IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC10-2433
L.T. 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.

REPLY BRIEF ON THE MERITS

On Discretionary Review from a Decision of the
First District Court of Appeal

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Propriety of the Immunity Issue

San Perdido begins its brief by asserting that Citizens improperly interjected the issue of its immunity into its Initial Brief, and urges the Court to strike the argument from the brief. The argument was entirely proper. Once this Court grants conflict review, the Court has the discretion to consider any issues properly raised and argued in the lower court. *Russell v. State*, 982 So. 2d 642 (Fla. 2008). Consideration of the issue was not only permissible, but necessary. Determination of the immunity issue is an essential prerequisite to determination of whether the trial court erred in denying Citizens' motion to dismiss, a fact recognized by the Fifth District in *Citizens Property Ins. Corp. v. Garfinkel*, 25 So. 3d 62 (Fla. 5th DCA 2009), and the dissenting opinion in the First District below.

Interlocutory Review

The remainder of San Perdido's brief reads as though it is responding to a brief other than the one filed by Citizens. San Perdido attributes to Citizens positions and arguments that Citizens has not advanced, entirely ignores arguments that Citizens has made, and presents what purport to be

verbatim quotes from Citizens' Initial Brief that do not appear anywhere in the brief.[1]

As should be abundantly clear from the briefs presented below and in this Court, Citizens' motion to dismiss was not based upon a claim of sovereign immunity and it makes no such claim in this Court. To the contrary, it is Citizens' position that the flaw in the decision below arises from the failure of the majority of the district court panel to distinguish between sovereign immunity, which provides an agency with only a cap on damages, and Citizens' statutory immunity from suit. *See, e.g.,* Citizens' Initial Brief, p. 18 n. 4. As discussed in Citizens' Initial Brief, the failure of the district court majority to recognize the distinction is what led it to conclude that its decision was controlled by *Dept. of Education v. Roe*, 679 So. 2d 756 (Fla. 1996), a case involving sovereign immunity and not

[1] San Perdido doggedly insists that Citizens' motion to dismiss in the trial court and its argument in this Court are based upon a claim of sovereign immunity. *See* San Perdido brief, pp. 6, 7, 10, 11, and 14. Erroneous attributions of purported quotes appear in San Perdido Brief, pages 11 ("irreparable loss of its right to sovereign immunity"), and 14 ("Citizens repeatedly asserts that it enjoys 'absolute immunity from suit' (Citizens' Brief, pp. 4, 7) or, interchangeably, 'sovereign immunity' (Citizens' Brief, pp. 13-17)").

involving immunity from suit.[2] Because San Perdido fails to acknowledge Citizens' actual position in this respect, it also fails to respond to it.

San Perdido attempts to distinguish this Court's decision *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1984), in which the Court held that interlocutory review was permissible in cases involving qualified immunity even though such an exception was not included in Rule 9.130. San Perdido argues that, because the case at bar does not involved qualified immunity, *Tucker* would not afford Citizens interlocutory review. The argument assumes that the *Tucker* decision was intended by this Court to create the one and only circumstance under which interlocutory review not recognized by Rule 9.130 would be permissible. However, nothing in the *Tucker* decision suggested that the qualified immunity exception was intended to be exclusive, and this Court has recognized other exceptions to Rule 9.130 both before and after *Tucker*.

In its Initial Brief, Citizens cited *Bellair v. Drew*, 770 So. 2d 1164 (Fla. 2000), in which this Court held that a petitioner was entitled to

[2] San Perdido states that Citizens "admits" in its brief that "The *Roe* court's concern over the volume of interlocutory cases that would burden the districts courts if interlocutory review were permitted in sovereign immunity cases would apply to Citizens and similar entities." In this instance, the quote is accurate. However, it is obvious from the context, and undoubtedly understood by opposing counsel, that the statement was not an "admission," but a typographical error in which the word "not" was inadvertently dropped.

certiorari review of an order granting a grandmother visitation rights with a child, and *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097 (Fla. 1987), in which the Court noted in dicta that orders requiring production of "cat out of the bag" information that "may reasonably cause material injury of an irreparable nature" would justify certiorari review. As it does with *Tucker*, San Perdido attempts to distinguish the two cases on the facts, ignoring the common principle recognized in both cases and discussed in Citizens' Initial Brief: a party will not be denied interlocutory review when the alternative is irreparable injury — including loss of a material right — that cannot be remedied on final appeal.

