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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,

**PETITIONER FLORIDA INSURANCE GUARANTY ASSOCIATION,
INC.'S, INITIAL BRIEF ON THE MERITS**

Respectfully submitted by,

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II. If this Court approves the Fifth District's opinion in this case, it must remand the case to the trial court for further proceedings because the Fifth District's observation that FIGA never plead nor proved its prejudice arising from Whistler's Park's premature filing of its Complaint before Banana Cay complied with its policy conditions was a denial of due process in light of the fact that the Fifth District's finding that prejudice must be proven before the Court may find a material breach of the policy was contrary to the law existing at the time of the summary judgment; the failure to do so will result in a denial of FIGA'S due process rights.

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PREFACE

The Petitioner THE FLORIDA INSURANCE GUARANTY ASSOCIATION, INC. will be referred to as FIGA. The Appellant WHISTLER'S PARK, INC. will be referred to in this Brief as WHISTLER'S PARK.

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 designated as (SC.Page #)

POINTS ON APPEAL

- I. **The Fifth District's opinion that the insured's compliance with Southern Family's reasonable request for a document review and examination under oath was not a condition precedent to suit against the carrier conflicts with the law throughout this state holding that a breach of these conditions is a material breach of the policy, regardless of whether the carrier has been prejudiced by the insured's failure or refusal to comply because the insurer's deprivation of an opportunity to investigate the claim, and possibly settle it presuit, is prejudicial, as a matter of law.**

- II. **If this Court agrees with the Fifth District that in a property insurance policy, the condition that the insured attend an examination under oath and permit a review of the insured's records is not a condition precedent, but is instead a condition subsequent requiring a showing of prejudice in order to warrant a forfeiture of policy benefits, FIGA should be provided the opportunity to prove its prejudice.**

STATEMENT OF THE CASE AND FACTS

Overview

This appeal arose from a summary judgment rendered in favor of FIGA, as successor to Southern Family Insurance Company, against WHISTLER'S PARK, in which the Circuit Court found that WHISTLER'S PARK was not entitled to recover property insurance benefits for damage allegedly sustained in Hurricane Charley on August 13, 2004. WHISTLER'S PARK was the successor in interest to Southern Family's insured, Banana Cay, who owned the 24 building Bristol Bay Apartments. At the time of the loss, Bristol Bay was insured by Southern Family, and before this suit was filed, the carrier paid \$363,635.79 on Banana Cay's claim shortly after it was filed. WHISTLER'S PARK filed a supplemental claim, which was not denied before it brought this litigation against Southern Family, and thereafter FIGA, seeking payment of an additional \$2,578,432.66 in insurance benefits, including a new claim for business interruption damages which was prepared with the assistance of a public adjuster.¹

After Banana Cay filed its supplemental claim, Southern Family's counsel requested that its representative appear for an examination under oath at the

¹ Although under Florida Statute § 631.57 FIGA is generally limited to paying \$300,000 per claim, the trial court granted a partial summary judgment in favor of WHISTLER'S PARK finding that the \$300,000 per claim limit applied to each building and therefore, WHISTLER'S PARK is seeking to recover the entire amount of its supplemental claim against FIGA.

insured's convenience and produce certain documents for the carrier's review. After receipt of this request, Banana Cay assigned its insurance claim to WHISTLER'S PARK, but never advised Southern Family of that assignment. Instead, Banana Cay's counsel, James Basque, acknowledged Southern Family's request for documents and an examination under oath and responded that "his client" was assembling the requested documents, which would be available for review at his client's office in mid-January, 2006. Mr. Basque told Southern Family the name of the corporate representative who would sit for the examination under oath, but he did not provide the carrier with any proposed date for the examination. On the same day Mr. Basque sent this correspondence, WHISTLER'S PARK filed suit against Southern Family, in its capacity as Banana Cay's assignee, alleging that Southern Family breached its contract with Banana Cay and seeking its insurance benefits.

Southern Family raised Banana Cay's failure to comply with its requests for documentation and an examination under oath as an affirmative defense and almost immediately moved for summary judgment on that defense. Before that motion was heard, the carrier became insolvent and FIGA was substituted as the defendant in a separate lawsuit against it. FIGA moved for, and was granted, final summary judgment on the same grounds raised by Southern Family.

On appeal, the Fifth District reversed the summary judgment and found that, on the authority of State Farm Mutual Automobile Ins. Co. v. Curran, 83 So. 3d 793 (Fla. 5th DCA 2011), which was issued less than a week before the oral argument in this case, the summary judgment would be reversed because Southern Family's policy did not expressly state that the failure to comply with the conditions in the policy would result in a forfeiture of the insured's benefits. The Fifth District also found that FIGA had not plead nor proven actual prejudice resulting from Banana Cay's breach of the policy such that it would be entitled to deny coverage on the grounds of Banana Cay's breach of "conditions subsequent".

FIGA filed motions for rehearing, rehearing en banc and certification on numerous grounds, all of which were denied by the Fifth District. FIGA sought this Court's review of the appellate court's decision on the grounds that its decision is in express and direct conflict with this Court's precedent, as espoused in Southern Home Ins. Co. v. Putnal, 57 Fla. 199, 49 So. 922 (Fla. 1909), as well as its progeny from all of the other appellate courts in this State, **all** of which have held that a property insured's failure to comply with these and similar policy conditions bars the insured's recovery under the policy, without a showing of prejudice. In its Jurisdictional Brief, FIGA advised this Court that it is currently considering Curran, as well as a case certified to this Court by the federal Eleventh Circuit Court of Appeal, Nunez v. Geico General Ins. Co., 685 So. 3d 1205 (11th

Cir. 2012), both of which involve breaches of conditions in Uninsured Motorist and Personal Injury Protection policies, respectively.²

On April 24, 2013, this Court accepted jurisdiction, and this Brief on the Merits follows.

