Filing # 96055953 E-Filed 09/20/2019 02:29:51 PM

RECEIVED, 09/20/2019 02:30:33 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CITIZENS PROPERTY INSURANCE CORPORATION, a Florida Government Entity,

Petitioner,

Case No.: SC19-1394
L.T. Case No.: 5D17-2841

vs.

MANOR HOUSE, LLC, OCEAN VIEW, LLC, and MERRITT, LLC,

Respondents.
_______________________________________/

RESPONDENTS' RESPONSE IN OPPOSITION TO CITIZENS' MOTION TO RECALL MANDATE AND STAY FURTHER PROCEEDINGS PENDING REVIEW

Respondents, Manor House, LLC, Ocean View, LLC, and Merritt, LLC ("Manor House"), requests that this Court enter an order denying Citizens Property Insurance Corporation's ("Citizens") Motion to Recall Mandate and Stay Further Proceedings Pending Review ("Motion"). In support, Manor House states[1]:

SUMMARY OF ARGUMENT

Citizens cannot satisfy its burden of proving a recall of the Fifth District's mandate is essential. The question of whether consequential damages are a

[1] This response cites to certain portions of the record as paginated below. Manor House is including those documents in an appendix. Citation to the appendix shall be ("M.H. App. at pg. ____). This response cites both the record and the appendix accompanying this response.

permissible measure of damage in a breach of insurance contract claim is not one of great public importance. Few cases have passed on this question. The dearth of cases addressing this issue is empirical evidence that litigation on this issue is rare and the Fifth District's opinion does not have widespread impact. When litigated, however, Florida's intermediate appellate courts and federal courts have held that consequential damages are a permissible measure of damage in a breach of insurance contract claim for over four decades. Thus, Manor House submits a question of great public importance does not exist.

Even if jurisdiction exists, Manor House believes it is likely to prevail on the merits. Florida treats insurance policies like a contract. Consequential damages are a basic remedy associated with a breach of contract claim. Consequential damages are an appropriate measure of damage for breach of an insurance policy at common law. Citizens contends section 624.155, Florida Statutes, consumed this common law remedy with its enactment in 1982. The flaw in Citizens' argument is that the plain language of section 624.155(8) makes clear that section 624.155 does not preempt any common law remedy or cause of action. Thus, section 624.155 does not transform the common law consequential damage remedy available in a breach of contract claim into a bad faith damage.

Finally, recalling the mandate and staying proceedings does not irreparably harm Citizens. Citizens' argument that forcing it to litigate constitutes irreparable

harm fails because this Court has held that the time, effort, and expense of trying a case does not constitute irreparable harm. Conversely, recalling the mandate and staying proceedings harms Manor House for two reasons. First, the claim is over 15 years old. Memories fade and people die. Delaying this case for another year or two further hampers Manor House's ability to develop this case. Second, Citizens has an order entitling it to attorney's fees at the trial court level. The existence of that order, which is accruing pre-judgment interest, constitutes a financial harm to Manor House. Recalling the mandate and staying proceedings precludes Manor House from vacating that order.

As such, Manor House requests this Court enter an order denying the Motion.

ARGUMENT

This Court has explained that staying or recalling a mandate should occur "only where…essential." *State ex rel. Price v. McCord*, 380 So. 2d 1037, 1038 n.3 (Fla. 1980) (citation omitted). Under *McCord*, a stay or recall of a mandate requires consideration of the following factors: (1) the likelihood that this Court will accept jurisdiction; (2) the likelihood that the movant will prevail on the merits; and (3) the likelihood of irreparable harm to the movant. *Id.*; *State v. Miyasato*, 805 So. 2d 818, 825 (Fla. 2d DCA 2001). As the movant, Citizens bears the burden of showing a recall is essential based on these factors. *Miyasato*, 805 So. 2d at 826 n.2. Citizens cannot satisfy its burden.

