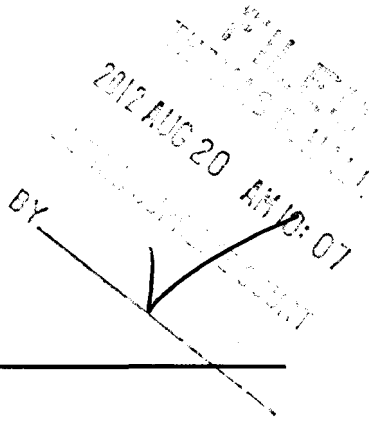

IN THE SUPREME COURT OF FLORIDA

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

FLORIDA INSURANCE GUARANTY ASSOCIATION,

Petitioner,

v.

WHISTLER'S PARK, INC.,
a Florida Corporation

Respondent.

FLORIDA INSURANCE GUARANTY'S INITIAL BRIEF ON JURISDICTION

Respectfully submitted by,

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II. THE FIFTH DISTRICT'S OPINION IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH NUMEROUS CASES THROUGHOUT THE STATE HOLDING THAT AN INSURED'S APPEARANCE AT A REQUESTED EXAMINATION UNDER OATH IS A VIOLATION OF A CONDITION PRECEDENT TO COVERAGE WARRANTING A DENIAL OF THE CLAIM AND THAT CONFLICT WAS EXPRESSLY ACKNOWLEDGED BY THE FIFTH DISTRICT IN THE BODY OF THE OPINION.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a trial court's summary judgment in favor of Florida Insurance Guaranty Association (FIGA), the successor in interest to Southern Family Insurance, against Whistler's Park, Inc. (WHISTLER'S PARK), assignee of the claim filed against Southern Family by its insured Banana Cay Apartments, Inc. d/b/a Bristol Bay Apartments. The relevant facts are as set forth in the attached opinion and will be briefly summarized herein.[1]

Whistler's Park filed suit against Southern Family seeking property insurance benefits for damages allegedly sustained by Banana Cay during Hurricane Charley. Southern Family had previously paid Banana Cay in excess of $363,000.00, and the subject claim was a supplemental claim for substantially more in benefits. After it received Banana Cay's Supplemental claim, and before suit was filed, Southern Family requested that Banana Cay's corporate representative provide the insurer with specified documentation in support of the claim and appear for an Examination under Oath at a mutually convenient time designated by the corporate representative. Banana Cay provided Southern Family with the name of its corporate representative and it's counsel advised Southern

[1] We recognize that this Court's decision on jurisdiction is based only on the facts as set forth in the decision on review, and we have therefore confined our Statement of the Facts to only those contained in the Fifth District's decision. Reaves v. State, 485 So. 2d 829, 830 at n.3 (Fla. 1986).

Family that the documents would be produced at Banana Cay's offices in a few weeks. Within a week after this correspondence, and before Banana Cay provided Southern Family with the requested documents and its representative's Examination under Oath, Whistler's Park filed suit against Southern Family alleging that it breached its policy with assignor Banana Cay.

Southern Family's counsel raised Banana Cay's failure to comply with the conditions precedent to payment as an affirmative defense and thereafter moved for summary judgment which was granted. While this motion was pending, Southern Family became insolvent and ultimately, FIGA was named as the successor in interest. On Whistler's Park's motion for reconsideration filed after Southern Family became insolvent, the trial court vacated that summary judgment because it appeared that at the time it was granted, Southern Family was no longer a viable entity with standing to litigate the case.

After FIGA was substituted as the defendant, it raised the affirmative defense of failure to comply with the conditions precedent contained in Southern Family's policy. FIGA moved for summary judgment and that motion was granted for a second time on the grounds that Banana Cay failed to comply with the conditions precedent in Southern Family's policy before Whistler's Park filed suit. Since Whistler's Park had no greater right to the insurance proceeds than did its

assignor Banana Cay, FIGA argued that this breach precluded Whistler's Park from recovering any benefits under Southern Family's policy.

The summary judgment was appealed by Whistler's Park to the Fifth District Court of Appeal. Just days before oral argument, that Court issued its decision in State Farm Mutual Automobile Ins. Co. v. Curran, 83 So. 3d 793 (Fla. 5th DCA 2011)(en banc), in which the majority held that in an Uninsured Motorist suit, an insured's failure to comply with a compulsory medical examination (CME) requested by the carrier pursuant to a pre-suit condition in its policy, was not a violation of a condition precedent to recovery under the policy. Rather, the violation of a pre-suit condition would not warrant a denial of the claim unless that violation was demonstrably prejudicial. The Court further held that it was the insurer's, and not the insured's, burden of proof to establish a material breach of its policy causing prejudice to the insurer.