Statement of the Facts

WHISTLER'S PARK'S assignor Banana Cay Apartments, Inc., d/b/a Banana Cay³ (hereinafter "Banana Cay") filed a property damage claim with its insurer Southern Family for damage allegedly suffered as a result of Hurricane Charley which occurred in August of 2004. (RII.265) Southern Family paid \$363,635.79 on that claim shortly after receipt.

Banana Cay hired a public adjuster, after which it filed a supplemental claim for property damage and business interruption proceeds. (RV.640-641) On August 18, 2005, Southern Family's counsel Alec Russell wrote to Banana Cay requesting that its representative produce certain enumerated documents for Southern Family's review within 30 days and appear for an examination under oath at his or her convenience within 60 days. (RII.312-314) Mr. Russell also requested that Banana Cay forward the correspondence to its attorney and that the

² As of this writing, this Court has issued its opinion in Nunez, but Curran remains pending.

³ At the time that it was insured by Southern Family, the Bristol Bay Apartments was insured as a commercial property. (RII.267) It has since been converted to condominiums.

attorney or insured should contact Mr. Russell's office to schedule the examination at a mutually convenient time. (RII.313) Mr. Russell indicated that if Banana Cay needed additional time to compile the requested records, he would work with the insured. (RII.313) On September 27, 2005, Banana Cay assigned its insurance claim to WHISTLER'S PARK but never advised Southern Family about the assignment.⁴ (RII.310)

On September 13, 2005, Mr. Basque wrote Southern Family acknowledging receipt of the carrier's request for EUO and documents, and requested that all future correspondence be directed to him as counsel for Banana Cay. (RII.315) Mr. Basque did not otherwise address the content of Southern Family's correspondence requesting an examination and production of documents, nor did he ever advise Southern Family that Banana Cay's insurance claim had been assigned to WHISTLER'S PARK. (RII.315)

On December 13, 2005, Mr. Russell wrote to Mr. Basque acknowledging receipt of Mr. Basque's correspondence and he reiterated Southern Family's requests for an examination under oath and relevant documentation. (RII.316) On December 20, 2005, Mr. Basque responded to Mr. Russell that "his client" was assembling the documents and would have them available for review sometime in

⁴ Southern Family only discovered the assignment when it was served with WHISTLER'S PARK'S Complaint, in which it was alleged that WHISTLER'S PARK was Banana Cay's assignee.

mid- to late-January, 2006 at his client's office in Kissimmee, Florida. (RII.317, 319) Mr. Basque designated Kenneth Dixon as the individual who would appear at an examination under oath, but he did not offer Southern Family any dates for Mr. Dixon's examination. (RII.317) On the same day, WHISTLER'S PARK filed suit against Southern Family in its capacity as Banana Cay's assignee, alleging that Southern Family breached its policy. (RII.303, 319)

On January 30, 2006, Southern Family answered the Complaint, moved to dismiss Count II for statutory bad faith, and raised affirmative defenses to Count I for breach of contract, including the defense that Banana Cay failed to comply with Southern Family's requests for an examination under oath. (RII.303) On March 31, 2006, the carrier moved for summary judgment on the grounds that Banana Cay failed to comply with conditions precedent to suit and attached the aforementioned correspondence as supporting evidence. (RII.307-309, 310-317, 318-320, RIII.359-369).⁵ WHISTLER'S PARK filed no written response to the motion for summary judgment before that motion was considered by the trial court. (RII.302-306, 371)

After the motion for summary judgment was filed but before it was heard, Southern Family became insolvent and on May 2, 2006, a notice of appointment of

⁵ At no time before summary judgment was granted in Southern Family's or FIGA'S favor did WHISTLER'S PARK ever dismiss its claim without prejudice or move to abate pending Banana Cay's compliance with Southern Family's presuit requests. (RII.302-306).

a receiver and stay was filed. (RIII.371) Although FIGA had not been substituted as the party Defendant by the time of the hearing, its counsel appeared at the hearing on Southern Family's behalf and no one appeared for WHISTLER'S PARK because its counsel believed that the hearing had been cancelled and the entire case stayed. (RIII.305, 371) On February 13, 2007, the trial court, Honorable Frederick Lauton presiding, granted Southern Family's motion for summary judgment. (RII.316-320)

WHISTLER'S PARK filed a Motion for Rehearing and Sanctions asserting that since Southern Family had been liquidated and the case should have been stayed, the trial court should not have granted Southern Family's motion when the appropriate party defendant, who had not yet been substituted, was FIGA. (RIII.375-377) WHISTLER'S PARK argued that since FIGA had not been substituted as the party defendant before the Court considered the motion, the Court's order granting Southern Family summary judgment was a nullity. (RIII.378)

In its motion for rehearing, WHISTLER'S PARK also asserted that "[n]o EUO was ever scheduled by Southern Family and one was never even requested by FIGA." (RIII.376) WHISTLER'S PARK asserted that it had offered FIGA an opportunity to take its representative's examination under oath pursuant to an attached letter written by its then-counsel Keith Lambdin on January 15, 2007,

more than a year after WHISTLER'S PARK filed suit against Southern Family. (RIII.376) Mr. Lambdin, wrote to Ryan Hayes, then counsel for FIGA, in which Mr. Lambdin indicated that WHISTLER'S PARK "is ready and willing to move forward with an Examination Under Oath or deposition." (RIII.376, 644) WHISTLER'S PARK sought rehearing on the grounds that "[t]he Plaintiff was ready willing and able to participate and Southern Family chose not to schedule the EUO even after receiving written confirmation of the intent **of the Plaintiff** to cooperate in the EUO process." (RIII.376)(emphasis added) The motion did not attach any sworn testimony or other evidence that **Banana Cay**, Southern Family's insured, ever provided the carrier or FIGA the opportunity to take **its** representative's examination under oath before **or after** suit was filed, nor did the motion for rehearing assert any reason why WHISTLER'S PARK filed suit on the same day Banana Cay advised Southern Family of its intent to provide Southern Family with documentation and to comply with the carrier's request for a sworn statement. (RIII.375-377) Judge Lauton granted the motion for rehearing and ordered that its prior January 17, 2007 order granting summary judgment was a nullity. (RIII.378)

After that summary judgment was vacated, WHISTLER'S PARK abandoned, but did not dismiss, the 2005 litigation and in 2007, it filed this lawsuit naming FIGA as the Defendant.⁶ (RI.1-38)

FIGA proceeded to defend the lawsuit on the merits. (RI.118-121) In 2009, it filed a Declaratory Judgment action raising Banana Cay's breach of Southern Family's policy conditions as grounds for denial of WHISTLER'S PARK'S claim:

E. Loss Conditions

The following conditions apply in addition to the Common Policy conditions and the commercial Property Conditions.

