Third District Court of Appeal

State of Florida

Opinion filed June 26, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-966
Lower Tribunal No. 11-13252

American Integrity Insurance Company,
Appellant,

vs.

Maria Estrada,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Rodney Smith, Judge.

Berk, Merchant & Sims, PLC, and William S. Berk and Patrick E. Betar, for appellant.

Alvarez, Carbonell, Feltman, & DaSilva, PL, and Paul B. Feltman, for appellee.

Before LOGUE,[1] SCALES and HENDON,[2] JJ.

SCALES, J.

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[1] Did not participate at oral argument.
[2] Did not participate at oral argument.

In this action for breach of a homeowner's insurance policy, American Integrity Insurance Company ("American Integrity"), the defendant below, appeals from the final judgment rendered in favor of its insured, Maria Estrada, the plaintiff below, after a jury trial. Because we find that the trial court abused its discretion both by striking American Integrity's affirmative defense asserting insurance fraud, and by thereafter failing to give American Integrity leave to amend its answer to assert this coverage defense, we reverse and remand for a new trial. Additionally, on remand, American Integrity shall be given leave to file amended affirmative defenses alleging Estrada failed to materially satisfy any contracted-for post-loss obligations. Estrada similarly shall be given leave to file appropriate replies to such affirmative defenses. If American Integrity establishes that Estrada failed to materially satisfy any contractually mandated post-loss obligations, then the burden shifts to Estrada to establish that American Integrity was not prejudiced by Estrada's breach.

I. RELEVANT FACTS AND PROCEDURAL BACKGROUND

A. Estrada's homeowner's insurance policy claim

American Integrity issued a standard HO3, all-risks homeowner's insurance policy insuring Estrada's residence for the policy period between July 1, 2009 and July 1, 2010. On January 16, 2010, Estrada's home was burgled, resulting in theft of Estrada's personal property and vandalism of her home. Estrada reported the

burglary to American Integrity and made a claim under the subject policy for losses allegedly caused by the incident.

American Integrity opened an investigation of Estrada's claim and, pursuant to the subject policy's post-loss obligation provisions,[3] demanded that Estrada

[3] Under "SECTION I – CONDITIONS," the subject policy set forth Estrada's obligations following a loss to covered property (i.e., post-loss obligations):

> **1. Your Duties After Loss.** In case of a loss to covered property, you must see that the following are done:
>
> a. Give prompt notice to us or our agent;
> b. Notify the police in case of loss by theft;
> c. Notify the credit card or fund transfer card company in case of loss under Credit Card or Fund Transfer Card coverage;
> d. Protect the property from further damage. If repairs to the property are required, you must:
>
> (1) Make reasonable and necessary repairs to protect the property; and
> (2) Keep an accurate record of repair expenses;
>
> e. Prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory;
> f. As often as we reasonably require:
>
> (1) Show the damaged property;
> (2) Provide us with records and documents we request and permit us to make copies; and
> (3) Submit to examination under oath, while not in the presence of any other "insured," and sign the same;
>
> g. Send to us, within 60 days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:
>
> (1) The time and cause of loss;
> (2) The interest of the "insured" and all others in the property involved and all liens on the property;
> (3) Other insurance which may cover the loss;

provide it various documents, complete a sworn proof of loss form, and submit to an examination under oath. American Integrity ultimately denied the claim for Estrada's alleged failure to comply with these, and other, post-loss obligations under the subject policy.

B. The instant litigation

After receiving American Integrity's letter denying her claim, Estrada, on April 28, 2011, filed the instant breach of contract action against American Integrity. Estrada's single-count complaint alleged Estrada had satisfied all post-loss obligations and all other conditions precedent to bringing the action. On December 1, 2011, American Integrity answered Estrada's complaint, raising numerous coverage defenses, including Estrada's alleged failure to comply with certain of her policy-imposed post-loss obligations:

- Failure to promptly notify American Integrity of the theft and vandalism (First Affirmative Defense – later withdrawn)

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(4) Changes in title or occupancy of the property during the terms of the policy;
(5) Specifications of damaged buildings and detailed repair estimates;
(6) The inventory of damaged personal property described in 2.e. above;
(7) Receipts for additional living expenses incurred and records that support the fair rental value loss; and
(8) Evidence or affidavit that supports a claim under the Credit Card, Fund Transfer Card, Forgery and Counterfeit Money coverage, stating the amount and cause of loss.

