's decision in this case, or Curran, for that matter. All that the Fifth District's decision did was to establish a necessary exception to avoid the complete nullification of policy benefits in cases where there was not a willful refusal to attend an examination under oath and where there was absolutely no prejudice to the insurer by the lack of such an examination under oath.

ARGUMENT

A. THE FIFTH DISTRICT'S OPINION IN THIS MATTER IS NOT IN CONFLICT WITH ANY EXISTING LAW AND MERELY CREATED A NEW, LIMITED EXCEPTION TO THE ESTABLISHED LAW THAT AN EXAMINATION UNDER OATH IS A REQUIRED CONDITION PRECEDENT TO COVERAGE

FIGA alleges that the Court's opinion should be reversed on the grounds that Fifth District panel which heard the case concluded that Banana Cay's failure to appear for an EUO did not prejudice FIGA's predecessor, Southern Family. FIGA argues that whether or not an insurer is prejudiced by the failure to appear for an EUO was not legally relevant under controlling case law at the time of the trial court's ruling and that the parties never argued the merits of prejudice as a defense for a failure to appear for an EUO.

Unfortunately, FIGA is incorrect in its interpretation of what the Court actually held. The Court did not change long standing Florida law, nor does the Court's opinion conflict with the law in this or any other circuit. Neither in the Court's opinion in the instant case, nor in the Curran case, did the Fifth District rule that an insurer must prove prejudice every time an insured fails to appear for an EUO. What the Fifth District actually did was draw a distinction between the remedy available for simply filing a lawsuit prior to an EUO being conducted and the insureds' **outright refusal** to attend an EUO.

In every case cited by FIGA in its Initial Brief, the insureds actually failed to attend scheduled EUOs that were scheduled to take place prior to the filing of the lawsuit. Moreover, all of the cases make clear that an EUO is a condition precedent to "recovery", not necessarily the mere act of filing a lawsuit. Shaw v. State Farm Fire & Casualty Co., 37 So. 3d 329 (Fla. 5th DCA 2010) (an EUO provision in an insurance policy qualifies as a condition precedent to **recovery of policy benefits**) (Emphasis Added); Starling v. Allstate Floridian Ins. Co., 956 So. 2d 511 (Fla. 5th DCA 2007); Amica Mut. Ins. Co. v. Drummond, 970 So. 2d 456 (Fla. 2nd DCA 2007); Goldman v. State Farm Fire Gen. Ins. Co., 660 So. 2d 300 (Fla. 4th DCA 1995). In each and every case cited above, as admitted in FIGA's Initial Brief, there was an explicit refusal by the insured to appear for an EUO or otherwise cooperate in pre-suit investigations.

Moreover, FIGA is incorrect when it argues that the Fifth District has overturned over 100 years of law regarding the requirement of an insured to appear for an EUO. Not only does the Court's opinion not overrule Southern Home Ins. Co. v. Putnal, 49 So. 922 (Fla. 1909), but the factual scenarios between the cases are so different, that the Fifth District's opinion actually brings much needed clarity to this area of law.

In Putnal, the insured believed that its insurer had waived the right to request an EUO because the insurer had previously made settlement offers and the parties were in active negotiations. As such, the insured refused to appear for an EUO. The Supreme Court held that the insured willfully refused to appear for an EUO and that if the insured "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 own peril." Id. at 232.

Factual scenarios like those set forth in Putnal, Goldman and Starling et al, are the exact scenarios where an insured would not be required to show prejudice. All of the cases cited by FIGA are situations where 1) an EUO was set for a time certain and the insured failed to appear; 2) the insured willfully refused to appear for an EUO despite a request to appear and; 3) the insured believed the insurer's right to an EUO had been waived. In all these scenarios an insurer does not need to show prejudice because the prejudice is obvious, the insured is not allowing the

insurer to investigate the claim. Nothing in the Fifth District's opinion changes or overturns that longstanding rule. All that the Fifth District's opinion in the instant case does is make a distinction between the factual scenarios described above and the facts of this case and cases like it. There is nothing in the Court's opinion which changes or confuses longstanding law.

Specifically, in the instant case, Whistler's Park allowed its insurer to inspect the property. Whistler's Park also did not ever refuse to appear for an EUO or claim that FIGA or Southern Family had waived the right to take one. All Whistler's Park did was file a lawsuit before an EUO was actually taken. Following the filing of the lawsuit, Whistler's Park still offered to appear for an EUO which FIGA declined to take.

This is precisely the scenario where the longstanding rule of Putnal, et. al., does not fit and leads to an inequitable result. Here, FIGA and any other insurer in its position should be required to show prejudice that it suffered by the lawsuit being filed prior to the EUO being taken and why that prejudice cannot be cured in a less draconian way than complete forfeiture of the policy benefits. The Fifth District has simply provided new guidance for future cases whose factual scenarios do not quite fit the normal rules. The normal rules still apply, just as they always have, to cases that they should apply to. The normal rules should not apply to cases like this one.

If an insured can have his policy benefits forfeited for willfully refusing to appear for an EUO, then surely an insurer at the very least must explain itself if it refuses an EUO that is offered following the filing of a lawsuit, and that if such an insurer is unable to prove it was prejudiced by having to take the EUO after the filing of a lawsuit rather than before it, the insurer should be allowed to proceed with its claim.

CONCLUSION

The Fifth District's opinion in this case does not conflict with the decisions of this Court or of the other district courts of appeal in the State of Florida and as such, it is respectfully requested that this Court decline jurisdiction to consider this case.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on October 1, 2012, a true and correct copy of the foregoing was furnished via Email and U.S. Mail to Hinda Klein, Esq., Attorney for Petitioner, mwhite@conroysimberg.com, and HKlein@Conroysimberg.com, Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow & Schefer, P.A. 3440 Hollywood Blvd, Second Floor, Hollywood, FL 33021 and H. Davis Lewis, Esq., Attorney for Petitioner, dlewis@hightowerlaw.net, Hightower & Partners, P.A., 73870 W. Sand Lake Road, Suite 395, Orlando, FL 32819.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this Answer Brief complies with the font requirements of Rule 9.210 of the *Florida Rules of Appellate Procedure* and the foregoing Reply Brief is Times New Roman, 14-point font, proportionately spaced.

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