3. Duties in the Event of Loss or Damage

...

b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

(RII.260)(emphasis added)

The policy further provided:

D. LEGAL ACTION AGAINST US

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

⁶ In its Motion to Transfer the Declaratory Judgment action to Judge Smith, WHISTLER'S PARK represented that the action had been pending since 2007, and made no mention of the 2005 litigation that it abandoned. (RII.239)

- 1. There has been full compliance with all of the terms of this Coverage Part; and**
- 2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.**

(RII.260)(emphasis added).

FIGA moved to consolidate the 2007 and 2009 actions and to transfer the case to the Complex Business Litigation Court where it was assigned to Judge Lauton, the original judge in the 2005 case against Southern Family. (RII.145-156, 168, 173-174, 247-255) When FIGA'S counsel later discovered the 2005 litigation, WHISTLER'S PARK dismissed the earlier suit. (RV.647)

In the 2007 litigation, WHISTLER'S PARK alleged that Southern Family and FIGA "were afforded every opportunity to investigate the claim" and "have affirmatively denied and/or failed to properly pay [WHISTLER'S PARK'S] claim" and further alleged that WHISTLER'S PARK complied with all conditions precedent or the conditions precedent contained in the policy had been waived." (RI.2-3) FIGA specifically denied the foregoing allegations and raised the failure to comply with the conditions precedent set forth in the policy as an affirmative defense. (RI.119)

On WHISTLER'S PARK'S motion, Judge Smith struck that affirmative defense because it had not been sufficiently plead. (RI.125) The affirmative defenses was never replead, but FIGA'S denial of WHISTLER'S PARK'S

allegation that all conditions precedent were complied with or waived, remained in its Answer and Banana Cay's failure to comply with the policy conditions was explicitly raised as grounds for declaratory relief in the 2009 action, which was consolidated with the 2007 litigation. (RI.168, 173-174)

FIGA moved for summary judgment on the issue of whether WHISTLER'S PARK filed the 2005 litigation before Banana Cay complied with the conditions precedent of appearing for a requested EUO with Southern Family and providing the carrier with the documents it specifically requested. (RIII.324-425) As support for the summary judgment, FIGA filed Southern Family's correspondence to Banana Cay requesting certain documents and its representative's examination under oath and Mr. Basque's response identifying the corporate representative designated for examination and further stating that the insured would make its documents available for Southern Family's review in mid- to late-January, 2006. (RIII.364-369) FIGA established that WHISTLER'S PARK filed suit on the same day Banana Cay's counsel told Southern Family that his client would comply with its request for a document review and sworn statement and that Banana Cay never provided either.

WHISTLER'S PARK opposed the motion and filed several affidavits, included the affidavit of Banana Cay's corporate representative Kenneth Dixon conceding that Southern Family had requested his examination under oath and

Banana Cay's production of documents before suit was filed but, stating that "to [his] knowledge", Southern Family never actually scheduled an examination. (RV.641) Mr. Dixon also attested that FIGA never scheduled his examination under oath and that he never refused to produce documents. (RV.640-641)

WHISTLER'S PARK also filed Keith Lambdin's affidavit, in which Mr. Lambdin asserted that on January 17, 2007, well after the 2005 suit was filed, he sent a letter to Ryan Hayes, FIGA'S then-counsel, indicating that WHISTLER'S PARK was willing and prepared to provide an Examination Under Oath or deposition. (RV.643-644) Mr. Lambdin asserted that that FIGA never requested an Examination Under Oath after taking over from Southern Family and that **WHISTLER'S PARK** "remains ready willing and able to comply with the Examination Under Oath and Document inspection". (RV.643-644) No mention was made of Banana Cay or Southern Family's pre-suit requests for compliance with the policy. (RV.643-644)

James Basque, WHISTLER'S PARK'S counsel in 2005-2006, attested in his affidavit that during the time he represented WHISTLER'S PARK, Southern Family never set a date for its Examination Under Oath and **WHISTLER'S PARK** never failed to appear for such an examination. (RV.632-633) Inconsistently, Mr. Basque recounted that on December 20, 2005, he sent correspondence to Alex D. Russell, an attorney for Southern Family, indicating

that “our client”, who he had previously identified in his September 13, 2005 correspondence as **Banana Cay**, was in the process of assembling documents in response to the carrier’s request and provided Southern Family with the name of its representative Kenneth Dixon for the purposes of an examination under oath. (RIV.592, 594, RV.633) Mr. Basque then stated “[u]ltimately, a Complaint was filed to protect the interests of our client, **Whistler’s Park**”, but nowhere in the affidavit did he address why the case was filed before Banana Cay provided Southern Family with a date for the examination under oath, as requested, or why the carrier was never provided with a pre-suit opportunity to review the documents it requested. (RV.633-634)

Similarly, W. Marvin Hardy III, an attorney for Banana Cay, asserted that **WHISTLER’S PARK**, remained ready, willing and able to comply with Southern Family’s request to **Banana Cay** for an examination under oath and request for documents after suit was filed by **WHISTLER’S PARK**. (RV.625) Mr. Hardy echoed Mr. Basque’s affidavit and also attested that “[u]ltimately, a Complaint was filed on behalf of Whistler’s Park, Inc. to protect the interests of our client, **WHISTLER’S PARK, INC.**,” but like Mr. Basque, Mr. Hardy did not otherwise explain why suit had to be filed before Banana Cay complied with the carrier’s requests. (RV.625) Mr. Hardy further set forth that “I have been involved in

litigation in which an insurance company conducted an Examination Under Oath after a lawsuit was filed against the insurance company.” (RV.626)