In its opinion in this case, the Fifth District relied on Curran as binding precedent warranting reversal because the policy language in Curran, was similar to that contained in Southern Family's policy. In doing so, the Court recognized that "[a]s discussed in Curran, several of Florida's district courts of appeal have concluded that the failure to an insured to appear for an EUO prior to filing suit to recover an unpaid claim is a material breach of contract, requiring forfeiture of coverage." Id. The Fifth District concluded that "[i]n light of Curran, FIGA

carried the burden of pleading and proving a breach that caused prejudice. FIGA did not plead or assert prejudice." Id. Accordingly, the panel reversed and remanded for further proceedings, the nature of which are somewhat unclear.[2]

After this opinion issued, this Court granted review of Curran, 83 So. 3d 793 (Fla. 5th DCA 2011)(en banc), rev. granted, 86 So. 3d 1114 (Fla. 2012) and it has been fully briefed and is currently set for oral argument on October 2, 2012.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal cited its own opinion in State Farm Mutual Ins. Co. v. Curran, 83 So. 3d 793 (Fla. 5th DCA 2011), rev. granted, 96 So. 3d 1114 (Fla. 2012 as dispositive of this case. Curran is currently pending before this Court on conflict review such that the Fifth District's citation to that case establishes the Court's discretionary jurisdiction.

In addition to the Fifth District's citation to Curran in the body of its opinion in this case, the opinion also expressly and directly conflicts with a myriad of precedent throughout the state, including a century-old precedent from this Court. This holding expressly and directly conflicts with this Court's decision Southern Home Ins. Co. v. Putnal, 49 So. 922 (Fla. 1909), as well as numerous District Court opinions including Gonzalez v. State Farm Florida Ins. Co., 65 So. 3d 608

[2] The Fifth District denied all of FIGA'S motions for rehearing, rehearing en banc, clarification and certification.

(Fla. 3d DCA 2011); Edwards v. State Farm Florida Ins. Co., 64 So. 3d 730 (Fla. 3d DCA 2011); Amica Mutual Ins. Co. v. Drummond, 970 So. 2d 456 (Fla. 2d DCA 2007); Goldman v. State Farm Fire Gen. Ins. Co., 660 So. 2d 300 (Fla. 4th DCA 1995) and Stringer v. Fireman's Fund Ins. Co., 622 So. 2d 1101 (Fla. 3d DCA), rev. denied, 630 So. 2d 1101 (Fla. 1993), all of which have held that an insured's failure to attend a requested EUO before filing suit against its insurer is a material breach of the policy warranting forfeiture of the policy benefits without a showing of prejudice to the carrier. The decision in this case is irreconcilable with the foregoing precedent such that this Court should accept jurisdiction to resolve this conflict.

ARGUMENT

I. THE FIFTH DISTRICT COURT OF APPEAL CITED FOUND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY V. CURRAN, 83 SO. 3D 793 (FLA. 5TH DCA 2011), REV. GRANTED, 86 SO. 3D 1114 (FLA. 2012) DISPOSITIVE OF THE ISSUES RAISED IN THIS CASE AND SINCE CURRAN IS CURRENTLY PENDING ON REVIEW BEFORE THIS COURT IN CASE NUMBER SC12-147, AS IS A RELATED ISSUE CERTIFIED BY THE FEDERAL ELEVENTH CIRCUIT COURT OF APPEAL IN NUNEZ V. GEICO, 685 F. 3D 1205 (11TH CIR. 2012), CURRENTLY PENDING BEFORE THIS COURT IN SC12-650.

This Court has discretionary jurisdiction to review a decision of a District Court of Appeal which expressly and directly conflicts with that of another District Court or with a decision of the Supreme Court on the same point of law. See, Article V, § 3(b)(3), Fla. Const.; Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 1988).

In this case, the Fifth District cited as controlling authority State Farm Mutual Automobile Ins. Co. v. Curran,, 83 So. 3d 793 (Fla. 5th DCA 2011), rev. granted, 86 So. 3d 1114 (Fla. 2012), which is currently pending before this Court in Case Number SC12-157 on a certified conflict.[3] An appellate court's citation to

[3] Although this case was not specifically mentioned in Nunez v. Geico General Insurance Co., 685 F. 3d 1205 (11th Cir. 2012), which is currently pending before this Court in Case Number SC12-650, Nunez was certified to this Court on the related issue of "whether, under Fla. Stat. §627-736, an insurer can require an insured to attend an EUO as a condition precedent to recovery of PIP benefits?" The Eleventh Circuit found that specific issue to be an issue of first impression in Florida, but noted that numerous cases, including those addressed in Point II of this Brief, would appear to compel a conclusion in the negative, but for this Court's

a decision which is pending review in this Court establishes the requisite jurisdiction over a case subsequently citing the case on review as authority. See, Jollie v. State, 405 So. 2d 418 (Fla. 1981)(per curiam opinion which cites as controlling authority decision that is pending review constitutes prima facie express conflict and permits the Supreme Court to exercise its jurisdiction).

