Electronically Filed 11/22/2013 02:13:17 PM ET

RECEIVED, 11/22/2013 14:13:41, John A. Tomasino, Clerk, Supreme Court

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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, REPLY BRIEF ON THE MERITS

Respectfully submitted by,

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STATEMENT OF THE CASE AND FACTS

WHISTLER'S PARK sets forth numerous "facts" in its Answer Brief that are not, and have never been, of record before the trial or appellate courts. A number of these "facts" were based on citations to documents filed in the Appendix to the Answer Brief and because the documents therein were not included in the Record on Appeal in this Court or in the Record before the Fifth District, this Court has stricken that Appendix. WHISTLER'S PARK has not sought leave to amend its brief to remove references to the stricken Appendix, and in an effort to clarify the factual record, we will point out those "facts" for which there is no record support. In addition, the Statement of Facts in the Answer Brief is riddled with inaccuracies relating to key facts which must be corrected.

WHISTLER'S PARK asserts that it was insured by Southern Family. Answer Brief, p. 1. WHISTLER'S PARK was not Southern Family's insured under the subject policy; the insured was Banana Cay and WHISTLER'S PARK brought suit in its capacity as Banana Cay's assignee.[1] (RI.1-4) On page 2 of the Answer Brief, WHISTLER'S PARK asserts that "[t]he intent and purpose of the Southern Family policy was to provide Whistler's Park with commercial lines residential property coverage . . . ." While the record on appeal does not reflect

[1] On page 2 of its Answer Brief, WHISTLER'S PARK represents that it paid Southern Family's premium for Banana Cay's policy, but it did not cite to the Record on Appeal as support for that representation.

Southern Family's intent, it did not insure WHISTLER'S PARK, it only insured Banana Cay. (RI.1-4)

Contrary to WHISTLER'S PARK'S representation on page 2 of its Answer Brief, Hurricane Charley did not strike WHISTLER'S PARK; it struck the apartment/condominium complex known as "Bristol Bay". See, Answer Brief, p. 1, n. 1, p. 2) There is no evidence in the Record establishing that WHISTLER'S PARK owned the buildings and property allegedly damaged by Hurricane Charley, as WHISTLER'S PARK represents on page 2 of its Answer Brief.

Because WHISTLER'S PARK was never Southern Family's insured, it never made an insurance claim on the Southern Family insurance policy before it brought suit against the insurer, and later FIGA, in its capacity as Banana Cay's assignee. See, Answer Brief, p. 2. Accordingly, contrary to WHISTLER'S PARK'S representation, Southern Family never adjusted its claim and never determined that WHISTLER'S PARK suffered any hurricane damage, nor did Southern Family pay policy benefits to WHISTLER'S PARK. See, Answer Brief, p. 2.

After Banana Cay filed a supplemental insurance claim seeking in excess of $2.5 million dollars in insurance payments over and above the $363,635.79 already paid on the claim, Southern Family's counsel wrote to Banana Cay's counsel requesting that Banana Cay's corporate representative appear for an examination

under oath and before doing so, produce certain enumerated documents supporting its claim.[2] (RII.312-314) At no time after that request and before suit was filed, did Banana Cay advise Southern Family that it had assigned its claim to WHISTLER'S PARK, and to this day, Banana Cay has never agreed to have its corporate representative appear for an examination under oath. Thus, WHISTLER'S PARK'S representation, on page 3 of its Answer Brief, that "Southern Family did not request an EUO after receiving Mr. Stone's estimate" is patently false as is evident from attorney Alec Russell's correspondence to Banana Cay, Inc, in which he clearly requested an EUO and numerous documents in furtherance of Southern Family's investigation of Banana Cay's supplemental claim. (RII.312-314) James Basque, the attorney representing Banana Cay, responded to that correspondence and requested that all further communications be

[2] On page 2 of its Answer Brief, WHISTLER'S PARK represents that it hired a public adjuster to inspect the property and prepare an estimate of its damages, which was then submitted to Southern Family. WHISTLER'S PARK cites to the Record on Appeal at Volume 5, pp. 643-645, which is attorney Keith Lambdin's affidavit. That affidavit does not attest to the foregoing facts, nor does the affidavit indicate that WHISTLER'S PARK, and not the insured Banana Cay, hired the public adjuster. (RV.643-645) Rather, Kenneth Dixon, in his affidavit filed as "an officer and/or agent of the company that owned Bristol Bay Apartments" attested that he retained a public adjuster to evaluate both the property damage and business interruption claims "for which [he] was covered under the Southern Family policy." (RV.640) Mr. Dixon had to have done so on behalf of Banana Cay, and not WHISTLER'S PARK, since Banana Cay had not yet assigned its claim to WHISTLER'S PARK. Moreover, the public adjuster's estimate of Banana Cay's damages is not of record in this litigation and therefore any reference as to what that estimate contained is inappropriate as unsupported by the record. See, Answer Brief, p. 3.