- Failure to provide American Integrity with all requested records and documents (Third Affirmative Defense)

- Failure to appear for a full and complete examination under oath (Fourth Affirmative Defense)

- Failure to protect the subject property from further damage by making repairs (Sixth Affirmative Defense)

- Failure to complete, sign and notarize a sworn proof of loss form (Eight Affirmative Defense)

American Integrity further alleged that the instant action was barred based on Estrada's violation of the subject policy's provisions providing that: (i) Estrada would comply with the policy's terms (Second Affirmative Defense);[4] and (ii) Estrada could not bring an action against American Integrity until Estrada fully complied with all of the policy's terms (Fifth Affirmative Defense).[5]

Unrelated to the subject policy's post-loss obligations, American Integrity also alleged that the instant action was barred because Estrada had committed

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[4] At the top of the first policy page, under the heading "AGREEMENT," the policy provided: "We will provide the insurance described in this policy in return for the premium and compliance with all applicable provisions of this policy."

[5] "SECTION I – CONDITIONS" of the subject policy, as amended by the policy endorsements, provided, in relevant part:

> **8. Suit Against Us**
> No action can be brought against us, unless:
> a. There has been full compliance with all of the terms of this policy; and
> b. The action is started within 5 years after the date of the loss.

insurance fraud (Seventh Affirmative Defense).[6,7] On January 8, 2016, four days before the jury trial was set to commence, the lower court entered a pre-trial order striking the Seventh Affirmative Defense, directing that no "argument relating to fraud, misrepresentation, concealment, false statements and the like" may be made at trial. While there is no transcript of the pre-trial hearing at which the trial court made its ruling, the parties agree that the lower court, on an *ore tenus* motion[8] by

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[6] American Integrity's Seventh Affirmative Defense, as pled in its December 1, 2011 answer, read, in its entirety, as follows:

> As its Seventh Affirmative Defense, American Integrity asserts that the claimed action is barred because Plaintiff intentionally concealed or misrepresented material facts or circumstances, engaged in fraudulent conduct, or made false statements relating to this insurance, before or after the claimed loss. The policy provides:
>
> **SECTION I – CONDITIONS**
>
> **2. Concealment or Fraud**
>
> a. Under SECTION I – PROPERTY COVERAGES, with respect to all "insureds" covered under this policy, we provide no coverage for loss under SECTION I – PROPERTY COVERAGES if, whether before or after a loss, one or more "insureds" have:
>
> (1) Intentionally concealed or misrepresented any material fact or circumstance;
>
> (2) Engaged in fraudulent conduct; or
>
> (3) Made false statements;
>
> relating to this insurance.

[7] American Integrity's Ninth, Tenth, and Eleventh Affirmative Defenses are not at issue here and, therefore, do not merit discussion.

[8] This is confirmed by the record not containing either a written motion to strike the affirmative defense or a notice of hearing on a motion to strike.

Estrada's counsel, struck the Seventh Affirmative Defense concluding that American Integrity failed to plead fraud with the requisite specificity. The trial court denied American Integrity's subsequent motions for reconsideration and for leave to amend its answer to add a more specific affirmative defense alleging insurance fraud.[9]

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[9] American Integrity's proposed amended defense, read, in its entirety, as follows:

> As its Seventh Affirmative Defense, American Integrity asserts that the claimed action is barred because Plaintiff intentionally concealed or misrepresented material facts or made false statements relating to this insurance by her representations on March 16, 2011 that the property sustained damage to the front entry door, side laundry door, rear sliding door and marble flooring which required repairs or replacement when she knew or should have known that no such damages occurred as a result of the burglary. Additionally, Plaintiff intentionally misrepresented or concealed material facts or made false statements by submitting an inflated estimate and claim on March 19, 2010 and a Sworn Statement in Proof of Loss received by American Integrity on September 13, 2010 in the amount of $134,185.6 [sic] which included items and scope that she knew or should have known were not a result of the burglary. These actions are in breach of the policy because they are in violation of the provision which provides:
>
> **SECTION I – CONDITIONS**
>
> **2. Concealment or Fraud**
>
> a. Under SECTION I – PROPERTY COVERAGES, with respect to all "insureds" covered under this policy, we provide no coverage for loss under SECTION I – PROPERTY COVERAGES if, whether before or after a loss, one or more "insureds" have:
>
> (4) Intentionally concealed or misrepresented any material fact or circumstance;
>
> (5) Engaged in fraudulent conduct; or

At trial, the parties disputed the extent of Estrada's compliance with her post-loss obligations prior to filing the instant action.[10] In particular, the parties introduced conflicting evidence as to whether Estrada had substantially complied with her post-loss obligations to provide requested documents, to submit to an examination under oath, and to execute a valid sworn proof of loss form.

