IN THE SUPREME COURT
OF THE
STATE OF FLORIDA

Case No. SC10-2433
First District Court of Appeals Case No. ID09-6183

CITIZENS PROPERTY INSURANCE CORPORATION,

Petitioner,

v.

SAN PERDIDO ASSOCIATION, INC.,

Respondent.

ANSWER BRIEF ON THE MERITS

On Discretionary Review of Conflict Certified
by the First District Court of Appeals

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Florida Statutes

Rules

STATEMENT OF THE FACTS AND OF THE CASE

The instant case is an action for damages for first party bad faith by an insurer, pursuant to § 624.155, et seq. *Florida Statutes* and concerns disputes over payments due to Respondent, San Perdido Association, Inc. ("San Perdido") under a policy of insurance issued by Petitioner, Citizens Property Insurance Corporation ("Citizens"), for damage caused by Hurricane Ivan. The facts and procedural history of the instant case were very succinctly stated by the First District Court of Appeals in its opinion below:

> "This case arises from a claim by San Perdido under a windstorm insurance policy with Citizens, after Hurricane Ivan caused substantial property damage in 2004. Citizens persistently refused to fully pay its obligation under the terms of the insurance policy, requiring San Perdido to file a circuit court action to compel such payment, and then defend that award in Citizens' appeal to this court. The circuit court ruling was upheld by this court, in *Citizens Property Insurance v. San Perdido Assoc*., 22 So. 3d 71 (Fla 1st DCA 2009), and San Perdido thereafter filed its *section 624.155* bad faith action in the circuit court. Citizens responded with a motion to dismiss, asserting that the action is barred by the immunity conferred on Citizens in *section 627.351(6), Florida Statutes.* Citizens argued that this statutory provision grants it sovereign immunity."

Citizens Prop. Ins. Corp. v San Perdido Ass'n., 46 So. 3d 1051, 1052 (Fla. 1st DCA 2010). 1

1 A sister case, *Perdido Sun Condominium Association v. Citizens Property Ins. Co.*, Escambia County Case No. 2005-CA-000831, another breach of contract action which concerns identical facts and legal issues, was litigated in conjunction with the breach of contract action which underlies the instant case. Perdido Sun filed its own bad faith action which is currently stayed pending the outcome of the instant case.

The trial court denied Citizens' motion to dismiss and Citizens appealed, petitioning, alternately, for a writ of prohibition or certiorari on the grounds that trial court lacked subject matter jurisdiction to hear the instant case based upon Citizens claims of sovereign immunity. The First District Court of Appeals denied Citizens' petition on the narrow procedural grounds that, in light of this Court's holding in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996), denial of a motion to dismiss based upon a claim of sovereign immunity is not subject to interlocutory appeal.

> "Without the irreparable harm required for certiorari, and given the Supreme Court's repudiation of the *Circuit Court of Twelfth Judicial Circuit* theory of jurisdiction in *Roe*, Citizens is not entitled to immediate interlocutory review of the denial of its motion to dismiss San Perdido's section 624.155 lawsuit. While *Roe* involved the waiver of sovereign immunity in section 768.28, Florida Statutes, and San Perdido's lawsuit involves the waiver of immunity in section 627.351(6)(s)(1), the statutory waivers are similar in that section 768.28 provides for a waiver in tort actions, and section 627.351(6)(s)(1) provides for a waiver for any willful tort, as well as upon a breach of the insurance contract.
>
> In light of the supreme court's ruling in *Roe*, the court declines to undertake immediate interlocutory review of the denial of Citizens' motion to dismiss San Perdido's section 624.155 lawsuit, nor will this court entertain such a challenge by prohibition or certiorari."

Citizens Prop. Ins. Corp. v San Perdido Ass'n., 46 So. 3d at 1053.

The First District Court of Appeals certified conflict with the Fifth District Court of Appeals decisions in *Citizens Prop. Ins. Co. v. Garfinkle*, 25 So. 3d 62 (Fla. 5th DCA 2009), and *Citizens Prop. Ins. Co. v. La Mer Condominium Ass'n.*,

37 So. 3d 988 (Fla. 5th DCA 2010), and further certified the following question as one of great public importance:

> 'Whether, in light of the Supreme Court's ruling in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996), review of the denial of a motion to dismiss based upon a claim of sovereign immunity should await the entry of a final judgment in the trial court?"

Id.

Citizens moved for rehearing *en banc*, which was denied. *Citizens Prop. Ins. Corp. v San Perdido Ass'n.*, 2010 Fla. App. LEXIS 18786 (Fla. Dist. Ct. App. 1st Dist. Nov. 17, 2010). These proceedings follow.

SUMMARY OF THE ARGUMENT

Citizens spends over half of its brief arguing the substantive issue of whether it is subject to liability for bad faith. This issue is not properly before this Court. In its opinion, the court below never reached Citizens' substantive claims, rather, it certified conflict with the Fifth District Court of Appeals opinions in, *Citizens Prop. Ins. Co. v. Garfinkle*, 25 So. 3d 62 (Fla. 5th DCA 2009), and *Citizens Prop. Ins. Co. v. La Mer Condominium Ass'n.*, 37 So. 3d 988 (Fla. 5th DCA 2010), on the narrow procedural grounds that, based upon this Court's holding in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996), interlocutory review is not available for denial of a motion to dismiss based upon a claim of sovereign immunity.