The trial court held a hearing on the motion, which was reported and the transcript has been included in the record on appeal as an exhibit to the Motion for Rehearing filed thereafter. (RV.646, 661-682) At the hearing on the motion, WHISTLER’S PARK’S counsel argued that since Southern Family’s affirmative defense of failure to comply with conditions precedent was stricken for failure to plead the defense with particularity and was never replead, FIGA was not entitled to summary judgment on that issue. (RV.669) On the merits, WHISTLER’S PARK never addressed why **Banana Cay** never attended an examination under oath or produced the documents requested by Southern Family, but only argued that **WHISTLER’S PARK** did not appear for an examination under oath because it was never given a date to appear. (RV.666) When Judge Lauton asked what interpretation he should give to WHISTLER’S PARK’S filing of the suit after Banana Cay agreed to Southern Family’s requests for a document review and examination, WHISTLER’S PARK’S counsel asserted that “the mere act of filing the suit isn’t a breach of the condition.” (RV.667) He also argued that because Southern Family paid in excess of \$300,000 to Banana Cay on the claim before the insured filed a supplemental claim, the carrier waived its right to enforce its policy language requiring compliance with its requests for additional information.

(RV.667-668) WHISTLER’S PARK also argued that even though **Banana Cay** did not comply with Southern Family’s requests for compliance with the conditions precedent in the policy, FIGA was required to have given **WHISTLER’S PARK** a second opportunity to do so after it succeeded Southern Family in this litigation. (RV.667)

Judge Lauton asked WHISTLER’S PARK’S counsel whether there was any law providing that FIGA had to reassert any defenses the former carrier had or any law requiring that FIGA begin an investigation again or run the risk of waiving its predecessor carrier’s legal defenses to the claim. (RV.669) Counsel responded that he did not have those cases with him.⁷ (RV.669)

FIGA asserted that WHISTLER’S PARK’S assignee’s failure to comply with conditions precedent had not been waived and that WHISTLER’S PARK itself alleged that it complied with all conditions precedent to suit and therefore, it was unnecessary to reassert a denial of that allegation in the form of an affirmative defense. (RV.670) In any event, FIGA argued that the issue was raised as part of the declaratory judgment action, which was consolidated with the subject action, and was therefore an appropriate and ripe subject for summary judgment. (RV.670) FIGA argued that pursuant to the law, it “stepped into the shoes” of the

⁷ WHISTLER’S PARK never provided any such case law to the Court after the hearing on the motion for summary judgment.

carrier it takes over such that it has the same defenses as did the carrier, and that WHISTLER'S PARK, as assignee, was subject to any defenses that would have been available against its assignor Banana Cay and that pursuant to the overwhelming weight of authority, the insured's failure to attend an examination under oath is a material breach of the policy regardless of whether it caused Southern Family or FIGA prejudice. (RV.670) However, FIGA noted, since WHISTLER'S PARK was seeking attorneys' fees from the inception of the litigation, it was in fact prejudiced because those fees might never have been incurred if Banana Cay had simply complied with Southern Family's requests before filing suit. (RV.670) Finally, FIGA argues that WHISTLER'S PARK had until at least August of 2009 within which to file suit on the claim to ensure that it was filed before the statute of limitations expired, such that it was unnecessary for WHISTLER'S PARK to file suit before Banana Cay complied with Southern Family's 2005 requests. (RV.671)

Judge Lauton granted FIGA'S Motion for Summary Judgment finding that Banana Cay failed to attend Southern Family's requested examination under oath and failed to comply with the carrier's document request at any time before WHISTLER'S PARK filed suit. (RV.649) Because full compliance with these requests was a condition precedent to filing suit and there was no evidence of even partial compliance, pursuant to Amica Mut. Ins. Co. v. Drummond, 970 So. 2d 456

(Fla. 2d DCA 2007), Banana Cay's failure to comply warranted final summary judgment against WHISTLER'S PARK, its assignee,. (RV.647-650)

WHISTLER'S PARK moved for rehearing, arguing that the Court did not address the question of whether it ever willfully failed to comply with Southern Family's request for an examination under oath and also failed to specify whether the Court's dismissal was without prejudice to permit FIGA to take WHISTLER'S PARK'S examination under oath. (RV.653-654) For the first time in the two and a half years since Banana Cay filed its Supplemental Claim and Southern Family requested certain documents and an examination under oath, WHISTLER'S PARK suggested that the case be stayed or abated in order to enable **the insured** to comply with the conditions precedent to suit. (RV.656) In the alternative, WHISTLER'S PARK suggested that the case be dismissed without prejudice. (RV.656) Finally, WHISTLER'S PARK argued that since it was relying on the same damage estimate that it provided Southern Family in 2005, FIGA had not been prejudiced by the premature litigation. (RV.655)

Judge Lauton denied rehearing and the Final Judgment was entered in favor of FIGA on June 14, 2010 and June 30, 2010, and those Judgments were appealed by WHISTLER'S PARK on July 14, 2010.⁸ (RV. 683-684, 687-693)

⁸ It appears that both parties submitted their own Final Judgments and the Court signed both of them, not realizing that they duplicated one another.

The Appeal

On appeal, WHISTLER'S PARK argued that the trial court's summary judgment should be reversed because it never "willfully refused" to comply with policy conditions before filing suit and that the trial court should have applied the "proper remedy" of abating the action to enable it to comply with those conditions instead of granting a summary judgment in FIGA'S favor. In response, FIGA argued that the trial court correctly granted summary judgment in its favor because the insured, Banana Cay, failed to attend Southern Family's requested examination under oath and failed to produce the requested records before its assignee, WHISTLER'S PARK, filed suit. FIGA also argued that at no time before summary judgment was granted did WHISTLER'S PARK ever suggest the action should be abated, and it therefore waived that argument on appeal.

