

IN THE SUPREME COURT OF FLORIDA

Case No. SC10-2433

(First DCA Case No. 1D09-6183)

CITIZENS PROPERTY INSURANCE
CORPORATION, A GOVERNMENTAL
ENTITY OF THE STATE OF FLORIDA,

Petitioner,

v.

SAN PERDIDO ASSOCIATION, INC.,
A FLORIDA NOT-FOR-PROFIT
CORPORATION,

Respondent.

**SAN PERDIDO'S AMENDED RESPONSE TO
CITIZENS' BRIEF ON JURISDICTION**

On Petition for Discretionary Jurisdiction to Review
Conflict Certified by First District Court of Appeal

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STATEMENT OF THE FACTS

The facts 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., 2010 Fla. App. LEXIS 15053 at p.1 (Fla. Dist. Ct. App. 1st Dist. Oct. 6, 2010).

The trial court denied Citizens' motion to dismiss and Citizens appealed, petitioning, alternately, for a writ of prohibition and 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 held:

“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., 2010 Fla. App. LEXIS 15053 at p.5 (Fla. Dist. Ct. App. 1st Dist. Oct. 6, 2010).

In addition, 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). The First District Court of Appeals 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?'

Citizens Prop. Ins. Corp. v San Perdido Ass'n., 2010 Fla. App. LEXIS 15053 at p.6.

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

Respondent, San Perdido Association would respectfully submit that the certified question is not of great public importance nor are the circuits in conflict. The certified question presupposes that Citizens enjoys sovereign immunity when Citizens' enabling statute clearly shows that it does not. Therefore, any holding by this Court in this case would necessarily be limited to whether interlocutory review was proper for claims of immunity based upon the statutory grant in Citizens' enabling statute, a procedural issue of importance only to the current litigants.

As explained further below, Citizens' request to alter the certified question to fit its own statutory immunity is an improper attempt to invoke this Court's jurisdiction over issues not adjudicated in the district court.

Conflict was certified 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). However, the procedural issues certified were never even considered in *Garfinkle* and *Le Mer*. Further, a reading of the Fifth District Court of Appeals decision in *Florida A & M Univ. Bd. Of Trustees v Thomas*, 19 So. 3d 445 (Fla. 5th DCA 2009), shows that the circuits are in fact in harmony concerning the procedural issues presented in the instant petition. For these reasons, this Court should not hear the instant case despite certification, and should deny Citizens' petition.

ARGUMENT

- I. CITIZENS' PETITION INVOLVES A NARROW PROCEDURAL ISSUE THAT IS NEITHER OF GENERAL IMPORTANCE UNDER FLORIDA LAW NOR INVOLVES DIRECT CONFLICT BETWEEN THE CIRCUITS.

A. The Issues Involved in Citizens' Petition Apply Only to Citizens and thus are not of Great Public Importance.

Citizens begins its argument in regard to the certified question with a misstatement of the court's holding below. Citizens claims that "Both the First and Fifth District opinions recognized that Citizens is a state governmental entity shielded by sovereign immunity." The district court's opinion, reproduced above, bears repeating:

"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."

Citizens Prop. Ins. Corp. v San Perdido Ass'n., 2010 Fla. App. LEXIS 15053 at p.5 (Fla. Dist. Ct. App. 1st Dist. Oct. 6, 2010).

Nowhere in its opinion does the court below recognize Citizens' claim to sovereign immunity, rather, it held that Citizens was a statutorily created corporation with an explicit and limited grant of *statutory immunity*, and treated the two types of immunity as the same for the purposes of substantive analysis. *Id.* at p.2.

The First District Court of Appeals is correct, the legislature did not grant Citizens full “sovereign immunity” as Citizens has often claimed, rather it gave Citizens a limited grant of statutory immunity defined in § 627.351(6)(s)(1), *Florida Statutes*, which provides in pertinent part:

(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.
- § 627.351(6)(s)(1) *Florida Statutes*.

If the legislature intended for Citizens to enjoy sovereign immunity, then the entire first part of section (s)(1) above is wholly unnecessary. 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). When the legislature created Citizens it clearly did not grant Citizens full sovereign immunity. By the plain wording of Citizens’ enabling statute, the legislature granted Citizens a limited, circumscribed form of statutory immunity.

The distinction between sovereign immunity and the limited statutory immunity that Citizens enjoys is crucial in terms of this Court’s certiorari jurisdiction. Jurisdiction to review the instant case is grounded upon the premise that the procedural issue for which review is sought is one “of great public importance”. However, the issue presented is not of “great public importance”. If Citizens enjoyed full sovereign immunity, then the procedural question concerning reviewability of its motion to dismiss would be generally applicable to an entire spectrum of cases involving state departments and agencies. But Citizens’ immunity is purely a creature of its’ enabling statute and is unique to Citizens. Therefore, certiorari should not be granted because, far from being of “great public importance”, any holding fashioned in this case *only* apply to Citizens and is only important to *it*.

