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IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. SC12-1661
L.T. Case No(s).: 5D10-2410; 09-CA-22050; 07-CA-4191

FLORIDA INSURANCE
GUARANTY ASSOCIATION, INC.

Petitioner,

v.

WHISTLER'S PARK, INC.,

Respondent.

RESPONDENT, WHISTLER'S PARK, INC.'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

INTRODUCTION 1

SUMMARY OF THE ARGUMENT 8

LEGAL ARGUMENT

POINT 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** 9

POINT B: **The Fifth District was correct in its' holding that under the facts of the instant case FIGA could not show it was prejudiced by the lack of an EUO, and FIGA could still take an EUO at the present time if it so desired** 15

CONCLUSION 19

CERTIFICATE OF COMPLIANCE 22

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Cases

Allstate Floridian Ins. Co. v. Farmer, 104 So. 3d 1242 (Fla. 5th DCA 2013).........13

Amica Mutual Ins. Co. v. Drummond, 970 So. 2d 456 (Fla. 2nd DCA 2007)..........10

Bankers Ins. Co. v. Macias, 475 So. 2d 1216 (Fla. 1985) 8

Goldman v. State Farm Ins. Co., 660 So. 2d 300 (Fla. 4th DCA 1995)...................10

Gonzalez v. State Farm Florida Ins. Co., 65 So. 3d 608 (Fla.3rd DCA 2011) 17

Riviera South Apartments, Inc., v. QBE Ins. Corp., 2007 WL 2506682 *6 (S.D. Fla. 2007) 14

Shaw v. State Farm Fire & Casualty Co., 37 So. 3d 329 (Fla. 5th DCA 2010) 10

Southern Home Ins. Co. v. Putnal, 49 So. 922 (Fla. 1909) 10

Starling v. Allstate Floridian Ins. Co., 956 So. 2d 511 (Fla. 5th DCA 2007)..........10

State Farm Mutual Auto. Ins. Co. v. Curran, 83 So. 3d 793 (Fla. 5th DCA 2011) (en banc)...7

Statutes

Fla. Stat. §631.67..4, 15,16

PRELIMINARY STATEMENT

The Respondent below, Whistler's Park, Inc., will be referenced as "Whistler's Park." The Florida Insurance Guaranty Association, Inc., the Petitioner below, will be referenced as "FIGA." Non-party and insolvent insurer, Southern Family Insurance Company, will be referenced as "Southern Family." The Southern Family insurance policy at issue will be referenced as the "Southern Family Policy." Chapter 631, Part 2, Florida Statutes, will be referenced as the "FIGA Act." References to the original Record on Appeal will be designated as [R. Vol. #, Page #). References to the Fifth District's Record on Appeal will be referenced as (SC. Page #).

I. Introduction

Whistler's Park is a residential condominium complex located in Daytona Beach, Volusia County, Florida, consisting of two hundred twenty eight (228) residential condominium units in twenty four (24) condominium buildings, and other improvements. [R.Vol. 1, pp 1-44]. In or about October 2003, Southern Family offered to renew the commercial lines residential property insurance policy it previously sold to Whistler's Park[1] in exchange for a premium of $36,536.00. [R. Vol. 1, pp 1-44]. Whistler's Park accepted Southern Family's offer and timely

[1] Whistler's Park is the assignee of Banana Cay, Inc. The condominium complex is known as "Bristol Bay."

paid the premium. The intent and purpose of the Southern Family policy was to provide Whistler's Park with commercial lines residential property coverage, including but not limited to coverage for damages caused by a hurricane [R. Vol. 1, pp 1-44].

On August 13, 2004, while the Southern Family Policy was in full force and effect, Hurricane Charley struck Whistler's Park [R. Vol. 5, pp 643-645]. The Whistler's Park condominium buildings and other property sustained extensive damage due to the wind load caused by Hurricane Charley [R. Vol. 1, pp 1-44].

After Hurricane Charley struck a devastating blow to Whistler's Park, Whistler's Park made a timely claim to Southern Family for the damages it suffered during Hurricane Charley [R. Vol. 1, pp 1-44]. Southern Family adjusted the claim and determined that Whistler's Park had suffered hurricane damages above the policy deductible and paid policy benefits to Whistler's Park [R. Vol. 3, pp 327]. Despite Southern Family's payment, there were additional damages to the condominium buildings for which Southern Family did not compensate Whistler's Park [R. Vol. 5, pp 643-645]. In order to determine the actual damages caused to the property by Hurricane Charley, Whistler's Park hired a public adjuster, Mr. Thomas Stone, to inspect the property and prepare an estimate of damages [R. Vol. 5, pp 643-645].