1. THIS COURT CAN REFUSE TO ACCEPT JURISDICTION.

Yes, the Fifth District certified a question of great public importance to this Court. But that does not mean this Court must accept jurisdiction; this Court has discretion to decline to accept jurisdiction. FLA. R. APP. P. 9.030(a)(2)(A)(v); ART. V, §3(b)(4), FLA. CONST.; *Floridians for a Level Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832, 834-35 (Fla. 2007).

One general guide in determining if a question is of great public importance is whether the existing decisional law coalesces around a single answer to the question posed. *See Star Cas. v. U.S.A. Diagnostics, Inc.*, 855 So. 2d 251, 252 (Fla. 4th DCA 2003). Florida's intermediate appellate courts agree that an insured can recover consequential damages independent of a bad faith claim where an insurer breaches the insurance contract. *Travelers Ins. Co. v. Wells*, 633 So. 2d 457, 461-62 (Fla. 5th DCA 1993); *Life Investors Ins. Co. of America v. Johnson*, 422 So. 2d 32, 33-34 (Fla. 4th DCA 1982); *Thomas v. Western World Ins. Co.*, 343 So. 2d 1298, 1304 (Fla. 2d DCA 1977). Florida's federal courts also hold that consequential damages are a permissible measure of damage for an insured to recover against its insurer where the insurer breaches the insurance contract. *T.D.S. Ins. v. Shelby Mut. Ins. Co.*, 760 F. 2d 1520, 1531 n.11 (11th Cir. 1985); *Hutchings v. Federated Ins. Co.*, 2008 WL 4186994, *1-2 (M.D. Fla. 2008); *Rondolino v. Northwestern Mut. Life Ins. Co.*, 788 F. Supp. 553, 554-55 (M.D. Fla. 1992). The Fifth District's opinion

reiterates the rule set forth by the aforementioned cases. *Accord* (App. at pg. 9) *with Wells*, 633 So. 2d at 461-62; *Johnson*, 422 So. 2d at 33-34; *Thomas*, 343 So. 2d at 1304; *T.D.S.*, 760 F. 2d at1531 n.11. The similar treatment of this issue indicates a question of great public importance does not exist. *See U.S.A. Diagnostics, Inc.*, 855 So. 2d at 252.

Because the Fifth District's opinion simply reaffirms four decades of Florida law, Citizens contention of widespread impact on how parties litigate insurance claims is unavailing. Citizens contends that prior to the Fifth District's opinion, insurers would move to strike requests made by insureds for consequential damages in an *ad damnum* clause but now, because of the Fifth District's opinion, insurers must litigate consequential damage claims unlike ever before. (Motion at pg. 10). Yes, insurers sometimes file motions to strike consequential damage requests. But courts deny those motions. *E.g. Hutchings*, 2008 WL 4186994 at *1-2; *Rondolino*, 788 F. Supp. at 554-55. *Hutchings* and *Rondolino* both denied the motions to strike because consequential damages are a permissible measure of damage in a breach of an insurance contract claim. *Hutchings*, 2008 WL 4186994 at *1-2; *Rondolino*, 788 F. Supp. at 554-55. Nothing about the Fifth District's opinion alters this rule so as to have the exceptional impact on how parties litigate breach of insurance contract lawsuits across the state as contended by Citizens.

And contrary to Citizens' contention, the Fifth District's opinion does not require insurers to consider an additional or new exposure. The Fifth District's opinion did not add a new layer of damage to an insured's measure of damage in a breach of insurance contract claim. The Fifth District's opinion does not advance a novel legal rule or otherwise change Florida's legal landscape. Instead, the Fifth District adhered to a four-decade-old rule. *Accord* (App. at pg. 9) *with Wells*, 633 So. 2d at 461-62; *Johnson*, 422 So. 2d at 33-34; *Thomas*, 343 So. 2d at 1304; *T.D.S.*, 760 F. 2d at 1531 n.11.

In those four decades, few cases have addressed whether consequential damages are a permissible measure of damages in a breach of insurance contract claim (though those cases addressing the issue hold consequential damages are a permissible). The dearth of cases is empirical evidence that litigation on this issue is rare and the Fifth District's opinion does not have widespread impact.

For these reasons, Manor House respectfully submits a question of great public importance does not exist.