Generally, non-final orders are not appealable subject to the exceptions found in Rule 9.130 (a)(3) F.R.A.P. The instant case does not fit any of those exceptions. Nevertheless, Citizens argues that the instant case falls within a further

exception to the general rule of non-appealability which this Court carved out in *Tucker v. Resha*, 648 So.2d 1187 (Fla. 1994). However, *Tucker* is inapplicable to the instant case. *Tucker* involved denial of a motion for summary judgment based upon a qualified immunity defense in a federal section 1983 claim tried in state court. *Id.* This Court held that certiorari should have been granted because 1) parties should be granted the same rights when litigating a federal cause of action in state court as they would enjoy in federal court, and 2) that the right of federal qualified immunity as applied to individual government officials would be lost if interlocutory review were not granted. *Tucker v. Resha*, 648 So.2d at 1189.

The concerns present in *Tucker* do not exist in the instant case. Here you have a state agency (not an individual) asserting a defense of sovereign (not qualified) immunity to a state law claim of bad faith. The instant case is controlled by this Court's holding in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996), wherein this Court declined to extend *Tucker* to cases involving the claim of an entire entity of the government to immunity from claims based upon state law. *Dep't. of Education v. Roe*, 679 So. 2d 756, 758-759 (Fla. 1996). In its opinion, this Court expressed its concern that, interlocutory appeals such the one posited by Citizens in the instant case tend to be fact specific, thus wasting judicial resources in fruitless appeals and, further, should such appeals be allowed, the district courts appeals would soon be flooded with appeals by state agencies. *Id*. Further, the

Court held that government entities like Citizens suffered no irreparable harm by being required to raise its immunity defense on plenary appeal. *Dep't. of Education v. Roe*, 679 So. 2d 756, 759 (Fla. 1996).

Citizens has been granted limited statutory immunity in its enabling statute, §627.351 Florida Statutes. However, the Legislature saw fit to carve out a series of exceptions to Citizens immunity. §627.351(6)(s)(1)(a)-(e). The ultimate substantive issue in the instant case is simply: Is bad faith as defined in §624.155 a "willful tort"? If so, it falls within the "willful tort" exception to Citizens' immunity outlined in §627.351(6)(s)(1)(a) and Citizens' motion to dismiss was properly denied by the trial court, and the case should be remanded for litigation to proceed.

In its brief, Citizens has posited a variety of arguments why bad faith either is not a willful tort or, alternately, that the Legislature "intended" to exempt Citizens from bad faith liability, all of which are discussed in depth below. In the final analysis, San Perdido would submit that if the Court decides to take cognizance of this issue, any analysis of whether Citizens is immune from bad faith must begin with one crucial question: **What is Citizens asking for in this appeal, and is the remedy that Citizens seeks congruent with the Legislature's purpose for creating Citizens in the first place?** No matter how Citizens tries to

spin this issue, it is asking this Court for the ability to deny claims in bad faith with impunity, which is totally contrary to the Legislature's stated purpose in creating it.

ARGUMENT

I. CITIZENS' HAS ATTEMPTED TO INSERT SUBSTANTIVE ISSUES INTO THIS APPEAL THAT ARE NOT PROPERLY BEFORE THE COURT.

Citizens has attempted to improperly insert the substantive issues of whether it is entitled to sovereign immunity and whether bad faith falls in the willful tort exception to its statutory immunity into this appeal when those claims are clearly not properly before the Court. By arguing these issues, Citizens seeks in a left handed way to obtain this Court's stamp of approval on its substantive claim that it is immune to bad faith, when the only issue that is properly before the Court is a narrow procedural matter. The First District Court of Appeals holding (reproduced above) is both succinct and narrowly focused. It did not reach the underlying issue of *whether* Citizens is entitled to full sovereign immunity or whether bad faith is a "willful tort" falling within the exception contained in Citizens' enabling statute. Rather, the court below held that an interlocutory appeal based upon a *claim* of sovereign immunity cannot be sustained in light of this Court's holding in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996). Further, while the First DCA certified conflict with the Fifth DCA cases, *Citizens Prop. Ins. Co. v. Garfinkle*, 25 So. 3d 62 (Fla. 5th DCA 2009), and *Citizens Prop. Ins. Co. v. La Mer*

Condominium Ass'n., 37 So. 3d 988 (Fla. 5th DCA 2010), it was explicit concerning the grounds of conflict which it certified, namely, not that Citizens is or is not immune to bad faith claims, rather, that the Fifth DCA had no business reviewing those claims on interlocutory appeal in the first place.

> "Contrary to the supreme court's pronouncements in *Roe*, the fifth district has issued writs of prohibition where Citizens claimed sovereign immunity in response to a section 624.155 lawsuit for bad faith insurance practices."

Citizens Prop. Ins. Corp. v San Perdido Ass'n., 46 So. 3d at 1052.