Mr. Stone performed this task and prepared an estimate of damages and submitted the estimate to Southern Family in December, 2004 [R. Vol. 5, pp 643-

645]. Southern Family paid Whistler's Park a grand total of $363,635.79 in hurricane damages above the policy deductible [R. Vol. 3, pp 324-425]. From the time of the loss, until the final payment, Southern Family never requested an EUO [R. Vol. 4, pp 618-619; R. Vol. 5, pp 651-682]. Southern Family did not request an EUO after receiving Mr. Stone's estimate [R. Vol. 5, pp 643-645]. The purpose of the EUO requirement in an insurance policy is to allow the insurer to gather information from its insured to determine how best to proceed with the claim. In the instant case, all parties agreed that Whistler's Park sustained damages due to Hurricane Charley that exceeded the policy's deductible [R. Vol. 3, pp 324-425].
Southern Family inquired about an EUO for the first time in August, 2005, one year after Hurricane Charley struck Whistler's Park and **eight months** after receiving Whistler's Park's public adjuster's estimate [R. Vol. 5, pp 643-645]. Counsels for Southern Family and Whistler's Park discussed the EUO but never exchanged dates and no EUO was ever set by Southern Family [R. Vol. 5, pp 651-682]. Whistler's Park filed suit against Southern Family for breach of the insurance contract on December 27, 2005 [R. Vol. 3, pp 324-425]. In its' Initial Brief, FIGA suggests that it was somehow the responsibility of Whistler's Park to schedule its' own EUO. There is nothing in the policy or anywhere in Florida law that places such a duty on the insured. It is the carrier's duty to schedule an EUO pursuant to the policy. If an EUO is never scheduled, the insured is not obligated to do anything further [R. Vol. 1, pp 1-44].

Southern Family went into receivership in June, 2006 and FIGA was appointed as its substitute in April, 2006 [R. Vol. 4, pp 548-619]. Pursuant to *Fla. Stat.* §631.67, FIGA is entitled to a six (6) month stay from May 31, 2006 of any judicial proceedings in order to "permit proper defense by the association of all pending causes of action as to any covered claims" [R. Vol. 4, pp 548-619]. In other words, FIGA is granted a stay so that it may investigate any outstanding claims and either pay them or defend them [R. Vol. 4, pp 548-619]. FIGA is entitled to all the rights of the insolvent insurer in these cases, including the right to request an EUO. [R. Vol. 4, pp 548-619]. FIGA never requested an EUO. [R. Vol. 4, pp 618-619]. In fact, counsel for Plaintiff, Keith J. Lambdin, Esq., wrote to counsel for FIGA on January 15, 2007[2] advising that Mr. Ken Dixon was available for an EUO at any time [R. Vol. 4, pp 618-619 and R. Vol. 5, pp 640-642].[3] FIGA never responded. FIGA's corporate representative, Delene Loughran, testified at her deposition that FIGA was in possession of Mr. Stone's estimate at the time it received the file from Southern Family but did not investigate the claim any further at that time [SC. p A-10].

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[2] Whistler's Park did not file suit against FIGA until May 18, 2007, four (4) months after the renewed offer for an EUO was given [R. Vol. 1 pp 1-44].

[3] Whistler's Park was forced to file a separate action against FIGA because Judge Lauten, for reasons which are unclear, denied Whistler's Park's Motion to Substitute FIGA as the Defendant in the original 2005 action against Southern Family.

Following the filing of the 2007 lawsuit against FIGA, FIGA proceeded with some normal discovery that is typical of most litigation. FIGA conducted a re-inspection of the Whistler's Park property with their own experts, who took several hundred photographs and wrote written reports detailing their findings and conducted paper discovery as well [SC. A-19]. The only thing that FIGA did not do following its substitution for Southern Family was take the EUO of Ken Dixon [R. Vol. 4, pp 618-619].