Shortly before the oral argument was scheduled, the Fifth District Court of Appeal granted rehearing en banc in State Farm Automobile Ins. Co. v. Curran, 83 So. 3d 793 (Fla. 5th DCA 2011)(en banc), and the Court notified the parties in this appeal to be prepared to address that opinion at the oral argument in this case. After oral argument, on the authority of in Curran, the appellate court reversed FIGA'S summary judgment finding that a breach of the post-loss conditions and "no action" clause in Southern Family's policy would not result in a forfeiture of benefits unless the insurer demonstrated its prejudice and the Court further found

that neither Southern Family nor FIGA was prejudiced by Banana Cay's failure to comply with Southern Family's requests for production of certain documents and an examination under oath. (SC.78-79)

In motions for rehearing, rehearing en banc and certification, FIGA argued that the Court's decision was contrary to a myriad of case law from both this Court as well as every other District Court of Appeal, holding that where an insured fails to comply with the conditions in a property insurance policy, the carrier will be entitled to a judgment in its favor on any subsequently filed breach of contract claim, without a showing of prejudice. (SC.82-98) FIGA also argued that since this was the law in effect at the time of the summary judgment, the appellate court's affirmative "finding" that Southern Family and FIGA had not been prejudiced by Banana Cay's failure to comply with these conditions was premature since the parties had no opportunity to address that issue before the Fifth District issued Curran. (SC.85-86) FIGA asserted that because the Fifth District's decision was contrary to its own prior precedent, it should grant rehearing en banc to enable the entire Court to consider whether it would recede from that precedent. (SC.91-92) In addition, FIGA argued, the Court's decision was also contrary to case law from this Court and other District Courts of Appeal such that it should certify its decision to this Court as in conflict with those cases. (SC.92-94) The Fifth

District denied all of the motions, and FIGA filed a Notice of Invoke this Court's jurisdiction. (SC.132-146)

After the parties filed their jurisdictional briefs on the issue of whether the Fifth District's decision was in express and direct conflict with cases from this and other Courts, this Court accepted jurisdiction. This Merits Brief follows.

SUMMARY OF ARGUMENT

The Fifth District's opinion that Banana Cay's failure to comply with Southern Family's request for a document review and an examination under oath was not a breach of condition precedent to coverage for its loss clearly conflicts with the governing law. Since 1909, the law in this state has always been that where an insured fails or refuses to comply with a property insurer's reasonable request for information before filing suit for breach of contract, and the policy expressly provides that no suit can be brought until the insured has fully complied with all of the conditions in the policy, the insured has materially breached the policy such that the carrier is entitled to deny coverage for the claim. The Fifth District's departure from this law expressly and directly conflicts with this Court's own precedent as well as that of District Courts throughout the state.

The Fifth District's opinion cannot stand because it was predicated on that Court's prior opinion in Curran, which addressed the enforceability of these conditions in a case for Uninsured Motorist benefits. Because Uninsured Motorist coverage, like Personal Injury Protection coverage, is statutorily regulated, those insurers may not include provisions in their policies that might be at odds with the governing statutes. The policy at issue in this case was a property policy that is not regulated and therefore, the Fifth District's Curran opinion did not compel the Court to find, as it did in that case, that Southern Family's policy conditions are

conditions subsequent, and not conditions precedent, the breach of which would constitute a material breach of the policy warranting denial of the claim. This is especially true in light of the fact that the policy language was perfectly clear, Southern Family's requests were reasonable and not abusive or unnecessarily intrusive and there is no evidence that Southern Family ever waived or should be deprived of its ability to investigate the claim before suit was filed.

In the event that this Court agrees with the Fifth District as to its interpretation of Southern Family's policy conditions as conditions subsequent that would only permit a denial of the claim if FIGA was able to demonstrate Southern Family's prejudice, then it should nevertheless quash the appellate court's opinion finding that FIGA could not prove such prejudice. During the entire pendency of this litigation, it was indisputably the law in this state that under these circumstances, an insurer did not have to prove its prejudice where, as here, the insured has breached policy conditions requiring compliance before suit can be filed against the insurer. As a result, the parties did not address that issue at the trial court level and the Fifth District's "finding" on this issue was premature and a denial of FIGA'S due process right to litigate an issue before the appellate court rules on it. Given that it has been nine (9) years since the hurricane and seven (7) years since Banana Cay was requested to provide Southern Family with

documentation and an examination under oath, FIGA will be able to establish that prejudice and should be given the opportunity to do so.

The Fifth District's opinion in this case must be quashed.

ARGUMENT

I. The Fifth District's opinion that the insured's compliance with Southern Family's reasonable request for a document review and examination under oath was not a condition precedent to suit against the carrier conflicts with the law throughout this state holding that a breach of these conditions is a material breach of the policy, regardless of whether the carrier has been prejudiced by the insured's failure or refusal to comply because the insurer's deprivation of an opportunity to investigate the claim, and possibly settle it presuit, is prejudicial, as a matter of law.