through his office, and Mr. Basque otherwise ignored Southern Family's requests for information. (RII.315) At no time did Mr. Basque advise Southern Family that he represented WHISTLER'S PARK nor did he ever advise Southern Family that Banana Cay had assigned its supplemental claim to WHISTLER'S PARK. (RII.315, 317) It is likewise undisputed that on the same day Mr. Basque advised Southern Family's counsel that "his client" was the designated corporate representative for Banana Cay and that the requested documents would be produced within the next few weeks, WHISTLER'S PARK filed suit against Southern Family for breach of contract. (RII.303, 319) WHISTLER'S PARK'S repeated representations regarding WHISTLER'S PARK'S willingness to attend an examination under oath and Southern Family's failure to schedule its EUO is simply misleading because WHISTLER'S PARK was not Southern Family's insured and Southern Family was never advised that Banana Cay had assigned its claim to WHISTLER'S PARK before suit was filed. See, Answer Brief, p. 3.

On page 4 of its Answer Brief, WHISTLER'S PARK refers to the deposition of FIGA'S corporate representative DeLene Loughran and cites to its Amended Initial Brief filed with the Fifth District, but it does not cite any portion of the Record on Appeal. Ms. Loughran's deposition has never been filed with the trial court and it has never been part of the Record on Appeal at the Fifth District or in this Court. In fact, WHISTLER'S PARK'S Appendix, which included these

excerpts, was stricken by this Court by Order dated November 5, 2013, for this very reason.[3] Therefore, any reference to Ms. Loughren's deposition was improper and should be ignored. The reference to FIGA'S inspection of the premises and its investigation, addressed in the first paragraph of page 5 of WHISTLER'S PARK'S Answer Brief, must likewise be ignored as unsupported by the Record and the citation (SC A.19) refers only to WHISTLER'S PARK'S Amended Brief in the Fifth District.

On page 6 of its Answer Brief, WHISTLER'S PARK correctly states that the trial court found that "[d]efendant's assignor [Banana Cay] did not sit for a requested examination under oath prior to the filing of the 2005 lawsuit." (RV.649) However, in the next sentence, WHISTLER'S PARK states "Judge Lauten did not specifically hold [sic] that Whistler's Park had willfully not complied with the policy." Answer Brief, p. 6. WHISTLER'S PARK'S counsel's rendition of the facts is somewhat confusing and it should be clarified that Judge Lauten's order granting FIGA summary judgment only addressed Banana Cay's failure to attend the requested EUO and because only Banana Cay, and not WHISTLER'S PARK, was Southern Family's insured bound by the terms and

[3] The Fifth District also struck WHISTLER'S PARK'S first Initial Brief and Appendix after FIGA moved to strike the Brief because it included no references to the Record on Appeal and cited only to the Appendix which included several documents that were never in the Record. (Fifth District Record on Appeal, pp. 15-21) WHISTLER'S PARK filed an Amended Initial Brief, but did not file an Amended Appendix. (SC Record on Appeal, Ex. "A")

conditions of the policy, Judge Lauton did not address WHISTLER'S PARK'S conduct in failing to sit for an examination under oath because it was legally irrelevant. See, Citizens Property Ins. Co. v. Ifergane, 114 So. 3d 190 (Fla. 3d DCA 2012)(insured's assignment of rights under an insurance policy did not operate to assign obligations, including attendance at an examination under oath).

On pages 7, 13 and 14 of the Answer Brief, WHISTLER'S PARK states, "[t]he two corporations [Banana Cay and WHISTLER'S PARK] are identical, with Ken Dixon being the sole shareholder of both." As support, WHISTLER'S PARK cites only to the affidavit of attorney Keith Lambdin and its own argument on rehearing of FIGA'S summary judgment. (RV.643-645, 655) Nowhere in Mr. Lambdin's affidavit is there any mention of the relationship between Banana Cay and WHISTLER'S PARK.

