

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

STATE FARM FIRE &	)	
CASUALTY COMPANY	)	
	)	
Appellant,	)	
	)	
	)	C.A. No: N12C-02-178 CLS
v.	)	
	)	
DIANE PURCELL and	)	
THOMAS PURCELL	)	
	)	
Appellees.	)	

Date Submitted: January 31, 2013

Date Decided: April 29, 2013

On Appellant's Motion for Summary Judgment.

**DENIED.**

**ORDER**

Robert K. Pearce, Esq., Ferry, Joseph & Pearce P.A., 824 Market Street,  
Suite 1000, P.O. Box 1351, Wilmington, Delaware, 19899. Attorney  
Defendant.

Paul G. Enterline, Esq., 113 South Race Street, Georgetown, Delaware,  
19947. Attorney for Appellees.

**J. Scott**

## Introduction

Appellant State Farm Fire & Casualty Company (“Appellant”) has moved for summary judgment on its appeal of an arbitration award resulting from Diane & Thomas Purcell’s, (“Appellees”) fire loss. Appellant bases its motion on Appellees’ failure to submit to an examination under oath. Issues of fact exist as to whether Appellees failed to submit to an Examination Under Oath, in violation of the insurance policy. For the foregoing reasons, Appellant’s Motion for Summary Judgment is **DENIED**.

## Facts

Appellees suffered a fire loss at their home on April 9, 2010. Appellee’s had an insurance policy to cover the loss with Appellant. The parties were to submit to arbitration; however, State Farm did not participate in the arbitration. Appellees were awarded \$171,255 in February 2012 and Appellant filed this appeal.

One of the conditions of the policy is that the parties were to submit to an Examination Under Oath (“EUO”). Appellant’s former attorney requested that the Appellees submit to an EUO in December, 2011. Appellees’ former attorney withdrew from the case and requested additional time for Appellees to find a new attorney to attend the EUO with Appellees.

Appellee Diane Purcell sent a letter to State Farm's former attorney stating that she would not submit to an EUO, claiming that State Farm was time-barred from requesting an EUO, that they waived their rights to an EUO, and alternatively, if Appellees were to submit to an EUO, they preferred that certain conditions be met prior to submission. These conditions included, among other things, requests to limit the scope of questioning, a mutually agreeable location, that certain State Farm Employees not be present, an agreement that State Farm would pay all costs, a copy of all recorded statements, that a copy of State Farm's fire investigation report be provided, and that a copy of the transcript be provided to Appellees by State Farm within ten days of the deposition. State Farm renewed its request that Appellees submit to an EUO and this pattern continued when Appellees hired a new attorney.

While the attempted scheduling of an EUO was continuing, the parties entered into arbitration. Appellant did not challenge the arbitration and Appellees were awarded monetary damages. Appellant subsequently filed an appeal of the arbitration award and this Motion for Summary Judgment for failure of Appellees to sit for an Examination Under Oath.

### **Parties' Contentions**

Appellant claims that the arbitration award must be dismissed because

Appellees were required to sit for an EUO as a condition precedent to coverage under the policy and that, as such, Appellees' refusal to submit to an EUO provided a basis for State Farm to deny coverage. Appellees claim that State Farm's request for an EUO was untimely and was contrary to the intended purpose of the EUO, which is to quickly make a coverage determination under the policy. Moreover, Appellees argue that they did not refuse to submit to an EUO, but rather, they agreed to an EUO, albeit untimely, under certain requested conditions. Finally, Appellees claim that once the arbitration determination was made, they did not have to submit to an EUO and Appellant's subsequent request for an EUO was moot.

### **Standard of Review**

The Court may grant summary judgment if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.”<sup>1</sup> The moving party bears the initial burden of showing that no material issues of fact are present.<sup>2</sup> Once such a showing is made, the burden shifts to the non-moving party to demonstrate that there are material

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<sup>1</sup> Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

<sup>2</sup> *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

issues of fact in dispute.<sup>3</sup> In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party.<sup>4</sup> “Summary judgment will not be granted when a more thorough inquiry into the facts is desirable to clarify the application of the law to the circumstances.”<sup>5</sup>

### **Discussion**

An insurance policy contract includes an implied covenant of good faith and fair dealing, which parties are liable for breaching “when their conduct frustrates the overarching purpose of the contract by taking advantage of their position to control implementation of the agreement's terms”<sup>6</sup> This covenant includes a duty to promptly investigate and pay claims.<sup>7</sup> On the other hand, an insured must also comply with the conditions precedent set forth in the policy by the insurer in order to establish contractual liability for breach of contract.<sup>8</sup>

In order to determine whether the parties violated either their covenants under the policy, or established liability for breach of contract,

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<sup>3</sup> *Id.* at 681.

<sup>4</sup> *Burkhart*, 602 A.2d at 59.

<sup>5</sup> *Phillip-Postle v. BJ Prods., Inc.*, 2006 WL 1720073, at \*1 (Del. Super. Apr. 26, 2006).

<sup>6</sup> *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 442 (Del. 2005).

<sup>7</sup> *Id.*

<sup>8</sup> *Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1198 (Del. 1992).

factual issues will need to be resolved. The facts show that the parties attempted to schedule and perform an EUO on several occasions, but could not agree as to the scope of the examination and discovery documents requested. Whether or not the Appellees failed to submit to an EUO, in violation of the insurance policy or hindering the investigation of the claim, is an inherently fact-specific question that cannot be resolved at this stage. As such, Appellant State Farm's Motion for Summary Judgment is **DENIED.**

**IT IS SO ORDERED.**

/S/CALVIN L. SCOTT  
**Judge Calvin L. Scott, Jr.**