In 1909, this Court expressly adopted the holding of a Georgia case as its own, holding that “[a] requirement in a policy of fire insurance that the insured shall submit to an examination under oath touching the matters relating to the risk assumed by the company and the destruction of the property insured is binding and valid, **and a refusal to comply with this condition will preclude the insured from recovering upon the policy, where it provides that no suit can be maintained until after a compliance with such condition.**” Southern Home Ins. Co. v. Putnal, 57 Fla. 199, 231, 49 So. 922, 932 (Fla. 1909)(quoting Firemen's Fund Ins. Co. v. Sims, 115 Ga. 939, 42 S.E. 269 (1902)(emphasis added). All of the District Courts of Appeal, including the Fifth District, have, until now, followed this precedent. See, e.g., Citizens Prop. Ins. Corp. v. Igergane, 37 Fla. L. Weekly D2205 (Fla. 3d DCA, Sept. 12, 2012); Starling v. Allstate Florida Ins. Co., 956 So. 2d 511 (Fla. 5th DCA 2007); Amica Mutual Ins. Co. v. Drummond, 970 So. 2d 456 (Fla. 2d DCA 2007); Kramer v. State Farm Florida Ins. Co., 95 So. 3d

303 (Fla. 4th DCA 2012); Goldman v. State Farm Fire Gen. Ins. Co., 660 So. 2d 300 (Fla. 4th DCA 1995); Stringer v. Fireman’s Fund Ins. Co., 622 So. 2d 145 (Fla. 3d DCA 1995). Cf., Sweeney v. Citizens Property Ins. Corp., 43 So. 3d 842 (Fla. 1st DCA 2010)(Rowe, J., concurring)(opining that if the issue had been preserved for appeal, the trial court’s summary judgment in favor of Citizens would have been affirmed because the insured failed to appear for an examination under oath).

Southern Family’s policy language is substantively indistinguishable from that at issue in Putnal, The Building and Personal Property Coverage Form in Southern Family’s policy required Banana Cay to comply with Southern Family’s request for an examination under oath, as a condition precedent to recovery under the policy and to a suit for breach of contract:

E. Loss Conditions

The following conditions apply in addition to the Common Policy conditions and the Commercial Property Conditions.

3. Duties in the Event of Loss or Damage

...

b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured’s books and records. In the event of an examination, an insured’s answers must be signed.

(RII.260)

The policy further provides under Commercial Property Conditions, that:

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. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

Id. (emphasis added). Notwithstanding these clear and unambiguous conditions, and Banana Cay's noncompliance with its presuit agreement, WHISTLER'S PARK filed suit. After Southern Family expressly raised these conditions in its Answer and Affirmative Defenses and in a summary judgment motion filed within three (3) months after suit was filed, WHISTLER'S PARK never dismissed or sought to abate its action and at no time before Southern Family became insolvent, did **WHISTLER'S PARK** "offer" to comply with those conditions.⁹ Banana Cay, which is still in existence, has never advised Southern Family or FIGA that the documents Southern Family requested were available for inspection, nor has

⁹ WHISTLER'S PARK has never asserted that it was unaware of these conditions nor could it have done so because both Banana Cay and WHISTLER'S PARK had the same attorney, James Basque, Esq., who advised Southern Family that "his client" was in the process of compiling the requested documents within the 30 day deadline and that Kenneth Dixon would appear thereafter as Banana Cay's representative, although he never gave Southern Family a date convenient for the examination.

Kenneth Dixon ever provided anyone with a mutually convenient date for his examination under oath.¹⁰ These facts have never been in dispute and under the law existing throughout the pendency of this case, FIGA was properly granted summary judgment.

WHISTLER'S PARK, as Banana Cay's assignee, has no greater rights to those benefits than would Banana Cay, and the latter's indisputably material breach of Southern Family's policy precluded WHISTLER'S PARK from recovering under that policy.¹¹ See, Goldman, 660 So. 2d 300 insured's refusal to comply with demand for EUO is a willful and material breach of the insurance policy which will preclude the insured from recovery; policy provisions requiring insureds to submit to examination under oath were conditions precedent to suit and thus, insureds failure to comply precluded action on policy regardless of showing of prejudice by insurer). See also, Amica Mutual, 970 So. 2d 456 (Fla. 2d DCA 2007)(failure to submit to an EUO as requested by insurance carrier was a material breach of a condition precedent to insurer's duty to provide coverage under the

¹⁰ The Fifth District incorrectly found that "when FIGA raised the failure to submit to an EUO as a defense, the offer to submit [to an EUO] was renewed." (SC.79) At no time during this litigation did Banana Cay, the named insured and the only party requested and compelled to submit to an examination, "renew" a previous "offer" to submit to a sworn statement.

¹¹ See, Farkus v. Florida Land Sales and Dev. Co., 915 So. 2d 688 (Fla. 5th DCA 2005)(assignee succeeds to his assignor's rights under the contract and takes it with all of the burdens to which it is subject); Shreve Land Co., Inc. v. J & D Financial Corp., 421 So. 2d 722 (Fla. 3d DCA 1987)(same).

policies); Starling, 956 So. 2d 511 (a material breach of insured's duty to comply with conditions precedent relieves the insurer of its obligations under the contract).

Despite the abundant law holding that where a property insurance policy contains the requirement that an insured produce documents and attend an examination under oath at the carrier's request and no suit may be brought until the insured has complied with those requests, the Fifth District held that because FIGA never plead nor proved that Banana Cay's failure to comply with Southern Family's request prejudiced it, WHISTLER'S PARK could recover policy benefits regardless of its assignor's indisputable breach. The Fifth District relied on its own recent opinion in Curran as support for its conclusion that the policy conditions were not conditions precedent, as the trial court so found, but rather, the conditions were "conditions subsequent", the breach of which would only relieve the carrier of its obligation to pay benefits if it demonstrated its actual prejudice. In departing from all of the binding law on this subject, the Fifth District clearly erred.

As set forth supra, it has **always** been the law in Florida that property insurance policies containing the requirement that an insured comply with the carrier's reasonable requests for information before the insured may file suit are conditions precedent, the breach of which are material and will preclude an insured from recovery under the policy. No case in this state has ever held to the contrary until Curran, an Uninsured Motorist case. In that case, which is currently pending

before this Court on the same conflict asserted in this case, the Fifth District found that although the insured breached her insurance policy with State Farm by refusing to attend an compulsory medical examination unless State Farm waived its contractual right to subsequent physical examinations, State Farm would nevertheless be required to pay benefits because its policy language did not contain a provision **expressly** stating that the violation of policy conditions would result in a penalty or forfeiture. According to the Court, “to avoid liability under the insurance policy based on non-compliance with the CME clause, it was essential that State Farm plead and prove a material breach, **which means a breach causing prejudice.**” Id. at 803 (emphasis added).