Therefore, all of Citizens' arguments concerning the underlying merits of its claim of sovereign immunity and immunity to bad faith should be struck and not considered by this Court.

II. DENIAL OF A CITIZENS' MOTION TO DISMISS BASED UPON ITS CLAIM OF SOVEREIGN IMMUNITY IS NOT SUBJECT TO INTERLOCUTORY REVIEW.

The question before the Court is whether the district courts of appeal had jurisdiction, either by certiorari or through writ of prohibition, to review Citizens' appeal in the first place. Generally, for a non-final order of a circuit court to be reviewable by this Court it must fit within one of the exceptions enumerated in Rule 9.130 (a)(3) F.R.A.P. Citizens' appeal to this Court is ultimately grounded upon its assertion of sovereign immunity, and that the trial court lacks subject matter jurisdiction to hear the case and should therefore have granted its motion to dismiss. Since these grounds do not fit within any of the classes of cases

enumerated in Rule 9.130 it would seem to be a rather straightforward proposition that the Court does in fact lack jurisdiction to hear Citizens' appeal, and the case should be remanded to continue litigation.

However, this Court carved out an exception to Rule 9.130 in *Tucker v. Resha*, 648 So.2d 1187 (Fla. 1994). *Tucker* involved denial of a motion for summary judgment based upon a qualified immunity defense in a federal section 1983 claim tried in state court. *Id.* Tucker filed a petition for writ of certiorari based upon the federal appellate mechanism for interlocutory review of orders denying summary judgment based upon qualified immunity. *Id.* at 1188. The District Court held that there is no analogous procedure under Florida law for review of a non-final order denying summary judgment. *Id.* While the Supreme Court agreed with the District Court's reasoning, it reversed, based upon application of federal precedents specific to qualified immunity and held that " … an order denying summary judgment based upon a claim of qualified immunity is subject to interlocutory review to the extent that the order turns on an issue of law." *Tucker v. Resha*, 648 So.2d 1187, 1190 (Fla. 1994).

Tucker is clearly inapplicable to the instant case. In *Tucker* the Court was concerned with applying federal principles of qualified immunity to a federal cause of action pursuant to 42 U.S.C. § 1983, and with the effect that breach of that

immunity might have on the ability of *individual office holders* to perform their duties.

> "Under the qualified immunity doctrine, "**government officials performing discretionary functions** generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. "The central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.'" *Elder v. Holloway*, 114 S. Ct. 1019, 1022, 127 L. Ed. 2d 344 (1994) (quoting *Harlow*, 457 U.S. at 806).
>
> Consistent with this purpose, the qualified immunity of **public officials** involves "*immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). The entitlement "is effectively lost if a case is erroneously permitted to go to trial." *Id.* Furthermore, an order denying qualified immunity "is effectively unreviewable on appeal from a final judgment," *id.* at 527, as the public official cannot be "re-immunized" if erroneously required to stand trial or face the other burdens of litigation."
>
> *Tucker v. Resha*, 648 So.2d at 1189 (emphasis added).

In *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996), this Court declined to extend *Tucker* to cases involving the claim of an *entire entity of the government* to immunity from claims based upon *state* law, which is the situation in the instant case. *Roe* involved a claim that an elementary school teacher had molested the plaintiff. Defendant, Department of Education filed a motion to dismiss based upon the defense of sovereign immunity, which was denied by the trial court. *Dep't. of Education v. Roe*, 679 So. 2d 756, 757 (Fla. 1996). The DOE

filed for certiorari, arguing that this Court had jurisdiction to review the denial of its motion to dismiss based upon extension of the *Tucker* holding to state court claims of sovereign immunity. *Id.* This Court held:

> "On the other hand, it cannot be said that suits against governmental entities grounded upon the statutory waiver of sovereign immunity constitute a small class of cases. To the contrary, permitting interlocutory appeals in such cases would add substantially to the caseloads of the district courts of appeal. Moreover, in light of the statutory waiver, it can no longer be said that the issue of sovereign immunity is always independent of the cause itself. Oftentimes, the applicability of the sovereign immunity waiver is inextricably tied to the underlying facts, requiring a trial on the merits. Thus, many interlocutory decisions would be inconclusive and in our view a waste of judicial resources. None of these concerns were evident in *Tucker*. *Tucker* is further distinguishable from cases involving sovereign immunity because qualified immunity is rooted in the need to protect public officials from undue interference, whereas sovereign immunity is not. Finally, in *Tucker* we had an interest in affording federal causes of action brought in state court the same treatment they would receive if brought in federal court. In contrast, this case involves no similar consideration; we are dealing here with a state law defense to an ordinary state law cause of action."
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> *Dep't. of Education v. Roe*, 679 So. 2d 756, 758-759 (Fla. 1996).

This Court has drawn a clear distinction in *Roe* which is directly applicable to the instant case. The instant case does not involve individual public officials being sued under a federal cause of action in state court, rather, here you have a "government entity that is an integral part of the state", §627.351(a)(1) Fla. Stat., claiming sovereign immunity to a state law cause of action brought pursuant to Florida's Bad Faith Statute.