At the close of all of the evidence, Estrada's counsel moved for a directed verdict on American Integrity's affirmative defenses related to Estrada's alleged failure to comply with her post-loss obligations under the subject policy – i.e., American Integrity's Second, Third, Fourth, Fifth, Sixth, and Eighth Affirmative Defenses. Estrada's counsel argued for the first time that, in order for there to be a valid coverage defense with respect to an insured's post-loss obligations in a homeowner's insurance policy, the Florida Supreme Court has held that the insurer must plead and prove that it was prejudiced by the insured's non-compliance. See State Farm Mut. Auto. Ins. Co. v. Curran, 135 So. 3d 1071 (Fla. 2014). The trial court agreed, granted Estrada's directed verdict motion, and struck

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(6) Made false statements;
relating to this insurance.

[10] The parties do not dispute that there was a jury question on this issue in the lower proceedings. Indeed, in December 2014, American Integrity moved for partial summary judgment on other, unrelated grounds; but, it did not seek a summary judgment on whether Estrada complied with her post-loss obligations.

American Integrity's Second, Third, Fourth, Fifth, Sixth and Eighth Affirmative Defenses on this basis.

With all of American Integrity's coverage defenses stricken, the only remaining question for the jury to consider was the amount of damages to award Estrada, i.e., to what extent did Estrada suffer covered damages as a result of the January 2010 burglary/vandalism incident? On January 15, 2016, the jury returned a verdict awarding Estrada $67,500. On March, 1, 2016, the trial court entered an order denying, in summary fashion and without a hearing, American Integrity's motion for a new trial. On March 29, 2016, the trial court rendered a final judgment in favor of Estrada. This appeal ensued.

II. ANALYSIS

American Integrity appeals: (i) the January 8, 2016 pre-trial order striking its Seventh Affirmative Defense and the lower court's subsequent denial of its motion to amend this affirmative defense; and (ii) the lower court's entry of a directed verdict on all of its coverage defenses with respect to Estrada's alleged failure to comply with her post-loss obligations because of American Integrity's failure to plead and prove that it was prejudiced by Estrada's alleged non-compliance. We address each argument in turn.

A. The Seventh Affirmative Defense alleging that Estrada committed insurance fraud[11]

Again, while we have no transcript from the pre-trial hearing, we know from the trial court's January 8, 2016 order granting Estrada's *ore tenus* motion that the trial court determined American Integrity's Seventh Affirmative Defense lacked the specificity required to assert a fraud defense. We conclude that the trial court abused its discretion with respect to its handling of American Integrity's Seventh Affirmative Defense for two reasons.

First, the trial court abused its discretion in striking the Seventh Affirmative Defense because Estrada's *ore tenus* motion was not properly noticed for hearing. See Menke v. Southland Specialties Corp., 637 So. 2d 285, 286 (Fla. 2d DCA 1994) (holding that the trial court erred in striking a party's pleading when neither the motion to strike nor the notice of hearing thereon referenced the struck pleading).

Second, after striking American Integrity's Seventh Affirmative Defense, the trial court should have allowed American Integrity leave to amend this defense to allege the claimed insurance fraud with the requisite specificity. See Morgan v.

[11] The standard of review of an order striking an affirmative defense is abuse of discretion. See Turner Constr. Co. v. E & F Contractors, Inc., 939 So. 2d 1108, 1109 (Fla. 3d DCA 2006). An order denying a defendant's motion to amend its affirmative defenses is also reviewed for an abuse of discretion. See Morgan v. Bank of N.Y. Mellon, 200 So. 3d 792, 794-95 (Fla. 1st DCA 2016).