Following FIGA's substitution for Southern Family, and the filing of the 2007 lawsuit, FIGA raised the defense of "failure of conditions precedent" in its initial response to Whistler's Park's Complaint [R. Vol. 1, p 119]. Judge Maura J. Smith initially struck that affirmative defense in November, 2008, giving FIGA twenty (20) days to amend its Affirmative Defenses. [R. Vol. 1, p 125]. FIGA failed to re-allege the defense of "failure of conditions precedent" with any specificity [R. Vol. 2, pp 131-142]. It was not until after nearly two years of litigation that FIGA filed a separate 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 [R. Vol. 2, pp 196-238] and requested leave to amend its

affirmative defenses for the second time to add "failure of conditions precedent" which was eventually granted by the trial court.[4]

FIGA moved for a summary judgment on that issue on August 28, 2009 [R. Vol. 3, pp 324-425]. Whistler's Park responded on November 6, 2009 [R. Vol. 3, pp 444-495]. A hearing was held on FIGA's Motion for Summary Judgment on February 2, 2010 [R. Vol. 5, pp 646]. Finally, on April 19, 2010, Judge Frederick Lauten granted FIGA's Motion for Summary Judgment, finding that Whistler's Park had failed to comply with conditions precedent [R. Vol. 5 pp 647-650]. Judge Lauten held that "[d]efendant's assignor did not sit for a requested examination under oath prior to the filing of the 2005 lawsuit" [R. Vol. 5, p 649]. Judge Lauten did not specifically hold that Whistler's Park had willfully not complied with the policy [R. Vol. 5 pp 647- 650].

Whistler's Park moved for Reconsideration and Clarification on the grounds that the trial court had not made the necessary finding of willful noncompliance with the insurer's request for an EUO and that the trial court had failed to order or

[4] The 2005 lawsuit by Whistler's Park against Southern Family was dismissed on August 6, 2009. The "offending" lawsuit, as FIGA describes it, which allegedly caused a breach of the Southern Family policy, is not the lawsuit this appeal is taken from. Any reference in FIGA's Initial Brief to the 2005 lawsuit is a "red herring" meant only to confuse and obfuscate the relatively simple facts of the instant matter.

advise on the outcome of the case; specifically whether or not the case could be stayed or abated to allow for compliance with the insurance policy to avoid a forfeiture that is disfavored under Florida law [R. Vol. 5, pp 651-682].

Whistler's Park appealed the summary judgment to the Fifth District Court of Appeals [R. Vol. 5, pp 687-693]. Several days before oral argument, the Fifth District decided the case of State Farm Mutual Auto. 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 against Southern Family 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 [SC. pp 70-81]. The Court found that FIGA did not schedule an EUO and that there was no explicit refusal of Banana Cay[5] or Whistler's Park to appear for an EUO, and thus, there could be no violations of

[5] 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 [R. Vol. 5, pp 643-645].

conditions precedent or subsequent and that the right to recovery under the subject insurance policy could not be compromised [SC. pp 70-81].

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. 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. Moreover, the necessity for an insurer to show prejudice in breach of cooperation clause cases like this one has been well established since Bankers Ins. Co. v. Macias, 475 So. 2d 1216 (Fla. 1985).

Further, it is completely disingenuous for FIGA to assert at this time that it was somehow prejudiced by the lack of an EUO in this matter. FIGA had an opportunity to conduct an EUO in 2007 during the statutory stay yet failed to do so [R. Vol. 5, pp 640-642]. FIGA again failed to even request an EUO after counsel for Whistler's Park specifically offered to cure any supposed problem by

producing the insured for an EUO in January, 2007 [R. Vol. 5, pp 640-642]. FIGA cannot now claim that it is somehow prejudiced because it allowed several years of dispute and litigation to go by without requesting or scheduling the EUO.

III. 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 the 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 insured's **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 the mere act of filing a lawsuit. Shaw v. State Farm Fire & Cas. 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 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, and where prejudice is rightly presumed. 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. In all these scenarios an insurer does not need to show prejudice because the prejudice is presumed; 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. If an insured fails to attend or refuses to attend a properly scheduled EUO (or compulsory medical examination as in Curran), the claims of the insured can be lost. However, in this case, FIGA is clearly playing

"gotcha" adjusting. It is clear that FIGA never actually wanted or needed an EUO to adjust this claim. If it had, it surely would have done so when an EUO was offered by counsel for Whistler's Park. FIGA's failure to take advantage of both Whistler's Park's offer, and its mandatory statutory stay, belies any notion that FIGA might have been prejudiced by the lack of an EUO. FIGA had not even been sued when the EUO was offered by Mr. Lambdin in January, 2007 [R. Vol. 5, pp 640-642].