The very concerns which this Court voiced in *Roe* are all present in the instant case. In its brief, Citizens admits that "The *Roe* court's concern over the volume of interlocutory cases that would burden the district courts if interlocutory review were permitted in sovereign immunity cases would apply to Citizens and similar entities." (Citizens' Brief at p. 17). The central issue in this case is whether Citizens' behavior in denying and delaying payment of San Perdido's claims constitutes a "willful tort" that falls within the exception to its statutory immunity. This issue is intimately intertwined with the facts of the case, and if interlocutory appeal is allowed, district courts will be tasked with interpreting all manner of fact situations to determine if the particular circumstances of each case fit one of the statutory exceptions to Citizens' immunity, each such case having little or no precedential value.

Citizens has attempted to justify its position by claiming that denial of its interlocutory appeal will cause it "irreparable harm", and the "irreparable loss of its right to sovereign immunity". Citizens cites two cases in support its position. *Belaire v. Drew*, 770 So. 2d 1164 (Fla. 2000), and *Martin-Johnson v. Savage*, 509 So. 2d 1097 (Fla. 1987). *Drew* involved denial of a petition for certiorari when a trial court ordered temporary visitation, pending a later hearing, by the paternal grandparents of a child over the custodial mother's objection that the visitation violated her constitutional right to privacy. *Drew*, 770 So. 2d at 1166-1167. This

Court held that the writ should have been granted because the trial court's order was a facial, ongoing violation of the mother's privacy rights which could not be undone even if she prevailed at the later hearing. *Id.* At 1167. This Court has clearly held that no such irreparable damage is caused by forcing a government agency to follow through with litigation to trial. In fact, it is strange that Citizens would cite *Martin-Johnson*, because in that case, not only did this Court hold that it is not proper for appellate courts to review a motion to dismiss or strike a claim for punitive damages, it made it clear that merely forcing a party to continue with litigation does not constitute "irreparable harm".

> "Litigation of a non-issue will always be inconvenient and entail considerable expense of time and money for all parties in the case. The authorities are clear that this type of harm is not sufficient to permit certiorari review. *See* *Wright v. Sterling Drugs, Inc.*, 287 So.2d 376 (Fla. 2d DCA 1973), *cert. denied*, 296 So.2d 51 (1974). Moreover, if we permitted review at this stage, appellate courts would be inundated by petitions to review orders denying motions to dismiss such claims, and trial court proceedings would be unduly interrupted. Even when the order departs from the essential requirements of the law, there are strong reasons militating against certiorari review. For example, the party injured by the erroneous interlocutory order may eventually win the case, mooting the issue, or the order may appear less erroneous or less harmful in light of the development of the case after the order. Haddad, *The Common Law Writ of Certiorari in Florida*, 29 U. Fla. L. Rev. 207, 227-28 (1977)."
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> *Martin-Johnson v. Savage*, 509 So. 2d 1097, 1100 (Fla. 1987).

In regard to "losing its immunity", not only has Citizens failed to cite exactly *how* it would suffer this "irreparable loss" if forced to wait for plenary appeal, this Court specifically rejected that argument in *Roe*.

> "While federal sovereign immunity is not identical to Florida's counterpart, we find portions of the reasoning in those cases persuasive here. Like the federal government, Florida has agreed to be sued in its own courts for tort actions. § 768.28. Further, forcing the state to wait until a final judgment before appealing the issue of sovereign immunity does not present the same concerns that exist in the area of qualified immunity. For example, public officials who defend tort suits against the state are not sued in their personal capacities. As a result, defending these suits is not likely to have a chilling effect on the exercise of public officials' discretion in the discharge of their official duties. In addition, although the state will have to bear the expense of continuing the litigation, the benefit of immunity from liability, should the state ultimately prevail on the sovereign immunity issue, will not be lost simply because review must wait until after final judgment."
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> *Dep't. of Education v. Roe*, 679 So. 2d 756, 759 (Fla. 1996).

Simply put, there is nothing that bars Citizens from raising an immunity defense on direct appeal, nor is it "lost" by litigating the case, therefore, this case should be remanded to the trial court for further proceedings.

III. CITIZENS IS NOT IMMUNE TO LIABILITY FOR BAD FAITH.

Citizens spent over half of its brief arguing about the substantive issue of whether it can be held liable for bad faith. As stated in Section I above, this issue was never reached by the First District Court of Appeals, nor is it properly before

this Court. However, the following analysis is provided should the Court choose to address the issue of Citizens' immunity.

In its brief, Citizens repeatedly asserts that it enjoys "absolute immunity from suit" (Citizens' Brief, pp. 4, 7) or, interchangeably, "sovereign immunity". (Citizens Brief, pp. 13 – 17). This is not only confusing, it is simply not true.