2. MANOR HOUSE IS LIKELY PREVAIL ON THE MERITS.

If jurisdiction is accepted, there is a strong likelihood this Court affirms the Fifth District. Woven throughout the Motion is the contention that Manor House's breach of contract claim is really an impermissible bad faith claim. (Motion at pg. 11, 18). First, this contention mischaracterizes Manor House's breach of contract

claim. Manor House alleged Citizens failed to perform express contractual obligations. For example, the policy mandates the parties go to appraisal if one party demands appraisal. (R. at pg. 722) (M.H. App. at pg. 53). Manor House alleged that Citizens breached the policy when Citizens refused to go to appraisal despite Manor House making the appropriate demand. (R. at pg. 683 ¶59-60, ¶63-64) (M.H. App. at pg. 14). This is but an example of the multiple breaches Manor House alleges Citizens committed. (App. at pg. 7) (noting that Manor House premised its breach of contract claim against Citizens for Citizen's failure to, among other things, honor Manor House's appraisal demand, provide Manor House with documents, and timely pay the appraisal award).[2] The grounds of breach all flow from express obligations imposed on Citizens by the policy. Citizens either performed these obligations or did not. Bad faith is not part of the equation because "[Citizens] exercised no faith at all[]" when it failed to perform these express contractual obligations. *Thomas*, 343 So. 2d at 1304.

Second, Citizens never argued Manor House's breach of contract claim was really an impermissible bad faith claim in the trial court or at the Fifth District.[3] Citizens has only ever argued consequential damages were an inappropriate measure

---

[2] The policy required Citizens to pay the appraisal award within thirty days. (R. at pg. 723) (M.H. App. at pg. 54).

[3] Citizens improperly raised this point for the first time in its motion for rehearing at the Fifth District. *Cleveland v. State*, 887 So. 2d 362, 364 (Fla. 5th DCA 2004).

of damage in a breach of insurance contract case. Thus, Manor House believes it is unlikely Citizens will prevail on an unpreserved argument. *Pagan v. State*, 29 So. 3d 938, 957 (Fla. 2009) (the "purpose of an appellate brief is to present arguments in support of the points on appeal" and failing to do so means that such arguments are "deemed to have been waived") (citations omitted); *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) ("[G]enerally, if a claim is not raised in the trial court, it will not be considered on appeal."); *see Sebo v. American Home Assurance Co.*, 208 So. 3d 694, 699 n.2 (Fla. 2016).

At bottom, Citizens' preserved argument is that all consequential breach of contract damages equate to a bad faith damage. Florida treats insurance policies like contracts. *E.g. State Farm Fire & Cas. Ins. Co. v. Deni Associates of Florida, Inc.*, 679 So. 2d 397, 400 (Fla. 4th DCA 1996) ("An insurance policy is a contract between the insured and the carrier."). Consistent with this treatment, Florida common law permits insureds to recover consequential damages against its insurer where the insurer breaches the insurance policy. *Wells*, 633 So. 2d at 461-62; *Johnson*, 422 So. 2d at 33-34; *Thomas*, 343 So. 2d at 1304; *T.D.S.*, 760 F. 2d at 1531 n.11; *Rondolino*, 788 F. Supp. at 554-55; *Hutchings*, 2008 WL 4186994 at *1-2. Citizens implicitly concedes this point but contends the Legislature's enactment of section 624.155 in 1982 preempted this common law breach of contract remedy. (Motion at pg. 13-14).

This argument, however, fails to account for the plain language of section 624.155(8), Florida Statutes, which states "[t]he civil remedy specified in this section does not preempt any other remedy or cause of action provided pursuant to any other statute or pursuant to the common law of this state." FLA. STAT. §624.155(8). The plain language of section 624.155(8) makes clear that consequential damages, which is a common law breach of contract remedy, differ from damages recoverable under a bad faith claim. *T.D.S.*, 760 F. 2d at 1531 n.11; *Johnson*, 422 So. 2d at 33-34; *see B-K Cypress Log Homes Inc. v. Auto-Owners Ins. Co.*, 2012 WL 13018751, *3-4 (N.D. Fla. 2012). Indeed, as one court observed, the fact that the Legislature authorized insureds to recover damages in a statutory bad faith actions suggests that it contemplated the recovery for something other than the same damages already available for breach of an insurance contract. *Marracini v. Clarendon Nat'l Ins. Co.*, 2003 WL 22668842, *2 (S.D. Fla. Oct. 1, 2003) (citation omitted).

