

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,

vs.

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

Respondent.

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**CITIZENS' AMENDED BRIEF ON JURISDICTION**

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

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### Cases

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## STATEMENT OF THE FACTS

Petitioner Citizens is a statutory corporation created by the Florida Legislature to ensure that Florida properties can be insured against hurricane damage; it holds the status of a government entity. Op. 2.<sup>1</sup> Respondent San Perdido obtained an award against Citizens on a claim for insurance coverage. After affirmance by this Court, San Perdido filed a first-party bad faith claim against Citizens. Citizens moved to dismiss on the ground of sovereign immunity pursuant to section 627.351(6)(s)1, Florida Statutes. The circuit court denied the motion and Citizens sought a writ of prohibition or, alternatively, certiorari from the district court. Op. 2. The district court denied the petition, but certified the case to this Court as being in conflict with *Citizens Property Insurance v. Garfinkel*, 25 So. 3d 62 (Fla. 5<sup>th</sup> DCA 2009), Op. 5, and 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 on a claim of sovereign immunity should await the entry of a final judgment in the trial court?

Op. 6.

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<sup>1</sup> A copy of the opinion, dated October 6, 2010, cited "Op.", is provided in the Appendix. Citizens' *Motion for Rehearing En Banc* was denied on November 17, 2010 and the mandate was issued on December 3, 2010.

## **SUMMARY OF THE ARGUMENT**

There were substantial grounds for the District Court's certification that its decision and the decision of the Fifth District are in express and direct conflict. The language of the two opinions are in express and direct conflict on three separate important issues of Florida law: (1) whether statutory governmental entities such as Citizens are entitled to interlocutory review by writ of a denial of a motion to dismiss based on sovereign immunity; (2) whether the sovereign immunity granted to such governmental entities involves the trial court's jurisdiction; and (3) whether the issuance of a writ of prohibition or certiorari is therefore appropriate.

The inter-district conflicts create uncertainty regarding important issues of Florida law and would result in an irrational disparity in treatment of persons in different districts, which is unfair and encourages forum shopping.

The Court should reword the question certified for review to more particularly focus on the question that requires resolution.

## ARGUMENT

### I

#### THIS COURT SHOULD GRANT REVIEW AND RESOLVE SEVERAL IMPORTANT CONFLICTS IN FLORIDA JURISPRUDENCE.

The district court's certification of conflict is well supported by the record. Both the First and Fifth District cases involved first-party bad faith claims against Citizens and in both cases the circuit courts had denied motions to dismiss on the ground of sovereign immunity. Both the First and Fifth District opinions recognized that Citizens is a state governmental entity shielded by sovereign immunity pursuant to sections 627.351(6)(a)1 and 627.351(6)(s)1. Op. 2, 3; *Garfinkel* at 25 So. 2d 64-65.<sup>2</sup> The Fifth District expressly and directly held that the circuit court exceeded its jurisdiction when it denied Citizen's motion to dismiss based on sovereign immunity and granted a writ of prohibition:

It is well established that a trial court lacks subject matter jurisdiction if a party enjoys the benefits of sovereign immunity with respect to the subject matter of the case before the court, and the issuance of the writ is appropriate to prevent the court from acting in the absence of such jurisdiction.

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<sup>2</sup> Section 627.351(6)(s)1 provides in relevant part: "*There shall be no liability on the part of, and no cause of action of any nature shall arise against, ... the corporation ... for any action taken by [it] in the performance of [its] duties or responsibilities under this subsection.*" § 627.351(6)(s)1, Fla. Stat. (emphasis added).

\* \* \* \* \*

In summary, we hold that Citizens is immune from first-party bad faith claims pursuant to section 627.351(6)(r)1.

\* \* \* \* \*

PETITION FOR WRIT OF PROHIBITION  
GRANTED;

*Garfinkel* at 25 So. 2d 63, 69.

The First District held that, even if Citizens were immune from suit for a first-party bad faith claim, the issue was not jurisdictional and the matter was not subject to interlocutory review either by writ of prohibition or writ of certiorari:<sup>3</sup>

Without 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.

\* \* \* \* \*

In light of the supreme court's ruling in *Roe*, this 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.

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<sup>3</sup> The First District did not address certiorari review. The dissent in the First District would have granted it, but the majority concluded that there was no irreparable harm and declined. Op. 5, 7.

Op. 5. The First District's decision requires Citizens to proceed through the burden and expense of trial and appeal of a final judgment in order to vindicate its sovereign immunity. In contrast, the Fifth District's decision provides for resolution of the issue by interlocutory writ.

Thus, the decisions of the First and Fifth districts are in express and direct conflict on the specific question of whether statutory governmental entities such as Citizens are entitled to interlocutory review by writ of a motion to dismiss based on sovereign immunity. Moreover, the conflicts extend to two other significant issues of Florida jurisdiction that underlie these holdings: whether the sovereign immunity granted to such governmental entities involves the trial court's jurisdiction and whether the issuance of a writ of prohibition or certiorari is therefore appropriate.

The district court's certification of great public importance is also well taken. The conflicts created by the district court opinions result in a disparity in the treatment of persons in different districts that cannot be rationally justified. Such disparity is unfair to all litigants and encourages forum shopping.



II  
THE COURT SHOULD REWORD THE  
QUESTION CERTIFIED FOR REVIEW TO  
BETTER FOCUS ON THE INTER-DISTRICT  
CONFLICTS.

The court below based its decision on its reading of this Court's opinion in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996), a case involving the general waiver of sovereign immunity embodied in section 768.28, Florida Statutes, which allows suits against state agencies, but caps the amount of recovery. The case at bar and *Garfinkel* involve governmental entities made statutorily immune from *all* liability and *all* causes of action not expressly excepted by the statute. The question that requires resolution is whether this distinction between a cap on damages on the one hand, and complete immunity from damages and actions on the other hand, makes a difference so far as the ability of governmental entities such as Citizens to seek interlocutory review of a denial of a motion to dismiss. Therefore, the Court is respectfully urged to reword the question certified for resolution to read as follows:

Whether review of the denial of a motion to dismiss based on a claim of sovereign immunity by a governmental entity against which both liability and all causes of action not expressly excepted are barred should await the entry of a final judgment in the trial court?

## **CONCLUSION**

The Court is requested to accept jurisdiction, pursuant to certification of conflict and great public importance, to review the opinions of the First and Fifth Districts and resolve the conflicts between those opinions.

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Barry Richard

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and U.S. Mail to counsel listed below this 3rd day of January, 2011:

Richard M. Beckish, Jr.  
Liberis Law Firm  
212 W. Intendencia St.  
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Barry Richard

**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.

\_\_\_\_\_  
Barry Richard

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