Citizens' immunity springs from its enabling statute, §627.351(6)(s)(1) *Florida Statutes*, which provides:

> (s) 1. There shall be no liability on the part of, and no cause of action of any nature shall arise against, any assessable insurer or its agents or employees, the corporation or its agents or employees, members of the board of governors or their respective designees at a board meeting, corporation committee members, or the office or its representatives, for any action taken by them in the performance of their duties or responsibilities under this subsection. Such immunity does not apply to:
>
> a. Any of the foregoing persons or entities for any willful tort;
>
> b. The corporation or its producing agents for breach of any contract or agreement pertaining to insurance coverage;
>
> c. The corporation with respect to issuance or payment of debt;
>
> d. Any assessable insurer with respect to any action to enforce an assessable insurer's obligations to the corporation under this subsection; or
>
> e. The corporation in any pending or future action for breach of contract or for benefits under a policy issued by the corporation; in any such action, the corporation shall be liable to the policyholders and beneficiaries for attorney's fees under *s. 627.428.*

While the legislature did deem Citizens to be a, "government entity that is an integral part of the state", §627.351(a)(1) *Fla. Stat*., it did not grant Citizens "absolute immunity" nor even "sovereign immunity", rather, by the plain wording of Citizens' enabling statute, the legislature granted Citizens a limited, circumscribed form of *statutory immunity*. Proof of this contention is found in the language of the statute. While the legislature was explicit in deeming Citizens to be a "government entity", nowhere does the statute mention clothing Citizens with sovereign immunity. Instead, there is a specific description of who within the organization is immunized and under what circumstances immunity attaches in the first part of section (s)(1), with the exceptions to that immunity following in subsections (a) through (e). If the legislature intended for Citizens to enjoy full sovereign immunity, then the entire first part of section (s)(1) above is wholly unnecessary, as arms of the state are presumed to be immune unless there is a specific waiver of immunity, in other words, only the exceptions would have any meaningful effect. It is axiomatic that statutes are not to be construed so as to render parts to be a nullity. *See, Young v. Progressive S.E. Ins. Co.*, 753 So. 2d 80, 84 (Fla. 2000). This point is significant because it should be remembered that analysis of Citizens immunity is analysis of the very specific immunity granted by its enabling statute, and general principles of sovereign immunity are inapplicable.

After obtaining judgment in its favor for multiple breaches of the insurance contract by Citizens, San Perdido brought the instant lawsuit for violation of §624.155 *Florida Statutes*, (Florida's Bad Faith Statute**). The ultimate substantive issue in the instant case is simply: Is bad faith as defined in §624.155 a "willful tort"?** If so, it falls within the "willful tort" exception to Citizens' immunity outlined in §627.351(6)(s)(1)(a) above, Citizens' motion to dismiss was properly denied by the trial court, and the case should be remanded for litigation to proceed. In its brief, Citizens argues that it is immune to bad faith liability and relies almost exclusively on the Fifth DCA's reasoning in *Citizens Prop. Ins. Co. v. Garfinkle*, 25 So. 3d 62 (Fla. 5th DCA 2009). Citizens presents three (or seven depending upon how you group them) reasons that bad faith is not a willful tort.

The first argument presented is that third party bad faith claims were recognized at common law, but first party bad faith claims weren't recognized until 1982 when the Florida Bad Faith Statute was enacted. Therefore, the *Garfinkle* court reasoned, a first party bad faith action is characterized as a "statutory cause of action" rather than a "willful tort". *Garfinkle*, 25 So. 3d 68. This argument holds no water because it's simply an exercise in labeling. The *Garfinkle* court never explains what the difference, if any, is between a "statutory cause of action" and a "willful tort". §627.351(6)(s)(1)(a) says that Citizens can be held liable for

"willful torts" …. not just "common law" willful torts. The *Garfinkle* opinion never explains why the bad faith "statutory cause of action" isn't tortuous in nature (a "statutory tort"). No analysis of the elements of the bad faith statute is undertaken, nor is any explanation offered as to what distinguishes it from a tort, or what authority exists to support such a distinction. In other words, the *Garfinkle* court's analysis totally sidesteps the question of whether, statutorily created or not, is bad faith as defined in §624.155 a "willful tort"? San Perdido asserts that it is.

The willful tort exception contained in §627.351(6)(s)(1)(a) makes no distinction between statutory and common law torts. It exempts torts, so long as they are willful. Florida has long recognized statutory torts under a wide variety of circumstances. *Miami Dairy Farms, Inc. v. Tinsley*, 164 So. 528, 530 (Fla. 1935)(Wrongful Death statute); *Reeves v. Ace Cash Express, Inc.*, 937 So. 2d 1136, 1138 (Fla. 2nd DCA 2006)(Florida Consumer Collection Practices Act); *Comptech Int'l v. Milam Commerce Park*, 711 So. 2d 1255, 1257 (Fla. 3rd DCA 1998)(violation of the Florida Building Code); *Sarkis v. Pafford Oil Co.*, 697 So. 2d 524, 527 (Fla. 1st DCA 1997)(Civil Theft and Civil Racketeering Statutes).

A tort is, of course, a breach of duty by the tortfeasor which causes damage to another.

> "A tort is the breach of a duty imposed by law which results in reasonably foreseeable damages. See W. Prosser & W. Keaton, *Prosser on Torts*, 164-165 (5th ed. 1984). The fact that the duty has been imposed by statutory rather than common law is of absolutely no

consequence. Such a distinction incorrectly ignores the basic tenets of the concept of duty. Legislatures as well as courts may impose duties and the breach of that duty, no matter who imposed it, must give rise to a cause of action."