Further support for this conclusion comes from the different standards an insured must satisfy to recover either type of damage. Section 624.155 permits insureds to recover all damages that are a foreseeable result of an insurer's violation of section 624.155. FLA. STAT. §624.155(8). On the other hand, an insured must satisfy a stricter standard that requires the insured to show the parties contemplated the damages at the time of contracting before recovering consequential damages.

Johnson, 422 So. 2d at 33-34; *T.D.S.*, 760 F. 2d at 1531 n.11. Bad faith damages under section 624.155 are broader than standard consequential damages recovered in a breach of contract claim. *B-K Cypress Log Homes*, 2012 WL 13018751 at *3 ("[A]n insured's recover for its insurer's bad faith conduct is not limited to damages within the contemplation at the time of the insurance contract.").

Manor House's lost rent is prototypical common law, consequential damage claim associated with a breach of contract claim. Contrary to Citizens' argument, section 624.155 neither altered nor transformed this consequential damage into a bad faith damage.

Next, Citizens cites *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 94 So. 3d 541 (Fla. 2012), for the proposition that this Court "has specifically declined to adopt the doctrine of reasonable expectations in the context of insurance contexts." (Motion at pg. 19). *Chalfonte* is inapplicable. The reasonable expectation doctrine is not a damages doctrine; it is a doctrine of insurance policy interpretation to ascertain what duties a party must perform. *State Farm Fire & Cas. Ins. Co. v. Deni Associates of Florida, Inc.*, 678 So. 2d 397, 401-02 (Fla. 4th DCA 1996). Unlike *Chalfonte*, this case concerns the effect of Citizens failure to perform express contractual duties rather than ascertaining the existence of a duty imposed on Citizens by the policy.

Accordingly, Manor House believes it is likely to prevail on the merits, making it unnecessary to recall the Fifth District's mandate and stay proceedings.

3. CITIZENS WILL NOT SUFFER ANY IRREPARABLE HARM.

Citizens contends that it will be harmed because it will have to defend Manor House's breach of contract claim. Not so. The time, effort, and expense of trying a case does not constitute irreparable harm. *Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214, 215 (Fla. 1998); *Wright v. Sterling Drugs, Inc.*, 287 So. 2d 376, 376 (Fla. 2d DCA 1973) ("The incurring of the expense of a trial on the merits has been held not to constitute a material or irreparable injury.").

Next, Citizens argues it will be subjected to countless pending lawsuits based on consequential damage claims if this Court does not recall the mandate. (Motion at pg. 23-24). First, this argument is pure conjecture. Second, ample authority exists independent of the Fifth District's opinion for insureds to seek consequential damages for an insurer's breach of an insurance contract. *Wells*, 633 So. 2d at 461-62; *Johnson*, 422 So. 2d at 33-34; *T.D.S.*, 760 F. 2d at 1531 n.11; *Thomas*, 343 So. 2d at 1304. Recalling the mandate will not dissuade insureds from seeking to recover what Florida law already authorizes. As such, Citizens' argument of harm associated with other cases fails.

Finally, Citizens argues that recalling the mandate will encourage insured cooperation and communication during the claims handling process and avoid a rush

to litigation. (Motion at pg. 24). This argument fails. First, the argument is pure speculation unsupported by any empirical evidence. Second, mechanisms already exist within any insurance policy to ensure cooperation by the insured—it is a cooperation clause or provision. *See Bankers Ins. Co. v. Macias*, 475 So. 2d 1216, 1217-18 (Fla. 1985); *see also Ramos v. Northwestern Mut. Ins. Co.*, 336 So. 2d 71, 75 (Fla. 1976); *see also Allstate Floridian Ins. Co. v. Farmer*, 104 So. 3d 1242 (Fla. 5th DCA 2012); 13 Lee R. Russ & Thomas Segalla, *Couch on Insurance 3d*. §196:23 (1999) (discussing the purpose and effect of cooperation clauses in an insurance policy). If an insured rushes out and files a lawsuit, Citizens has protections it knows how to assert. *E.g. Citizens Prop. Ins. Corp. v. Ifergane*, 114 So. 3d 190 (Fla. 3d DCA 2012) (holding insured's "refusal to submit to a requested EUO precludes recovery under the policy, because the EUO stands as a condition precedent to coverage.").