On page 16 of the Answer Brief, WHISTLER'S PARK states, "after Southern Family's insolvency, FIGA chose willingly to perform no investigation during the six month stay." Once again, WHISTLER'S PARK does not provide a record citation but only cites to its own brief filed with the Fifth District, which in turn provided no citation to the record on appeal in that court. On page 17, WHISTLER'S PARK contends that Mr. Lambdin, WHISTLER'S PARK'S counsel, offered to produce Mr. Dixon for an EUO in 2007, three years after the date of Hurricane Charlie (and during the pendency of the 2005 litigation against

Southern Family), but Mr. Lambdin's affidavit indicates that only WHISTLER'S PARK was "ready and willing to move forward with an Examination Under Oath or Deposition". (RV.643-645) Again, there is no evidence in any record before this Court indicating that Banana Cay ever agreed to appear for an Examination Under Oath in furtherance of its insurance claim, later assigned to WHISTLER'S PARK and all of WHISTLER'S PARK'S representations regarding WHISTLER'S PARK'S alleged willingness to give a pre-suit sworn statement are irrelevant and misleading in the context of this case.

REPLY 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.

WHISTLER'S PARK'S argument in response to this point on appeal is confusing at best. Initially, WHISTLER'S PARK appears to be arguing that the Fifth District's holding, that attendance at a requested examination under oath is not a condition precedent to recovery under the policy, is entirely consistent with the existing law in the Supreme Court and other District Courts of Appeal, **all** of which have held to the contrary. WHISTLER'S PARK then argues that FIGA was

required to have demonstrated its prejudice resulting from Banana Cay's failure to comply with its request for an EUO, which is most decidedly **not** the law that applies to breaches of conditions precedent in insurance policies. Indeed, until State Farm Mutual Automobile Ins. Co. v. Curran, 83 So. 3d 793 (Fla. 5th DCA 2011)(on rehearing en banc), jur. accepted, 86 So. 3d 1114 (Fla. 2012), issued a mere three (3) days before the oral argument in this case, it was inapposite to the law in the Fifth District. See, Shaw v. State Farm Fire & Casualty, 37 So. 3d 329, 331 (Fla. 5th DCA 2010)(on rehearing en banc), disapproved on other grounds, Nunez v. GEICO General, 117 So. 3d 388 (Fla. 2013)("[i]t is undisputed that a provision in an insurance policy that requires the insured to submit to an EUO qualifies as a condition precedent to the recovery of policy benefits"). This is why WHISTLER'S PARK never argued that the breach of this condition was not prejudicial to FIGA but instead, WHISTLER'S PARK confined its argument to whether it ever refused to attend an examination under oath.[4] It was only after summary judgment was entered that WHISTLER'S PARK, years after its premature filing of the 2005 lawsuit seeking Southern Family's policy benefits,

[4] Throughout its Statement of the Facts in this Brief, WHISTLER'S PARK repeatedly referred to itself as if it was the insured under the policy while completely ignoring the fact that Southern Family's requests for documents and a statement under oath were directed to **Banana Cay**, whose records and representative's statement was obviously crucial to Southern Family's ability to adjust its multi-million dollar insurance claim.

that WHISTLER'S PARK even suggested that the case be abated to enable it to comply with Southern Family's request to Banana Cay.

Nowhere in WHISTLER'S PARK'S brief does it address the obvious conflict between the Fifth District's opinions in Curran and this case and all of the cases cited on pages 26-27 of our Initial Brief, beginning with Southern Home Ins. Co. v. Putnal, 57 Fla. 199, 49 So. 922 (Fla. 1909). WHISTLER'S PARK now argues, **for the first time in this litigation,** that neither Southern Family nor FIGA ever actually needed an EUO to adjust this claim for in excess of $2.5 million in damages (including alleged business interruption losses) and therefore it was obviously not prejudiced by Banana Cay's failure and refusal to attend an examination. Moreover, WHISTLER'S PARK has studiously avoided any mention of the undeniable fact that it is **Banana Cay** who was legally obligated to comply with Southern Family's request for an EUO and there is no record evidence that **Banana Cay** ever complied with Southern Family's pre-suit requests for documents and an examination under oath.

WHISTLER'S PARK has treated this litigation and the subsequent appeal as a shell game. It has refused to acknowledge that it is only an assignee, and that Southern Family was absolutely entitled to investigate Banana Cay's claim before WHISTLER'S PARK brought suit. There is no legitimate argument that Banana Cay's failure to comply with Southern Family's request was a willful and material

breach of the policy which specifically provides that "**no one may bring legal action against us under this Coverage Part unless . . . there has been full compliance with all of the terms of this coverage part."** (RII.250) (emphasis added). Nothing in the clear and unambiguous terms of the policy requires that the insurer (or FIGA as its successor) accept the compliance of anyone other than the insured or demonstrate its prejudice in fact. Moreover, the fact that Southern Family extended Banana Cay the courtesy of requesting that Banana Cay's counsel provide Southern Family with a date convenient for the insured, rather than simply unilaterally setting the statement at Southern Family's convenience, belies WHISTLER'S PARK'S argument that there was no violation of the condition because a date had never been set. The facts clearly demonstrate that Banana Cay willfully failed to comply with Southern Family's request and it has never offered to comply at any time after WHISTLER'S PARK'S suit was filed.