Dept. of Health and Rehabilitative Svcs. v. Wright, 522 So. 2d 838, 841 (Fla. 1988)(Kogan, J., dissenting).

§624.155(1) *Florida Statutes*, provides in pertinent part:

"(1) Any person may bring a civil action against an insurer when such person is damaged:

… (b) By the commission of any of the following acts by the insurer:

1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests; …

(5) No punitive damages shall be awarded under this section unless the acts giving rise to the violation occur with such frequency as to indicate a general business practice and these acts are:

(a) Willful, wanton, and malicious;

(b) In reckless disregard for the rights of any insured; or

(c) In reckless disregard for the rights of a beneficiary under a life insurance contract. Any person who pursues a claim under this subsection shall post in advance the costs of discovery. Such costs shall be awarded to the authorized insurer if no punitive damages are awarded to the plaintiff."

§624.155 simply codifies the duty of good faith and fair dealing in settling claims between an insurer and its insured and authorizes a civil action for <u>breach of</u>

that duty. This is beyond mere breach of the insurance contract. It is a breach of a *duty* imposed by law, which, by definition, is a tort. The statute also allows recovery of punitive damages for willful breach of that duty. It is well settled under Florida law that punitive damages are not recoverable in contract actions absent an independent tort. *Southern Bell Tel. & Tel. Co. v. Hanft*, 436 So. 2d 40, (Fla. 1983).

A tort is "willful" if the tortuous act is done intentionally, as opposed to mere negligence.

> "A thing is willfully done when it proceeds from a conscious motion of the will, intending the result which actually comes to pass. It must be designed or intentional, and may be malicious, though not necessarily so. "Willful" is sometimes used in the sense of intentional, as distinguished from "accidental," and, when used in a statute affixing a punishment to acts done willfully, it may be restricted to such acts as are done with an unlawful intent."

Jersey Palm-Gross v. Paper, 658 So. 2d 531, 534 (Fla. 1995)(quoting, *Chandler v. Kendrick*, 146 So. 551, (Fla. 1933)).

§624.155 speaks of the insurer being liable when it fails to act "fairly and honestly toward its insured and with due regard for her or his interests." This is the language of an intentional wrong, as opposed to mere negligence or breach of a contract. As the old saying goes, "if it walks like a duck and quacks like a duck, it's a duck". Clearly the plain language of the statute defines a tort, not an action in contract or some nebulous "statutory cause of action". Further, breach of

§624.155 is a *willful* tort because the statute specifically prescribes willful conduct. Therefore, breach of §624.155 is a statutory willful tort and for that reason falls under the willful tort exception to Citizens' immunity.

The second argument presented by Citizens is that bad faith is distinct from a "willful tort" because there would be no recourse for tortuous conduct against Citizens without the exception for willful torts contained in §627.351(6)(s)(1)(a), but there IS recourse for bad faith because, as a prerequisite, an aggrieved insured must recover for breach of contract, which is one of the exceptions to its immunity contained in §627.351(6)(s)(1)(b). (Citizens' brief, pp. 8-9). This argument is meritless. Citizens simply ignores the fact that an action for bad faith not only is based upon an entirely different legal theory than a breach of contract action, it allows recovery of damages *beyond* those allowed in a simple breach of contract action. The whole reason bad faith exists as a tort is to compensate plaintiffs for the willful actions of the insured in wrongfully withholding payment, and to deter the insurers from doing so.

Citizens' third argument is that the legislature did not intend for it to be liable for bad faith. Citizens attempts to support this contention with several sub-arguments, the first being that allowing it to be liable for bad faith is contrary to " … the Legislature's expressed goal of maximizing available financial resources available to Citizens for payment of claims an maintaining affordable rates for

Citizens policyholders …" (Citizens' brief, p. 9). This statement of "legislative intent" is lifted from §627.351(a)(1) and is presented totally out of context.

> "… Because it is essential for this government entity to have the maximum financial resources to pay claims following a catastrophic hurricane, it is the intent of the Legislature that Citizens Property Insurance Corporation continue to be an integral part of the state and that the income of the corporation be exempt from federal income taxation and that interest on the debt obligations issued by the corporation be exempt from federal income taxation."
>
> §627.351(a)(1) *Florida Statutes*.

A plain reading of the text shows that the Legislature was simply explaining the fact that it made Citizens a "government entity" in order to allow it to enjoy tax exempt status under the I.R.S. code. Citizens has attempted to spin this statement into a legislative imprimatur for Citizens to maximize its own wealth at all costs. This is not what the Legislature intended. To the contrary, the statute clearly says that the *reason* for granting tax exempt status is to pay claims.

This leads to the most crucial question that this Court must answer when interpreting the immunity granted in Citizens' enabling statute: **What is Citizens asking for in this appeal, and is the remedy that Citizens seeks congruent with the Legislature's purpose for creating Citizens in the first place?** Citizens seems to argue that its primary purpose is simply to continue its own existence. However, the Legislature was clear on why it created Citizens:

> "… The state therefore has a compelling interest and a public purpose to assist in assuring that property in the state is insured and that it is

> insured at affordable rates so as to facilitate the remediation, reconstruction, and replacement of damaged or destroyed property in order to reduce or avoid the negative effects otherwise resulting to the public health, safety and welfare, to the economy of the state, and to the revenues of the state and local governments which are needed to provide for the public welfare. …"

§627.351(a)(1) *Florida Statutes* (emphasis added).