Bank of N.Y. Mellon, 200 So. 3d 792, 795 (Fla. 1st DCA 2016) ("Absent exceptional circumstances, motions for leave to amend should be granted, and refusal to do so constitutes an abuse of discretion."); H. Trawick, Trawick's Florida Practice and Procedure § 10:7 (2018-2019 ed.) ("An initial defense should not be stricken without leave to amend, but the third deficient attempt to state a defense justifies striking it without leave to amend.") (footnotes omitted). "Amendments to pleadings ought to be allowed freely unless there is a clear danger of prejudice, abuse, or futility. If such dangers cannot be clearly established, the trial court abuses its discretion by denying the party's motion for leave to amend the pleading." RV-7 Prop., Inc. v. Stefani De La O, Inc., 187 So. 3d 915, 916-17 (Fla. 3d DCA 2016) (citation omitted). Here, Estrada would have suffered no prejudice by permitting American Integrity to amend the defense. Indeed, the substance of American Integrity's proposed, amended affirmative defense was based largely on American Integrity's responses to interrogatories propounded by Estrada asking American Integrity to: (i) "describe each and every fact upon which you rely to substantiate such affirmative defense, including identification of all witnesses to each such fact"; and (ii) explain further how Estrada had "intentionally concealed or misrepresented material facts or circumstances, engaged in fraudulent conduct, or made false statements" as had been alleged in American Integrity's answer. American Integrity provided its interrogatory responses on April 16, 2014 and June 6, 2014, over a year

and a half before Estrada's *ore tenus* motion to strike the defense just prior to trial. The factual basis for American Integrity's Seventh Affirmative Defense was further discussed by American Integrity's corporate representative during the April 7, 2015 deposition conducted by Estrada's counsel.

For these reasons, we conclude that the trial court abused its discretion both in striking the Seventh Affirmative Defense and in denying American Integrity leave to amend the defense. Because we are unable to conclude that this error was harmless and that the jury would have rejected this defense,[12] we are compelled to reverse the final judgment on review and remand for a new trial. See Chmura v. Sam Rodgers Props., Inc., 2 So. 3d 984, 985-86 (Fla. 2d DCA 2008) (reversing the final judgment and remanding for a new trial, concluding the trial court abused its discretion in striking the defendant's affirmative defenses before trial). The trial court shall give American Integrity leave to file an amended pleading asserting this defense, and Estrada may file an appropriate reply.

B. American Integrity's coverage defenses with respect to Estrada's alleged failure to comply with her post-loss obligations[13]

[12] We express no opinion as to the validity of, or whether American Integrity would have been able to proffer competent, substantial evidence to establish, this defense.

[13] The standard of review of an order granting a directed verdict is *de novo*. See Banco Espirito Santo Int'l, Ltd. v. BDO Int'l, B.V., 979 So. 2d 1030, 1032 (Fla. 3d DCA 2008). "A trial court's construction of an insurance policy to determine coverage is a matter of law subject to *de novo* review." Barnier v. Rainey, 890 So. 2d 357, 359 (Fla. 1st DCA 2004).

1. Introduction

We next address the second, far more difficult issue raised by American Integrity in this appeal: whether the trial court erred by partially directing a verdict against American Integrity and striking its coverage defenses that alleged Estrada forfeited coverage under the policy by failing to satisfy all post-loss obligations required by the subject policy before filing suit. The policy's post-loss conditions are outlined in footnote 3, *supra*, and the policy clearly and unambiguously states that no action may be brought against American Integrity by an insured unless there has been "full compliance" with all policy terms. See footnote 5, *supra*.

While American Integrity's affirmative defenses alleged that Estrada had failed to comply with a number of her contractually mandated post-loss obligations (and therefore had failed to comport with a condition precedent to filing suit against the insurer), the trial court, relying on the Florida Supreme Court's opinion in Curran, nevertheless struck these affirmative defenses – and directed a verdict for Estrada on the coverage issues – because American Integrity had failed either to plead or prove *that it had been prejudiced* by any failure of Estrada to satisfy any alleged post-loss obligation.

Given this District's extensive adjudication of first-party homeowners' insurance claims, one would think that this issue – whether an insurer must plead and prove prejudice in order to successfully establish a coverage defense based upon

an insured's failure to satisfy all post-loss obligations – would have been definitively decided in this District. It has not, though; we endeavor to do so now.