B. Citizen’s Request to Alter the Certified Question is an Attempt to Improperly Invoke This Court’s Jurisdiction on Questions not Litigated Below.

The distinction between statutory and sovereign immunity, outlined above, is acknowledged by Citizens in a left handed way by its attempt in section II of its

argument where Citizens urges the Court to “reword” the certified question. Buried in Citizens reasoning for this request is its acknowledgement that the limited immunity it enjoys is statutory, rather sovereign immunity. “The case at bar and *Garfinkle* involve governmental entities made statutorily immune from *all* liability and *all* causes of action not expressly excepted by the statute.” Citizens Brief On Jurisdiction, p. 6. (underline added).

This is not just a case of Citizens simply mixing its metaphors. The question certified by the district court, was whether Citizens should have been granted interlocutory appeal based upon its claim of *sovereign immunity*, however, this begs the question of whether Citizens is sovereignly immune. It is clear from Citizens enabling statute and the court’s opinion below that Citizens does not enjoy sovereign immunity. Citizens seeks to avoid this issue by simply “changing the question’, in effect, asking this Court for a de facto grant of sovereign immunity.

The issue of whether Citizens actually enjoys sovereign immunity (versus statutory immunity) was neither certified nor litigated below (as noted above, the district court simply skirted the question). Neither was the issue of whether Citizens is immune to *all* liability and *all* causes of action not excepted by its enabling statute. Therefore, from a jurisdictional standpoint, neither of these questions are properly before the Court and even exercising the broadest discretion

under certiorari principles, this Court does not have jurisdiction to review issues not presented to the court below.

C. There is no Conflict Between the Circuits on the Procedural Issues Involved in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996).

In its opinion below, 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). All three cases involve Citizens, and all three cases involve review of denial of motions to dismiss filed by Citizens based upon its claim of immunity. In *Garfinkle* and *La Mer*, the Fifth District Court of Appeals granted review and reversed the trial court, holding that Citizens was in fact immune to suit for bad faith. However, in the instant case the First District Court of Appeals held that it had no jurisdiction to entertain an interlocutory appeal based on claims of sovereign immunity in reliance upon this Court's holding in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996). *Citizens Prop. Ins. Corp. v San Perdido Ass'n.*, 2010 Fla. App. LEXIS 15053 at p.6.

One must bear in mind that in *San Perdido*, the First District Court of Appeals never reached the substantive issues addressed in *Garfinkle* and *La Mer*, therefore, analysis must be confined to whether there is conflict over the narrow

procedural grounds addressed in *San Perdido*. Respondent submits that there is no conflict between the circuits on this narrow procedural issue. As pointed out by the First District Court of Appeals in *San Perdido*, a close reading of *Garfinkle*¹ shows that the *Garfinkle* court simply never even considered how *Roe*, supra, applied. *Citizens Prop. Ins. Corp. v San Perdido Ass'n.*, 2010 Fla. App. LEXIS 15053 at pp.4-5.

However, in *Florida A & M Univ. Bd. Of Trustees v Thomas*, 19 So. 3d 445 (Fla. 5th DCA 2009), a case decided just two months prior to *Garfinkle*, the Fifth District Court of Appeals correctly applied the holding in *Roe*, and rejected an interlocutory based upon a petitioners' claim of sovereign immunity.

“Petitioner seeks a writ of certiorari, contending that the trial court's denial of its motion for summary judgment constituted a departure from the essential requirements of law. It is petitioner's position that respondent's claim is barred by application of the sovereign immunity doctrine. We conclude that we lack jurisdiction to review this interlocutory order. *See Dep't of Education v. Roe*, 679 So. 2d 756 (Fla. 1996); *School Bd. of Miami-Dade County v. Leyva*, 975 So. 2d 576 (Fla. 3d DCA 2008).”

Florida A & M Univ. Bd. Of Trustees v Thomas, 19 So. 3d 445 (Fla. 5th DCA 2009).

The Fifth District Court of Appeals has never repudiated or expressly overruled *Thomas*, therefore, there is every reason to believe that *Garfinkle* and *La*

¹ *La Mer* simply followed *Garfinkle* without adding any substantive content, therefore the discussion will focus upon *Garfinkle*. *See, Citizens Prop. Ins. Co. v. La Mer Condominium Ass'n.*, 37 So. 3d 988 (Fla. 5th DCA 2010).

Mer are anomalous rulings in which the issues addressed in *Roe* were simply overlooked or never raised at all. That being the case, it would seem that, at least on the narrow procedural grounds addressed in the district court's opinion below, the First and Fifth District Courts of Appeal are in accord.

CONCLUSION

WHEREFORE, based upon the facts and premises set forth hereinabove, San Perdido respectfully requests the Court to refuse jurisdiction in this cause, and allow the instant case to be remanded to the trial court for further proceedings consistent with the opinion of the court below, and afford such other, further relief to San Perdido as the Court deems 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 11th day of January, 2011.

/s/ Richard M. Beckish, Jr.

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.

Richard M. Beckish, Jr.