Specifically, in the instant case, Whistler's Park allowed its insurer to inspect the property [R. Vol. 5, p 655]. Whistler's Park never refused to appear for an EUO or claimed that FIGA or Southern Family had waived the right to take one [R. Vol. 5, pp 643-645]. All Whistler's Park did was file a lawsuit before an EUO was actually taken. A suit which was ultimately dismissed by Whistler's Park. Whistler's Park still offered to appear for an EUO which FIGA declined to take prior to the instant lawsuit being filed against FIGA [R. Vol. 5, pp 640-642].

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 where there is no refusal to attend or failure to attend a properly scheduled EUO.

Specifically, the rule requiring an insurer to show and prove prejudice in scenarios similar to the one in the instant case is not new and has been the law of the State of Florida since 1985. See Macias 475 So. 2d 1216, 1218. In Macias, this Court held that in a breach of cooperation clause case, the insurer must show a material failure to cooperate which substantially prejudiced the insurer. Id.[6] This general rule has been upheld numerous times over the last 26 years, including in Allstate Floridian Ins. Co. v. Farmer, 104 So. 3d 1242 (Fla. 5th DCA 2013) (A failure to cooperate clause sometimes relieves an insurer of liability but as a condition subsequent it is proper to place the burden of showing prejudice on the insurer.)

Moreover, FIGA continually states in its Initial Brief that any offer by Whistler's Park to appear for an EUO was somehow ineffective because "Banana Cay" did not agree to appear. However, this is merely a distinction without a

[6] Even if this Court believes that an EUO provision in the subject policy is a condition precedent, rather than cooperation clause, prejudice is still an issue under Macias. Specifically, this Court held that where it is alleged that the insured violated a condition precedent, the condition can still be avoided, and forfeiture of the policy benefits avoided if the insured can allege and show that the insurer was not prejudiced by any noncompliance with the condition. Id. at 1218. In the instant case, the facts are clear that FIGA chose not to conduct an EUO when it had the opportunity and was otherwise not prejudiced by an action of the insured.

difference as Banana Cay and Whistler's Park are privately held corporations owned by the same person, Ken Dixon [R. Vol. 5, pp 643-645 and R. Vol. 5, p 655]. Whistler's Park was merely assigned this claim prior to the turnover of Banana Cay from the developer to the condominium association [R. Vol. 5, pp 647-650]. FIGA would receive exactly the same information from Ken Dixon even today whether he would have appeared as a representative of Banana Cay or Whistler's Park [R. Vol. 5, p 655]. Additionally, FIGA also attempts to mislead this Court with the notion that somehow Mr. Dixon and his attorneys were responsible for providing dates for the EUO. There is simply no responsibility on behalf of the insured under any case law or statute to do the insurance company's job for them. All that the insurance policy in this case, and all of the others cited require, is that if an EUO is demanded and properly scheduled that the insured appear to be examined. Here, neither Southern Family nor FIGA ever scheduled an EUO [SC. p 70-81]. FIGA never even requested one [SC. p 70-81 and R. Vol. 5, pp 640-642]. If either entity had scheduled such an EUO, Mr. Dixon would have appeared [R. Vol. 5, pp 643-645]. The courts have determined that unless an insured fails to attend a **scheduled** EUO or **otherwise refuses to comply** with requests to schedule an EUO the contract will not be voided. Riviera South Apartments, Inc., v. QBE Ins. Corp., 2007 WL 2506682 *6 (S.D. Fla. 2007).

FIGA's actions in this case are precisely the type of "gotcha tactics" the Fifth District was trying to stop in its opinions in both the instant case and Curran.

As pointed out by the Fifth District, "these decisions have led to a cottage industry of EUO litigation" and that "[t]he actual, if unglamorous true purpose of the EUO-verification of the insured's loss-has been lost in this larger battle." (SC. pp 70-81). There has been no reason ever given why FIGA could not have conducted the EUO in January of 2007.