For the reasons outlined below, we conclude that, for an insurer to successfully establish a coverage defense based upon an insured's failure to satisfy post-loss obligations such that an insured forfeits coverage under a policy, the insurer must plead and prove that the insured has materially breached a post-loss policy provision. If the insurer establishes such a material breach by the insured, the burden then shifts to the insured to prove that any breach did not prejudice the insurer. Because we are remanding this case for a new trial, and are otherwise requiring the trial court to allow American Integrity leave to file an amended affirmative defense, we are similarly directing the trial court to allow American Integrity leave to file, consistent with this opinion's conclusions, any amended affirmative defenses related to Estrada's post-loss obligations, and Estrada similarly should be given leave to file appropriate replies to such affirmative defenses.

2. The Florida Supreme Court's *Curran* decision

In moving for a directed verdict below, Estrada's counsel convinced the trial court that the Florida Supreme Court's decision in State Farm Mutual Automobile Insurance Co. v. Curran, 135 So. 3d 1071 (Fla. 2014) – an uninsured motorist ("UM") case – had established that, in order to prevail on a valid coverage defense for an insured's failure to comply with his or her post-loss obligations in a

homeowner's insurance policy, the insurer must plead and prove that it was prejudiced by the insured's alleged non-compliance. The relevant provisions of the UM policy in Curran are functionally indistinguishable from the relevant policy provisions in this case. The UM policy in Curran required the insured to submit to examinations by physicians as often as the insurer reasonably required *and* provided that the insured had no right of action against the insurer until all policy terms had been met. Id. at 1078.[14] We do not agree, though, that the Florida Supreme Court's holding in Curran can be applied so easily in a homeowner's insurance policy context.

In Curran, the Florida Supreme Court answered the following (rephrased) questions of great public importance certified to it by Fifth District:[15]

> WHEN AN INSURED BREACHES A COMPULSORY MEDICAL EXAMINATION [("CME")] PROVISION IN AN UNINSURED MOTORIST CONTRACT, DOES THE INSURED FORFEIT BENEFITS UNDER THE CONTRACT WITHOUT REGARD TO PREJUDICE? IF PREJUDICE MUST BE CONSIDERED, WHO BEARS THE BURDEN OF PLEADING AND PROVING THAT ISSUE?

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[14] Neither the policy in Curran nor the instant policy specifically states that the insured's failure to satisfy the policy's post-loss obligations results in a forfeiture of coverage.

[15] See State Farm Mut. Auto. Ins. Co. v. Curran, 83 So. 3d 793 (Fla. 5th DCA 2011) (*en banc*). In answering the certified questions, the Florida Supreme Court resolved the appeal on different grounds than those relied upon by the Fifth District in its *en banc* decision. Id.

Id. at 1072. Notwithstanding the plain and unambiguous policy provisions, the Court, in a plurality decision, determined that: (i) the "CME provision *in the UM coverage context* is not a condition precedent to coverage"; (ii) "an insured's breach of this provision should not result in a post-occurrence forfeiture of insurance coverage without regard to prejudice"; and (iii) therefore, the insurer bore the burden of pleading and proving prejudice, as an element of its coverage defense. Id. at 1079 (emphasis added). In making these determinations, the Court expressly stated the public policy rationale of its holdings: "Given the UM statute's intended purpose of protecting persons who are legally entitled to recover damages for injuries caused by owners or operators of uninsured or underinsured motor vehicles, our conclusion that the insurer must plead and prove prejudice as an element of its affirmative defense fully comports with this purpose." Id.

Critical to the plurality's decision in Curran was the determination that the CME provision contained within the UM coverage section of the subject automobile insurance policy was a *condition subsequent* to coverage (i.e., similar to a cooperation clause), as opposed to an express *condition precedent* to an insured's ability to sue his or her insurer. Id. at 1078-79. Put another way, the Curran court concluded that the CME provision was not a condition precedent to an insured's

entitlement to sue the insurer for breach of the UM policy, and, therefore, an insured does not forfeit UM coverage simply by failing to submit to a CME.[16] Id.

The trial court concluded Curran applied to the instant case, despite this case being outside the UM context. As mentioned earlier, though, this District has not specifically addressed whether Curran's discrete holding, as it relates to the insured's post-loss obligations in the UM context, is applicable in the homeowner's insurance context.