The Fifth District’s reliance on Curran in this case was entirely misplaced as Curran was factually inapposite and legally flawed. First, we believe that Curran was incorrectly decided in light of the existing law in Florida holding that a CME is a condition precedent to coverage under the policy. State Farm’s policy required compliance with its conditions before the insured could bring suit, which renders the provision a condition **precedent**, and not a condition **subsequent**, and therefore, as a matter of law, a breach of that condition required no showing of prejudice to support a denial of coverage. See, Id. at 833 (Palmer, J. dissenting)(Curran’s refusal to comply with the CME provision in her policy before filing suit constituted a breach of a condition precedent because the policy

provided that the insured had no right of action against the carrier until all the terms of the policy have been met, citing Goldman. Curran was an inexplicable and unwarranted departure from well-entrenched law holding that where an insured breaches a policy condition and the policy provides that suit can not be brought against the carrier until all the conditions of the policy have been met, the insured will be deemed to have breached a condition precedent and no showing of prejudice is required.¹² Because it was incorrectly decided and in insoluble conflict with the case law from this Court and every other District Court of Appeal on the same issue, the Fifth District's decision in this case is equally flawed.

Even if this Court ultimately approves Curran, its decision would not mandate approval of the Fifth District's opinion in this case because Curran involved Uninsured Motorist and not property insurance coverage. Under Florida Statute 627.414(3), "a policy may contain additional provisions not inconsistent with this code and which are . . . desired by the insurer and neither prohibited by law nor in conflict with any provisions required to be included therein." Id. Uninsured Motorist coverage, like PIP coverage, is statutorily regulated and

¹² Since this Court is currently considering Curran and these arguments have already been fully addressed by the parties in their briefs and oral argument, we will not belabor the issue. We agree with State Farm's position in that appeal insofar as it contests the legal correctness of the Fifth District's sweeping holding that examinations under oath are not conditions precedent in any insurance policy unless the policy expressly states that a breach of a condition will result in forfeiture.

property insurance is not. As this Court recently held in Nunez v. Geico General, 2013 WL 3214401 (Fla. June 27, 2013), a Personal Injury Protection case, public policy concerns may restrict when a carrier may deny that coverage.

There are no such concerns or restriction in property insurance cases. This is a simple contract and Banana Cay agreed to be bound by the policy conditions in exchange for the benefits. Thus, if this Court finds in Curran, as it found in Nunez, that because the coverage at issue in those cases is statutorily regulated, policy provisions not expressly authorized by the statute which permit a carrier to deny coverage for a breach of the policy conditions are unenforceable, that holding would not compel the same result here. See, Custer Medical Center v. United Automobile Ins. Co., 62 So. 3d 1086, n. 1 (Fla. 2011)(noting that “PIP insurance is markedly different from homeowner’s/tenants insurance, property insurance, life insurance, and fire insurance, which are not subject to statutory parameters and are simply a matter of contract not subject to statutory requirements”); Flores v. Allstate Ins. Co., 819 So. 2d 740, 745 (Fla. 2002)(“because both PIP and UM are statutorily mandated coverages, analogies to cases interpreting coverages that are not statutorily mandated, such as provisions in fire, life, and property insurance policies, may not necessarily be illuminating in guiding our analysis [of a provision in a PIP/UM policy].”

There is simply no good reason for this Court to approve of the Fifth District's departure from well-established precedent governing conditions contained in property insurance policies that permit the insurer to conduct a reasonable presuit investigation of an insured's claim and which expressly state that no suit may be brought until the insured has complied with the carrier's reasonable requests for information. This was not a case where the policy language was unclear as to the insured's obligations after an insurer has timely exercised its right to an examination under oath nor is this a case where the insurer abused its right to investigate or required the insured to endure an unreasonably broad investigation.¹³ Compare, DeLeon v. Great American Assurance Co., 78 So.

¹³ In its opinion in this case, the Fifth District observed that the case law in this area has led several of the District Courts of Appeal to conclude that an insured's failure to appear for an EUO before filing suit is a material breach of the contract, requiring a forfeiture of coverage. (SC.29) The Court opined that "[t]hese decisions have led to a cottage industry of EUO litigation. If an insurer can procure a failure to comply – or, even better, a refusal to comply – with the EUO requirement, they have a perfect defense to payment. Similarly, if counsel for insureds can bait the insurer into refusing payment without adequate justification, this may trigger a bad faith claim. The actual, if unglamorous, true purpose of the EUO – verification of the insured's loss – has been lost in this larger battle. No doubt there can be genuine instances of insurance fraud, but the recent and ever-escalating number of EUO cases that have arisen all over the state appear to be more about strategy than truth." (SC.29) This statement is pure dicta because nowhere in the Court's opinion did it find that Southern Family's document or examination requests were in any way unreasonable and there is certainly no evidence that Southern Family "procured" Banana Cay's failure or refusal to comply by, for instance, unilaterally setting an examination under oath under circumstances rendering it difficult or impossible for Banana Cay to comply.

3d 585 (Fla. 3d DCA 2011)(finding that the insurer took advantage of its right to conduct an examination under oath by engaging in intrusive and unwarranted question and the insurer's counsel repeatedly threatened to void the insured's coverage). At no time before or since suit was filed did Banana Cay or its counsel ever object to the nature or scope of Southern Family's requests for documents and a sworn statement, nor was WHISTLER'S PARK able to prove any conduct on the part of Southern Family that would have waived the carrier's right to request a presuit examination.¹⁴ This Court's disapproval of the Fifth District's decision would only reaffirm the prevailing law throughout the state permitting a property insurance carrier to deny coverage where, as in this case, the insured has

¹⁴ As the Fifth District recognized, that examinations under oath may be useful tools in ferreting out fraudulent claims and legitimate tools in resolving insurance claims outside of the litigation process by providing a mechanism for presuit discovery that in many instances, leads to presuit settlement. However, the panel's recitation of what was admittedly an extensive document request, coupled with the Court's observations regarding abuses of the process in DeLeon, imply that Southern Family somehow abused the EUO condition to no legitimate end when in fact, all of the record evidence is to the contrary.