If an insured can have his policy benefits forfeited for willfully refusing to appear for an EUO, then surely an insurer should at least be obligated to schedule an EUO. This is especially true when one is offered by the insured and refused by the insurance company. At the very least, FIGA must explain itself for refusing to schedule or ever request an EUO. In circumstances such as these, FIGA should at least have been required to prove it was prejudiced by having to take the EUO after the filing of a lawsuit.

B. THE FIFTH DISTRICT WAS CORRECT IN ITS' HOLDING THAT UNDER THE FACTS OF THE INSTANT CASE FIGA COULD NOT SHOW IT WAS PREJUDICED BY THE LACK OF AN EUO, AND FIGA COULD STILL TAKE AN EUO AT THE PRESENT TIME IF IT SO DESIRED

When FIGA steps in for an insolvent insurer, such as Southern Family, it is given an automatic six (6) month stay of any pending litigation in order to perform any investigation it deems necessary and pay legitimate claims. *Fla. Stat §631.67* [R. Vol. 4, pp 548-619]. FIGA is a governmental entity that was created in order to ensure that the citizens of the State of Florida would have some recourse if their

insurance company became insolvent and could no longer pay out its claims. FIGA is funded by the insurance companies, who account for such funding in the amount of premiums they charge their customers. *Fla. Stat §631.67*

Much like it does in its other arguments; FIGA ignores the specific facts of this case and instead attempts to focus the Court's attention on more general and broad principles of law which the Fifth District **did not change** in its opinion.

In its Initial Brief, FIGA laments that it has been over nine (9) years since Hurricane Charley struck Florida and "over seven (7) years since Southern Family requested documentation in support of Banana Cay's claim and its representative's examination under oath." Unfortunately for FIGA, Southern Family performed a thorough investigation of this claim and did in fact pay $363,635.79 to Banana Cay [R. Vol. 5, p 655]. Southern Family visually inspected the property and apparently did all the investigation it needed to do. All that is left is a dispute as to the amount of damage, not whether there was in fact any damage. This is simply a dispute as to the ultimate scope of damages caused by a covered event, Hurricane Charley.

Moreover, after Southern Family's insolvency, FIGA chose willingly to perform no investigation during the six month stay [SC. p A-10]. This is despite the fact that counsel for WHISTLER'S PARK offered to produce Mr. Dixon for an

EUO[7] [R. Vol. 5, pp 640-642]. FIGA instead chose to do nothing. FIGA litigated this matter for more than one year, prior to obtaining new counsel who sprung this lack of conditions precedent argument on WHISTLER'S PARK and on the court, literally, on the eve of trial after it had previously been stricken [R. Vol. 2, pp 196-238]. The FIGA statute did not contemplate such behavior on the part of FIGA and FIGA should not be rewarded for its own failure to properly investigate this claim, as it seeks to be here.

Additionally, FIGA has never offered an explanation as to why (if it was so important to their investigation of the claim) it did not request or schedule an EUO despite multiple offers by counsel for Whistler's Park to appear for an EUO [R. Vol. 5, pp 640-642].

It is clear from the record that neither Banana Cay, nor WHISTLER'S PARK, ever **refused to appear for an EUO** [R. Vol. 5, pp 624-645]. It is also undisputed that Southern Family never scheduled an EUO [SC.70-81]. The record also indicates that FIGA never requested an EUO, formally or informally, during the mandatory six month stay of litigation once FIGA stepped into the shoes of the liquidated insurance company, or at any time thereafter [SC. 70-81]. FIGA cannot hide behind its own delay and then seek to profit from it. It is undisputed that an

[7] As it is undisputed that FIGA was offered an EUO in 2007, FIGA cannot rely on Gonzalez v. State Farm Florida Ins. Co., 65 So. 3d 608 (Fla. 3rd DCA 2011), for the proposition that an offer to appear for an EUO "only in the face of an imminent ruling" against the insured is too late to cure the potential breach.

EUO was unequivocally offered to it in January, 2007 by Mr. Lambdin [R. Vol. 5, pp 640-642]. FIGA ignored the offer. It cannot now claim, as it does in its Initial Brief, that it is prejudiced by the simple passage of time. See Macias 475 So. 2d 1216, 1218 and Farmer 104 So. 3d 1242, 1248.

FIGA's strategy was clearly an attempt at "gotcha" adjusting, as the Fifth District recognized. It chose not to request an EUO in order to maintain its "defense" that the policy was breached by the filing of the original lawsuit against Southern Family (a suit that was ultimately dismissed). FIGA failed to comply with its statutory imperative, which is to investigate all covered claims.