To date, only the Fourth District has addressed this question, finding that Curran does not apply outside the UM coverage context and, therefore, that an insured's post-loss obligations contained in a homeowner's insurance policy are *conditions precedent* to suit. See Hunt v. State Farm Fla. Ins. Co., 145 So. 3d 210, 212 (Fla. 4th DCA 2014) ("We have considered Curran, and do not find it instructive as there, the court clarified the standards applicable to an insured's breach of a condition subsequent to coverage – not a condition precedent as is at issue in the instant case."); Rodrigo v. State Farm Fla. Ins. Co., 144 So. 3d 690, 692 (Fla. 4th DCA 2014) (concluding that, in Curran, "our supreme court limited its rationale and

[16] In his dissent, Justice Polston laments that the plurality's characterization of the CME provision as a condition subsequent, rather than a condition precedent, effectively rewrites the plain and unambiguous terms of the parties' contract while all but thwarting the most practical means of remedying any CME non-compliance: having the insured simply submit to the requested CME and refile the suit. Curran, 135 So. 3d at 1083 (Polston, C.J., dissenting).

holding to the unique subject of uninsured motorist coverage and compulsory medical exams"). We agree with the Fourth District that Curran is limited to the UM insurance context, and is therefore not instructive in this case. Not only is the plurality decision in Curran limited by its express rationale, the opinion in no way addressed, much less attempted to overturn, well-established Florida precedent holding that an insured's post-loss obligations set forth in a homeowner's insurance policy are *conditions precedent* to suit. See Hunt, 145 So. 3d at 212; Citizens Prop. Ins. Corp. v. Ifergane, 114 So. 3d 190, 197 (Fla. 3d DCA 2012); Amica Mut. Ins. Co. v. Drummond, 970 So. 2d 456, 460 (Fla. 2d DCA 2007); Starling v. Allstate Floridian Ins. Co., 956 So. 2d 511, 513 (Fla. 5th DCA 2007). Hence, we conclude the trial court erred in granting Estrada's motion for a directed verdict based on Curran.

Our determination though, that Curran is inapplicable here, does not end our inquiry as to whether, and to what extent, prejudice should be an element of American Integrity's defenses alleging that Estrada failed to comply with her post-loss obligations prescribed in the subject policy. Before reaching this issue, though, we first distinguish "materiality" from "prejudice."

3. Materiality as an element of an insurer's coverage defense for failure to comply with post-loss obligations

Florida law "abhors" forfeiture of insurance coverage. See Axis Surplus Ins. Co. v. Caribbean Beach Club Ass'n, Inc., 164 So. 3d 684, 687 (Fla. 2d DCA 2014).

"Moreover, '[p]olicy provisions that tend to limit or avoid liability are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy . . . .'" Bethel v. Sec. Nat'l Ins. Co., 949 So. 2d 219, 223 (Fla. 3d DCA 2006) (quoting Flores v. Allstate Ins. Co., 819 So. 2d 740, 744 (Fla. 2002)).

With these basic principles in mind, it is, unsurprisingly, well settled that, for there to be a total forfeiture of coverage under a homeowner's insurance policy for failure to comply with post-loss obligations (i.e., conditions precedent to suit), the insured's breach must be *material*. See Drummond, 970 So. 2d at 460 (concluding that the insured's failure to comply with a post-loss obligation "was a *material* breach of a condition precedent to [the insurer's] duty to provide coverage under the policy") (emphasis added); Starling, 956 So. 2d at 513 ("[A] *material* breach of an insured's duty to comply with a policy's condition precedent relieves the insurer of its obligations under the contract.") (emphasis added); Goldman v. State Farm Fire Gen. Ins. Co., 660 So. 2d 300, 303 (Fla. 4th DCA 1995) ("An insured's refusal to comply with a demand for an examination under oath is a willful and *material* breach of an insurance contract which precludes the insured from recovery under the policy.") (emphasis added); Stringer v. Fireman's Fund Ins. Co., 622 So. 2d 145, 146 (Fla. 3d DCA 1993) ("[T]he failure to submit to an examination under oath is a *material* breach of the policy which will relieve the insurer of its liability to pay."

(quoting 13A Couch on Insurance 2d (Rev. 3d) § 49A:361 at 760 (1982) (footnote omitted) (emphasis added))).