In other words, Citizens exists to pay claims and help the people of this state get back on their feet after a disaster. It serves no other function nor provides any other benefit to the people of this state. Yet Citizens is asking this Court to allow it ***to deny claims in bad faith*** without any adverse consequences. This is diametrically opposed to what Citizens was created for and no one can rationally reconcile its position with the objectives stated in its enabling statute.

The tort of bad faith was created because time and again, insurance companies have attempted to maximize their own wealth at the expense of their insureds. The law books are full of examples. The Legislature was well aware of this fact, and went so far as to specifically include a duty of good faith on the part of Citizens in its enabling statute:

> "2. The corporation shall manage its claim employees, independent adjusters, and others who handle claims to ensure they carry out the corporation's duty to its policyholders to handle claims carefully, timely, diligently, and in good faith, balanced against the corporation's duty to the state to manage its assets responsibly to minimize its assessment potential."

§ 627.351(6)(s)(2) *Florida Statutes*

The foregoing section comes immediately after the immunity section in Citizens' enabling statute. While it does not "create a private of action" (a straw man argument presented by Citizens on page 12 of its brief) what it does do is *indicate the Legislatures' intent*. Clearly, the Legislature intended to impose a duty upon Citizens to act in good faith, or, put negatively, prohibited Citizens from acting in bad faith. In the preceding section, §627.351(6)(s)(1)(a - e), the Legislature simply included the means to <u>enforce</u> that duty.2

The very existence of the bad faith statute is proof positive that the Legislature is well aware of the proclivities of insurance companies to wrongfully deny claims and, despite any claims to the contrary, Citizens is no different from any other insurance company in this regard. Denying Citizens immunity for commission of breaches of contract and willful torts (including bad faith) makes sense as a necessary corrective mechanism to curb those tendencies.

The entire purpose of creating Citizens is to;

> "… facilitate the remediation, reconstruction, and replacement of damaged or destroyed property in order to reduce or avoid the negative effects otherwise resulting to the public health, safety and welfare, to the economy of the state, and to the revenues of the state and local governments …"
>
> § 627.351(6)(a)(1) *Florida Statutes.*

2 In the past, Citizens has tried to claim that its enabling statute provides oversight in the form of government bureaucrats reviewing its operations, in effect, making Citizens "self policing". Obviously the Legislature thought differently, otherwise the §627.351(6)(s)(1)(a - e) immunity exceptions would be totally unnecessary.

A statute should not be construed in a manner which produces an absurd result. *Fla. Dep. of Envt'l. Prot. v. ContractPoint Florida Parks, L.L.C.*, 986 So. 2d 1260, (Fla. 2008). How absurd it would be for the Legislature to grant Citizens blanket immunity which would allow it to breach its insurance contracts at will and thus flaunt the very purpose for which it was created? How absurd it would be to construe the statute that created Citizens to allow it to engage in bad faith claims handling practices when that very same statute says Citizens shall not do so?

Citizens next argues that because the legislature didn't *specifically list* violation of §624.155 *Fla. Stat.* as an exception to Citizens' immunity such a violation is not exempted as a willful tort. While San Perdido agrees with Citizens that any waiver of immunity must be "clear and unambiguous", that does not mean that the legislature must include a laundry list specifically naming <u>every possible cause of action</u> in order to make its intent to exempt a particular *type* of behavior from immunity clear. There is simply no such requirement under Florida law.

An interesting question was posed by the First DCA panel during oral argument in the instant case: Given that Citizens'' business consists entirely of insuring Florida property owners against windstorm hazards, what other "willful torts" could it possibly commit other than bad faith? The answer is, there are none. If Citizens is held to be immune from bad faith, then the exemption to its immunity for willful torts contained in §627.351(6)(s)(1)(a) is meaningless.

In Citizens' case, the legislature has exempted in clear and unequivocal language, commission of "willful torts" from its' immunity. For the reasons cited above, San Perdido submits that violation of §624.155 is a willful tort, and therefore is specifically and unambiguously exempted from Citizens' statutory immunity.

Finally, Citizens points to a difference in the language in the House and Senate versions of the 2007 amendments to its enabling statute §627.351(6) *Florida Statutes,* as evidence that the Legislature "intended" Citizens to be immune to bad faith liability. The House version contained the following language which the Senate version did not:

"Citizens Property Insurance Corporation shall remain subject to all remedies available against an insurer."

Because the final version of the amended statute adopted the Senate and not the House version of the bill, Citizens concludes that the Legislature did not intend to waive Citizens' immunity for §624.155 suits. San Perdido disagrees. Omission of a single sentence in an 85 page bill does not in any way automatically lead to the conclusion Citizens' urges. It is just as valid to conclude that in the course of compromising the two versions, the legislators may have felt that the verbiage was simply unnecessary as the willful tort and breach of contract exceptions were already in place. In fact, it should be noted that the cited language is in the

preamble to the bill, not in the immunity section. If the Legislature felt that it was necessary to modify or further define the exceptions to Citizens' immunity, the logical place to amend the statute would be in the section that deals with Citizens' immunity, not the preamble.