4. A STAY IRREPARABLY HARMS MANOR HOUSE.

Manor House's breach of contract claim flows from a 2004 hurricane. Resolution of this claim has been "snail-paced." (App. at pg. 5). A stay delays trial court proceedings on a claim that is already fifteen (15) years old. *See* (*Id.*). Material witnesses may die, move, or otherwise become unavailable. Additionally, material witnesses' memories fade. "[T]he old adage that justice delayed is justice denied" applies where a court stays further proceedings and could not be more applicable

than here—a claim over 15 years old. *See Sunshine State Serv. Corp. v. Dove Invs. Of Hillsborough*, 468 So. 2d 281, 284 (Fla. 5th DCA 1985). Contrary to Citizens' assertions, another year or two delay irreparably harms Manor House. *See Rowell v. Smith*, 342 So. 2d 149, 149 (Fla. 1st DCA 1977) (there is no adequate remedy for delay created by a stay).

Additionally, Citizens obtained an order finding it is entitled to recover trial court attorney's fees from Manor House. Staying the mandate and proceedings allows pre-judgment interest to accrue on an attorney's fee entitlement order that should be vacated. *Southern Nat. Track Services, Inc. v. Gilley*, 152 So. 3d 13, 19 (Fla. 1st DCA 2014); *Dooley and Mack Constructors, Inc. v. Buildtec Const. Group, Inc.*, 983 So. 2d 1243, 1244 (Fla. 3d DCA 2008). This financially harms Manor House.

CONCLUSION

Manor House believes this Court is unlikely to accept jurisdiction. Even if this Court accepts jurisdiction, Manor House believes this Court will resolve the matter in its favor. Finally, Citizens will not suffer any harm, let alone irreparable harm, if this Court does not stay proceedings. Accordingly, Manor House requests that this Court enter an order denying Citizens' motion to recall mandate and stay proceedings.

Respectfully submitted,

By: /s/ Alexander Brockmeyer
Alexander Brockmeyer
Fla. Bar No.: 105758
BOYLE LEONARD & ANDERSON, P.A.
2050 McGregor Blvd.
Fort Myers, Florida 33901
Telephone: (239) 337-1303
Facsimile: (239) 337-7674
Counsel for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the parties on below service list through the Court's e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1) on September 20, 2019:

Co-Counsel for Respondent, Manor House, LLC, Ocean View, LLC, and Merritt, LLC
Christopher N. Mammel, Esq.
Merlin Law Group
222 Lakeview Ave., Ste. 950
West Palm Beach, FL 33401-6173
Phone: (561) 855-2120
cmammel@merlinlawgroup.com

Co-Counsel for Petitioner, Citizens Property Insurance Corporation
J. Pablo Caceres, Esq.
Butler Weihmuller Katz Craig LLP
400 N. Ashley Drive, Ste. 2300
Tampa, FL 33602-4305
Phone: (813) 281-1900
pcaceres@butler.legal
eservice@butler.legal

Co-Counsel for Petitioner, Citizens Property Insurance Corporation
Kara Berard Rockenbach, Esq.
Daniel Schwarz, Esq.
Link & Rockenbach, P.A.
1555 Palm Beach Lakes Boulevard, Suite 301
West Palm Beach, FL 33401

Phone: (561) 727-3600
kara@linkrocklaw.com
david@linkrocklaw.com
troy@linkrocklaw.com

By: /s/ Alexander Brockmeyer
Alexander Brockmeyer, Esq.
Fla. Bar No.: 105758