At the time of the Hurricane Charley, the property was a 24-building rental community which was in the process of converting to condominiums. In its supplemental claim, Banana Cay sought additional benefits of \$2.5 million in alleged property and business income losses over and above the \$363,000.00 it had already been paid by Southern Family. Southern Family's document and examination requests were therefore appropriately tailored to discover information necessary for Southern Family's evaluation of the legitimacy and amount of Banana Cay's claim.

intentionally chosen not to comply with the carrier's requests for additional information before filing what could be an entirely unnecessary lawsuit.

For all of these reasons, the Fifth District's decision in this case must be quashed.

II. If this Court agrees with the Fifth District that in a property insurance policy, the condition that the insured attend an examination under oath and permit a review of the insured's records is not a condition precedent, but is instead a condition subsequent requiring a showing of prejudice in order to warrant a forfeiture of policy benefits, FIGA should be provided the opportunity to prove its prejudice.

Before the Fifth District's opinion in this case and since 1909, the law in this State was clear that an outright failure or refusal to attend a requested examination under oath was a material breach of the policy warranting forfeiture of property insurance policy benefits without requiring the carrier to demonstrate its prejudice. See, e.g. Putnal, 57 Fla. 199, 49 So. 922; 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, 970 So. 2d 456; Starling, 956 So. 2d 511; Fassi v. Amer. Fire & Cas. Co., 700 So. 2d 51 (Fla. 5th DCA 1997); Goldman, 660 So. 2d 300; Stringer v. Fireman's Fund Ins. Co., 622 So. 2d 1101 (Fla. 3rd DCA), rev. denied, 630 So. 2d 1101 (Fla. 1993). The Fifth District's conclusion that "the delay in obtaining Banana Cay's EUO caused by Banana Cay's failure to comply with Southern Family's request to schedule an EUO prior to filing suit did not prejudice FIGA," was clearly unwarranted given the fact that during the entire time this case was pending, the law did not require an insurer to plead or prove prejudice in order to prevail on its affirmative defense that the insured breached conditions in its policy. (SC.33) Given the clarity of the law and the Fifth

District's marked departure from it in this case, neither Southern Family nor FIGA were ever given a reason or opportunity to litigate the prejudice issue but it had been legally irrelevant.¹⁵ Since the panel's opinion obviously significantly changed the law by not only shifting the burden of proof on the issue of whether the insured has complied with its obligations under the policy, but also requiring the insurer to affirmatively establish its prejudice, the panel's finding that FIGA failed to meet this new burden of proof was premature and a denial of FIGA'S due process.

It has been nine (9) years since the hurricane, and over seven (7) years since Southern Family requested documentation in support of Banana Cay's claim and

¹⁵ WHISTLER'S PARK filed no substantive response to Southern Family's first motion for summary judgment on the grounds that the insured failed to comply with conditions precedent prior to filing suit. In response to FIGA'S subsequent motion based on the same argument, WHISTLER'S PARK only asserted that its breach was not willful and that FIGA (not Southern Family) somehow waived its predecessor's right to an EUO from Banana Cay. (RIII.661-671) It was only **after** summary judgment was granted did WHISTLER'S PARK, **for the first time since it filed suit in 2005**, request that the Court abate the action in order to enable **Banana Cay** to comply with Southern Family's repeated requests for an EUO made over four (4) years before that request. (RIII.656) The Third District in Gonzalez, 65 So. 3d 608, held that a similar offer made by an insured five years after her loss and "only in the face of an imminent ruling against her at the hearing on the carrier's motion for summary judgment" was unavailing to defeat that motion. See also, Fassi, 700 So. 2d 51(insured's belated offer to submit to a requested examination came too late and summary judgment was properly granted for insurer); Goldman, 660 So. 2d 300 (where the insured flatly refused to appear for insurer's presuit request for an examination under oath, insurer was entitled to summary judgment despite the insured's request for an opportunity to comply with the request after suit was filed).

its representative's examination under oath. No one has ever disputed that these requests were reasonable in light of the circumstances surrounding the supplemental claim, the complexities inherent in determining business interruption damages and the fact that the supplemental claim was so much greater than Southern Family's initial adjustment of the claim revealed immediately after the Hurricane. While we believe that the prejudice to an insurer is inherent in an insured's filing of a suit without complying with the conditions precedent designed to enable an insurer to avoid litigation, if this Court should disagree and find that FIGA was required to prove its prejudice, it should permit FIGA to do so at the trial level. Fundamental fairness would require a remand to the trial court with directions to permit FIGA to litigate that issue.

CONCLUSION

For all of the foregoing reasons, the Fifth District's decision must be quashed and the trial court's summary judgment affirmed on appeal. In the alternative, if this Court finds that the Fifth District was correct in holding that an insurer is required to prove that it was prejudiced by the insured's failure or refusal to comply with presuit requests for compliance with the policy conditions, then this Court should remand the case in order to permit FIGA to have an opportunity to litigate its case in light of this Court's opinion, which would necessarily depart from the law in the effect during the pendency of this litigation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished Via Eservice to: Scott Dornstein, Esq., Katzman Garfinkel Rosenbaum, 300 N. Maitland Avenue, Maitland, FL 32751-4724, sdornstein@kgrlawfirm.com; Davis Lewis, Esq., Hightower, Stratton, Wilhelm., 7380 W. Sand Lake Road, Ste. 395, Orlando, FL 32819, DLewis@hightowerlaw.net; on this 28th day of June, 2013.

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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 Civil Procedure.

The brief is presented in Times New Roman, 14-point font.

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