II. THE FIFTH DISTRICT'S OPINION IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH NUMEROUS CASES THROUGHOUT THE STATE HOLDING THAT AN INSURED'S APPEARANCE AT A REQUESTED EXAMINATION UNDER OATH IS A VIOLATION OF A CONDITION PRECEDENT TO COVERAGE WARRANTING A DENIAL OF THE CLAIM AND THAT CONFLICT WAS EXPRESSLY ACKNOWLEDGED BY THE FIFTH DISTRICT IN THE BODY OF THE OPINION.

In addition to the Court's citation to Curran, the Fifth District's opinion also expressly and directly conflicts with a myriad of precedent throughout the state, including a century-old precedent from this Court. Although the Court did not specifically name these cases in its opinion, the Court recognized that "[a]s discussed in Curran, several of Florida's district courts of appeal have concluded that the failure of an insured to appear for an EUO prior to filing suit to recover an unpaid claim is a material breach of contract, requiring forfeiture of coverage." Id.

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dicta in Custer Med. Ctr. v. United Auto. Ins. Co., 62 So. 3d 1086, 1089, n. 1 (Fla. 2010), in which this Court noted that although that issue was not before it, under the PIP statute, a condition in the policy requiring a verbal exam under oath without counsel is invalid.

The Court then held that the failure to attend an EUO is **not** a ground for forfeiture under the policy unless and until the carrier proves its actual prejudice arising from the insured's refusal to comply with this policy condition. This holding expressly and directly conflicts with this Court's decision Southern Home Ins. Co. v. Putnal, 49 So. 922 (Fla. 1909), as well as numerous District Court opinions including Gonzalez v. State Farm Florida Ins. Co., 65 So. 3d 608 (Fla. 3d DCA 2011); Edwards v. State Farm Florida Ins. Co., 64 So. 3d 730 (Fla. 3d DCA 2011); Amica Mutual Ins. Co. v. Drummond, 970 So. 2d 456 (Fla. 2d DCA 2007); Goldman v. State Farm Fire Gen. Ins. Co., 660 So. 2d 300 (Fla. 4th DCA 1995) and Stringer v. Fireman's Fund Ins. Co., 622 So. 2d 1101 (Fla. 3d DCA), rev. denied, 630 So. 2d 1101 (Fla. 1993), all of which have held that an insured's failure to attend a requested EUO before filing suit against its insurer alleging a breach of contract is a material breach of the policy warranting forfeiture of the policy benefits without a showing of prejudice to the carrier.

It is not necessary that the appellate decision explicitly identify by name the conflicting appellate decisions in its opinion in order to create an express and direct conflict if the "discussion of the legal principles which the [district] court applied supplies a sufficient basis for a petition for conflict review." Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981). One test of whether two or more decisions expressly and directly conflict is whether the decisions are irreconcilable.

Aravena v. Miami-Dade County, 928 So. 2d 1163 (Fla. 2006); Crossley v. State, 596 So. 2d 447 (Fla. 1992). The Fifth District's decision holding that an insured's unexplained failure to attend a requested EUO before filing suit is not a material breach of the policy unless and until the carrier has established its prejudice is expressly and directly in conflict with numerous cases throughout the state holding that the carrier does not need to establish its prejudice in order to prevail on its defense of failure to comply with conditions precedent. See, e.g., Goldman, 660 So. 2d at 306 ("[w]e . . . hold that the policy provision at issue [requiring a presuit EUO] is a condition precedent to suit and that appellants' noncompliance precludes an action on the policy regardless of a showing of prejudice by the insurer."). The Fifth District's holding in this case is therefore expressly and directly in conflict with those decisions, rendering the current case law irreconcilable.

CONCLUSION

Because the Fifth District's opinion in this case expressly and directly conflicts with numerous cases from this Court as well as other district courts of appeal and the decisions are irreconcilable, it is respectfully requested that this Court accept jurisdiction to consider this case and resolve this insoluble conflict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to Scott Dornstein, Esq., Katzman Garfinkel Rosenbaum, 300 N. Maitland Avenue, Maitland, FL 32751-4724; H. Davis Lewis, Jr., Esq., Hightower & Partners, P.A., 7380 W. Sand Lake Road, Ste. 395, Orlando, FL 32819 by mail on this 17th day of August, 2012.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief is filed in compliance with the requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure. The brief is presented in Times New Roman, 14-point font.

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