Further, while the interpretation of the terms of an insurance contract normally presents an issue of law, the question of whether certain actions constitute compliance with the contract often presents an issue of fact. See State Farm Fla. Ins. Co. v. Figueroa, 218 So. 3d 886, 888 (Fla. 4th DCA 2017) ("Whether an insured *substantially complied* with policy obligations is a question of fact.") (emphasis added); Solano v. State Farm Fla. Ins. Co., 155 So. 3d 367, 371 (Fla. 4th DCA 2014) ("A question of fact remains as to whether there was *sufficient compliance* with the cooperation provisions of the policy to provide State Farm with adequate information to settle the loss claims or go to an appraisal, thus precluding a forfeiture of benefits owed to the insureds.") (emphasis added).

Whether an insured has substantially complied with a post-loss policy provision, though, is markedly different from whether an insurer has suffered any prejudice resulting from an insured's failure to materially comply with a policy's post-loss condition.

4. Prejudice as an element of an insured's coverage defense for failure to comply with post-loss obligations

Hence, we now address whether, after a finding has been made that an insured materially breached a post-loss policy provision, a further finding must also be made that the insured's non-compliance caused prejudice to the insurer. The case law on

this issue is confusing, and the Fourth and Fifth Districts seem to be split on the prejudice issue. And, as noted earlier, the question is an issue of first impression in this District.[17]

The Fourth District has held that the insurer need not plead and prove that it was prejudiced by the insured's failure to comply with his or her post-loss obligations in a homeowner's insurance policy for the insurer to have a valid coverage defense. See Goldman, 660 So. 2d at 303 ("A substantial line of cases supports the rule that an insurer need not show prejudice when the insured breaches a condition precedent to suit."); see also Rodrigo, 144 So. 3d at 692 (citing Goldman with approval, and rejecting the insured's argument that the insurer was required to show that it was prejudiced by the insured's failure to submit a sworn proof of loss); but see Hunt, 145 So. 3d at 212 (holding that when an insured fails to comply with a condition precedent before filing suit, the breach is deemed material and the insurer is relieved from its policy duties irrespective of prejudice; but, if an insured's

[17] Alhough this Court has, in a number of cases, found that the insured's failure to comply with a post-loss obligation is a material breach of the policy, it does not appear that prejudice to the insurer was raised or addressed in any of these decisions. See State Farm Fla. Ins. Co. v. Xirinachs, 251 So. 3d 221, 222 (Fla. 3d DCA 2018); Ifergane, 114 So. 3d at 197; Gonzalez v. State Farm Fla. Ins. Co., 65 So. 3d 608, 609 (Fla. 3d DCA 2011); Edwards v. State Farm Fla. Ins. Co., 64 So. 3d 730, 732-33 (Fla. 3d DCA 2011); Stringer, 622 So. 2d at 146. Similarly, while this Court has, on occasion, cited the Fourth and Fifth District cases discussed, *infra*, it does not appear that this Court has ever done so in reliance on the prejudice determination set forth in those cases.

compliance is merely untimely, the insurer is relieved of its duties only if it was prejudiced by the insured's untimeliness – in this latter scenario, prejudice is presumed and the insured bears the burden of rebutting the presumption).

In contrast, the Fifth District has held that, to be relieved of its obligation to provide coverage, the insurer must be prejudiced by the insured's non-compliance. See Allstate Floridian Ins. Co. v. Farmer, 104 So. 3d 1242 (Fla. 5th DCA 2012); Whistler's Park, Inc. v. Fla. Ins. Guar. Ass'n, 90 So. 3d 841 (Fla. 5th DCA 2012); see also Hamilton v. State Farm Fla. Ins. Co., 151 So. 3d 1 (Fla. 5th DCA 2014) (relying upon Whistler's Park, Inc.).

We find the Fifth District's Farmer decision to be particularly instructive on this issue. In that case, the Farmers provided a sworn proof of loss form to Allstate, but the form was not notarized as required by the policy. Farmer, 104 So. 3d at 1244. At trial, the lower court permitted the jury to consider both whether the Farmers had substantially complied with the proof of loss condition (i.e., whether the breach was material), and whether Allstate was prejudiced by any failure to comply with the condition. Id. at 1245. Ultimately, the jury found the Farmers failed to substantially comply with the proof of loss condition; "however, the jury found Allstate had not been prejudiced by the noncompliance and returned a verdict for the Farmers." Id.