The Fifth District's decision in this case is a clear departure from this well-established law and one that is wholly unwarranted under the facts of this case.

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.

WHISTLER'S PARK argues that "[i]n 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." Answer Brief, p. 15 (emphasis added). In doing so, WHISTLER'S PARK implicitly acknowledges that the Fifth District's opinion prematurely found that FIGA was not prejudiced by virtue of Banana Cay's failure to attend Southern Family's requested examination under oath when that was clearly not required under the law governing this case at the time of summary judgment and we agree. FIGA was clearly denied its due process as a result of the Fifth District's retroactive application of new case law without a concomitant remand to the trial court to permit the parties to litigate the case under the new law.

This is the first time in this litigation that WHISTLER'S PARK ever suggested that this Court consider Southern Family or FIGA'S alleged lack of prejudice in the context of the no-action clause at issue. This is not surprising since before Curran, Florida law was absolutely clear that where the insured breaches a condition precedent to recovery under the policy, the carrier was not required to demonstrate prejudice before it was entitled to deny the claim. Indeed

between 1909, when this Court issued Putnal, 57 Fla. 199, 49 So. 922, until the Fifth District issued Curran, 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); Fassi v. Amer. Fire & Cas. Co., 700 So. 2d 51 (Fla. 5th DCA 1997); Stringer v. Fireman's Fund Ins. Co., 622 So. 2d 1101 (Fla. 3rd DCA), rev. denied, 630 So. 2d 1101 (Fla. 1993). Not only did the Fifth District depart from this well-entrenched law, but it compounded its error by then finding, as a matter of law, that FIGA had not been prejudiced by Banana Cay's failure to comply with Southern Family's EUO request.

In Curran, an appeal from a judgment in favor of the insured on the issue of whether the insured had breached the CME condition of an Uninsured Motorist policy and the no-action clause prohibiting a claimant from bringing suit before he/she has complied with that condition, the majority found that while the insured unquestionably breached the contract by failing to attend the CMEs but it nevertheless affirmed the judgment in the insured's favor on a finding that the record established that State Farm was not prejudiced by the insured's breach. In

doing so, the Court reasoned that, under the "tipsy coachman" doctrine, a trial court's ruling may be affirmed where the Court's decision was correct on any ground appearing of record, even if the basis of the Court's affirmance was never argued.[5] Id. at n. 1 (citing, Dade Cnty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 645 (Fla. 1999).

In his well-reasoned dissent in Curran, Judge Sawaya argued that the appellate court's conclusion was "very troubling" because that issue was never litigated by the parties at the trial or appellate courts. Id. at 813, 831. In this case, the Fifth District went even a step further by utilizing Curran as grounds to **reverse** the trial court's judgment on an issue **never raised by either party** at the trial or appellate court levels. While the "tipsy coachman" doctrine permits an appellate court to **affirm** a judgment on grounds other than those argued by the parties, the doctrine does **not** permit an appellate court to **reverse** a judgment where the grounds for reversal have never been raised by the parties. See, State v. Baez, 894 So. 2d 115, 121 (Fla. 2005)(Pariente, J. dissenting)("[u]nder the 'tipsy coachman' rule, an appellate court may **affirm** a lower court ruling for any reason supported by the record . . . but I can find no authority for using the rule to **quash or reverse** a lower court decision on a theory not argued by the party challenging the ruling in the reviewing court")(emphasis supplied).

[5] The "tipsy coachman rule" is derived from a Georgia case, and was adopted by this Court's opinion in Carraway v. Armour & Co., 156 So. 2d 494 (Fla. 1963).

Neither Southern Family nor FIGA were ever given an opportunity to litigate the prejudice issue because at the time the case was litigated, it was legally irrelevant. Since the Fifth District's opinion fundamentally altered the law by requiring insurers to prove they were prejudiced by a breach of a condition precedent, if this Court finds the Fifth District was correct, since WHISTLER'S PARK never raised this issue before the trial or appellate courts and neither party was ever given an opportunity to litigate that issue, at the very least, this Court must quash the Fifth District's opinion as in violation of FIGA'S due process rights. As one commentator has noted, "because it is a violation of the due process guarantees under both the Florida and U.S. constitutions to fail to provide a party fair notice as well as to fail to give a party an opportunity to be heard, application of the Florida tipsy coachman doctrine simply should never be permitted to overcome these fundamental, constitutionally-imbedded rights." Munoz, Tipping the Ole Tipsy Coachman Over in his Grave, 81 Fla. B. J. 33 (Aug. 2007).

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.

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 22nd day of November 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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