Under the facts of the instant case, there is no conceivable way that FIGA could ever show it was prejudiced by the failure to obtain EUO testimony when FIGA itself chose not to take Mr. Dixon's EUO after it was offered to it [R. Vol. 5, pp 640-642]. FIGA cannot create its' own breach. FIGA cannot drop its defense of "failure of conditions precedent" for two years and then claim to be prejudiced by its failure to secure an EUO. On the eve of trial, FIGA sprung a trap on Whistler's Park, raising long dormant affirmative defenses and jumping through several procedural hoops to not only knock the instant case off the trial calendar, but to obtain a second and eventual third bite at the apple to eliminate the policy benefits rightfully due Whistler's Park.

Whistler's Park is relying on the same estimate given to Southern Family by Banana Cay in December, 2004 [R. Vol. 5, p 655]. Its corporate representative is

the same person, Mr. Ken Dixon, who would have testified in 2005. FIGA has performed its own re-inspection of the property and has obtained its own expert reports and estimates [SC A-19]. There has been simply no harm to FIGA whether or not an EUO ever is taken or not. This is not a case where the insured is hiding the property or evading the insurance company. The damages to the property are still evident. There are over **nine hundred** pictures of the property taken shortly after the hurricane by both Mr. Stone and Southern Family's own adjusters which clearly evidence the damages to the buildings [R. Vol. 5, p 655].

IV. Conclusion

The Fifth District's holding in the instant case was correct. Despite FIGA's many protestations, the Fifth District's opinion did not overturn or irrevocably change 100 years of law. What the Fifth District did was merely bring much needed clarity to the law regarding EUOs and conditions precedent in insurance policies when certain facts are present. The Fifth District was correct when it determined that in cases such as the instant one, where there has been no direct, willful refusal to comply with a request for an EUO, then an insurance company (or FIGA) cannot simply lay in wait for the insured to file suit and then seek to have the policy voided on the basis of failure to comply with the request for an EUO that was never scheduled.

Nothing in the Fifth District's opinion changes the underlying law in Florida that complying with a request for an EUO is typically a condition precedent to the

recovery of benefits under the policy. All the court did was take that law one step further and apply it to the facts of this case. Here, where no EUO was ever actually scheduled, and there was no failure to appear or explicit refusal to appear, the mere fact of filing a lawsuit should not completely bar an insured's right to recovery unless the insurer can show some prejudice.

Further, based on the actions of both Southern Family and FIGA in this case, it is clear that neither suffered any prejudice due to the lack of an EUO (which was caused by their own actions), Southern Family was given unfettered access to the property following Hurricane Charley and eventually made payment to Banana Cay for over $300,000.00. The only dispute was over how much more money, if any, was owed to Whistler's Park. Following Southern Family's insolvency, FIGA chose to do no investigation of this claim during its statutory six month claim, despite being explicitly offered the EUO that FIGA now claims to have desperately needed. Moreover, following the six month stay, FIGA conducted its own re-inspection of the subject property and participated in discovery during litigation. It was only on the eve of trial that FIGA played the "EUO card" that eventually led to this Court. Given all that FIGA has done to investigate this claim, to determine whether or not it should be paid, how could it possibly have been prejudiced by the lack of an EUO, particularly where it refused to take that EUO when offered over six years ago? FIGA cannot now claim that it has been prejudiced by the passage of time, when it was FIGA itself who allowed that time to pass.

This Court should affirm the opinion of the Fifth District Court of Appeals and remand this matter back to the trial court for trial on the merits.

Respectfully submitted on August 14th , 2013.

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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 Answer Brief is Times New Roman, 14-point font, proportionately spaced.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on August 14, 2013, a true and correct copy of the foregoing was furnished via e-mail to Hinda Klein, Esq., hklein@conroysimber.com and Eservicehwdappl@conroysimberg.com, Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow & Schefer, P.A. 3440 Hollywood Blvd, Second Floor, Hollywood, FL 33021 and Davis Lewis, Esq., DLewis@hightowerlaw.net and hhughes@hightowerlaw.net, Hightower , Stratton, Wilhelm, 7380 W. Sand Lake Road, Suite 395, Orlando, FL 32819.

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