On appeal, a split panel of the Fifth District affirmed the jury verdict in favor of the insureds by relying upon the policy's failure to include forfeiture language in the relevant provision of the underlying homeowner's insurance policy. The "Suit Against Us" provision in Farmer – which is substantially similar to the "Suit Against Us" provision under consideration here – provided, in relevant part, that "[n]o suit or action may be brought against [the insurer] unless there has been full compliance with all policy terms." Id. at 1246. Because the "Suit Against Us" provision failed to expressly establish that forfeiture was the consequence of failing to substantially comply with a post-loss obligation set forth in the policy, the Farmer court held that the remedy for such failure should be proportionate to the harm; ergo, prejudice should be considered. Id. at 1249. The Court explained: "[A]n insurer's ability to avoid coverage based on an insured's failure to submit a [sworn proof of loss] form, in the absence of prejudice, is akin to winning on a technicality and violates the general rule against forfeiture." Id.

Upon careful consideration, we agree with the Fifth District that the insurer must be prejudiced by the insured's non-compliance with a post-loss obligation in order for the insured to forfeit coverage. We certify conflict with the Fourth District's Goldman and Rodrigo cases on this question.

5. Burden to establish prejudice

Less clear from the Fifth District's jurisprudence, however, is *which party* bears the burden to demonstrate whether the insurer was prejudiced by its insured's material failure to satisfy a post-loss policy provision. Should the insurer have to prove it was prejudiced by the breach, or should the breaching insured have to prove his or her insurer suffered no prejudice?

Citing to the Florida Supreme Court's decision in Bankers Insurance Co. v. Macias, 475 So. 2d 1216, 1218 (Fla. 1985), which dealt with a breach of the notice provision in an automobile insurance policy, our sister court in Farmer concluded that prejudice to the insurer is presumed when an insured materially breaches a post-loss policy provision; thus, the Farmer court concluded, the *insured* carries the burden of proving lack of prejudice. Farmer, 104 So. 3d at 1250, 1250 n.11. Nearly seven months earlier, however, in its Whistler's Park, Inc. decision, the Fifth District found that the *insurer* "carried the burden of pleading and proving a breach that caused prejudice." 90 So. 3d at 846. To date, it does not appear that the Fifth District has harmonized these two positions.

As illustrated in this case, in deciding who bears the burden to establish prejudice or the lack thereof when an insured has materially breached a contractually mandated post-loss obligation, two competing principles are implicated. On the one hand, the plain language of the subject policy required Estrada to "fully comply" with her contractually mandated post-loss obligations before filing suit against

American Integrity; and, on the other hand, the policy does not expressly provide that an insured forfeits coverage for failing to satisfy a post-loss obligation and Florida law disfavors such forfeiture. To balance these seemingly competing principles, we adopt the rationale expressed by our sister court in Farmer and hold that, when an insurer has alleged, as an affirmative defense to coverage, and thereafter has subsequently established, that an insured has failed to substantially comply with a contractually mandated post-loss obligation, prejudice to the insurer from the insured's material breach is presumed, and the burden then shifts to the insured to show that any breach of post-loss obligations did not prejudice the insurer.[18]

III. CONCLUSION

The trial court abused its discretion in striking American Integrity's Seventh Affirmative Defense asserting insurance fraud on an unnoticed motion to strike. The trial court also erred by denying American Integrity leave to amend this defense because Estrada would not have been prejudiced by the amendment. We, therefore, reverse the final judgment on review and remand for a new trial. On remand, American Integrity shall be given leave to amend its Seventh Affirmative Defense, and Estrada may file an appropriate reply.

[18] We express no opinion as to the validity of any such defenses or whether American Integrity or Estrada will be able to proffer competent, substantial evidence to establish any such defenses or replies thereto.

On remand, consistent with the holdings in section II. B. of this opinion, American Integrity shall also be given leave to file amended affirmative defenses alleging Estrada failed to materially satisfy any contracted-for post-loss obligations. Estrada shall similarly be given leave to file appropriate replies to such affirmative defenses. If American Integrity establishes that Estrada failed to materially satisfy any contractually mandated post-loss obligations, then the burden shifts to Estrada to establish that American Integrity was not prejudiced by Estrada's breach.

We certify conflict between our holding in section II. B. 4. of this opinion, and the Fourth District's decisions in Goldman v. State, 660 So. 2d 300 (Fla. 4th DCA 1995) and Rodrigo v. State Farm Fla. Ins. Co., 144 So. 3d 690 (Fla. 4th DCA 2014).

Reversed and remanded with instructions; conflict certified.