Further, there is no reference to §624.155 in either of the bills or the amended statute. If the Legislature "intended" to exempt Citizens from bad faith liability, it could easily have done so in a much clearer fashion by either eliminating the willful tort exception altogether or defining the exception so as not to include bad faith liability under §624.155.

There is simply no way to tell with any certainty what the legislature 'intended" by omitting particular language from a proposed bill or what compromises permeated the legislative process in the course of compromising the two versions of the bill. In the end, Citizens' arguments in this regard are, at most, sheer speculation.3

CONCLUSION

The First District Court of Appeals certified conflict with the Fifth District on a very narrow procedural question:

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3 The *Garfinkle* court also made much of the inclusion of the word "or" at the end of §627.351(6)(s)(1)(e) in the Senate version of the amendment. However, that particular section excludes from immunity *awards of attorney fees on appeal* in an action against Citizens for breach of contract and has no relevance to the issues at hand.

'Whether, in light of the Supreme Court's ruling in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996), review of the denial of a motion to dismiss based upon a claim of sovereign immunity should await the entry of a final judgment in the trial court?"

Citizens Prop. Ins. Corp. v San Perdido Ass'n., 46 So. 3d at 1053.

This Court answered that question definitively in Roe:

> "On the other hand, it cannot be said that suits against governmental entities grounded upon the statutory waiver of sovereign immunity constitute a small class of cases. To the contrary, permitting interlocutory appeals in such cases would add substantially to the caseloads of the district courts of appeal. Moreover, in light of the statutory waiver, it can no longer be said that the issue of sovereign immunity is always independent of the cause itself. Oftentimes, the applicability of the sovereign immunity waiver is inextricably tied to the underlying facts, requiring a trial on the merits. Thus, many interlocutory decisions would be inconclusive and in our view a waste of judicial resources.."
>
> *Dep't. of Education v. Roe*, 679 So. 2d 756, 758-759 (Fla. 1996).

As shown above, the same concerns expressed by the Court in *Roe* exist in the instant case. Even Citizens has admitted that, should the Court allow this interlocutory appeal, the floodgates would be open. Therefore, the Court below should be affirmed, the Fifth DCA cases, *Citizens Prop. Ins. Co. v. Garfinkle*, 25 So. 3d 62 (Fla. 5th DCA 2009), and *Citizens Prop. Ins. Co. v. La Mer Condominium Ass'n.*, 37 So. 3d 988 (Fla. 5th DCA 2010), should be expressly overruled, and the instant case should be remanded to the trial court for further proceedings.

Citizens likes to claim that it's an arm of the government, created to promote the welfare of the average Floridian and for that reason it is entitled to special protection. But the Legislature recognized that when it created Citizens, it was, first and foremost, creating an insurance company and checks were needed to prevent Citizens from straying off course and behaving like an insurance company. To this end, the Legislature carved out specific exceptions to Citizens general grant of immunity, as set forth in §627.351(6)(s)(1)(a - e) *Florida Statutes* Analysis of the provisions of §627.351(6)(s)(2) shows that the Legislature clearly and unambiguously imposed a duty of good faith in regards to claims handling and settlement upon Citizens. §627.351(6)(s)(1) *Florida Statutes* grants Citizens general immunity then carves out specific exceptions to that immunity in order to provide a mechanism to enforce the duty of good faith.

The ultimate question that this Court must answer is this: What was Citizens created for and does it serve that purpose to allow Citizens to breach its contracts at will and engage in bad faith claims handling practices? Because when all the rhetoric is cleared away, that's what Citizens is really arguing for: Citizens wants this Court to say that it's ok for it to breach its contracts with the people of this State and deny their claims in bad faith.

Based upon the foregoing facts and premises, Respondent, San Perdido Association, Inc., respectfully requests the Court to DENY Citizens Property

Insurance Corporation's Appeal in this matter on grounds that prohibition and certiorari do not lie in the instant case, and remand the instant case to the trial court for further proceedings, or, in the alternative, enter judgment holding that a cause of action for bad faith pursuant to §624.155 *Florida Statutes* can be maintained against Citizens, remand the instant case to the trial court for further proceedings consistent therewith, and grant San Perdido Association such other, further relief as the Court may deem appropriate.

Respectfully submitted,

/s/ Richard M. Beckish, Jr.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been delivered to Barry Richard, Esquire, and Glenn Burhans, Jr., Esquire, at Greenberg Traurig, P.A., 101 East College Avenue, Tallahassee, Florida 32301, via U.S. Mail, postage prepaid and via e-mail on this 31st day of March, 2011.

/s/ Richard M. Beckish, Jr.

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Richard M. Beckish, Jr.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2). This document is submitted in Times New Roman 14-point font.

/s/ Richard M. Beckish, Jr.

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Richard M. Beckish, Jr.