San Perdido expresses surprise that Citizens cited the *Martin-Johnson* case considering that it held that interlocutory certiorari would not be appropriate to review the denial of a motion to strike a claim for punitive damages. The *Martin-Johnson* opinion, however, provides an excellent discussion of the difference between interlocutory orders that do not pose a threat of irreparable harm and those that do. The court noted, for example, that while orders to produce discovery materials ordinarily would not justify certiorari review, when they involve production of privileged documents, such review would be appropriate. The Court stated:

> A non-final order for which no appeal is provided by Rule 9.130 is reviewable by petition for certiorari only in limited

> circumstances. The order must depart from the essential requirements of law and thus cause material injury to the petitioner throughout the remainder of the proceedings below, **effectively leaving no adequate remedy on appeal**.
>
> *****
>
> Ordinarily, orders on motions to strike or dismiss claims do not qualify for review by certiorari. Orders granting discovery, on the other hand, have traditionally been reviewed by certiorari. **The rationale of these cases is that appeal after final judgment is unlikely to be an adequate remedy because once discovery is wrongfully granted, the complaining party is beyond relief**.
>
> *****
>
> [N]ot every erroneous discovery order creates certiorari jurisdiction in an appellate court. Some orders entered in connection with discovery proceedings are subject to adequate redress by plenary appeal from a final judgment.
>
> We recognize that discovery of certain types of information may reasonably cause **material injury of an irreparable nature**. Illustrative is "cat out of the bag" material that could be used by an unscrupulous litigant to injure another person or party outside the context of the litigation.

509 So. 2d at 1099 (emphasis added, internal quotes deleted). One of the primary purposes of the writ of certiorari is to protect a party from material injury that cannot be remedied on plenary appeal. *Martin-Johnson* recognized that purpose.

San Perdido's only response to the irreparable injury principle is that "there is nothing that bars Citizens from raising an immunity defense on

direct appeal, nor is it 'lost' by litigating the case . . ." [San Perdido brief, p. 13] The statement is an oxymoron. The right not to have to defend a lawsuit cannot be preserved if the defendant is forced to litigate the case until final appeal. To hold that certiorari review in unavailable in this case would be unprecedented and would deprive the writ of certiorari of a primary reason for its existence.

Immunity from Bad Faith Actions

On the issue of whether Citizens is immune from bad faith lawsuits, San Perdido states that Citizens "relies almost exclusively on the Fifth DCA's reasoning in *Citizens Prop. Ins. Co. v. Garfinkel"*. The statement is not entirely accurate. In this case, as in any case involving conflict review, each party is urging the Court to embrace the result reached by one of the conflicting district court decisions. It is true that in this case Citizens urges the Court to adopt the decision reached in *Garfinkel*, and Citizens believes that the reasoning of the *Garfinkel* opinion is persuasive. However, it is not the decision itself upon which Citizens relies, but the legal principles and authorities upon which the *Garfinkel* decision rested.

In its Initial Brief, Citizens presented a wide array of rules of statutory construction relating to the language of the statute itself and to extrinsic evidence of legislative intent. The application of all of those rules leads to

the conclusion that the Legislature did not intend the willful tort provision to create an exception from Citizens' immunity for bad faith actions. San Perdido urges the Court to reject all of these rules without offering any persuasive reason for doing so or identifying any rules of construction or evidence of legislative intent that would support a contrary interpretation.

San Perdido does make two attempts to invoke rules of construction, but both lack substance. First, San Perdido argues that statutes cannot be construed in a manner that produces an absurd result, and asserts that it would be absurd to give Citizens "blanket immunity which would allow it to breach its insurance contracts at will . . . ." [San Perdido brief, p. 24] Citizens has no such immunity. A breach of the insurance contract is actionable as an express statutory exception to immunity, and a successful plaintiff is entitled to damages, attorneys' fees and costs. Sections 627.351(6)(s), 624.155, Florida Statutes.

San Perdido also suggests that "willful torts" must refer to bad faith because "what other 'willful torts' could it possibly commit other than bad faith?" [San Perdido brief, p. 24] In the first place, there are a number of willful torts other than bad faith that Citizens or its agents or employees could commit including, for example, intentional battery, defamation, and sexual harassment. Second, if the Legislature had it in mind that there were

no other willful torts, the question is begged why it didn't simply refer to "bad faith" rather than "willful torts".

Rules of statutory construction are not arbitrary judicial constructs. They have been developed based on centuries of English and American common law experience indicating that they are reliable guideposts to legislative intent. Moreover, a legislative body is presumed to be aware of traditional rules of construction and to draft legislation with such rules in mind. *See McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991). When literally all of the relevant rules point in the same direction, the result cannot be as easily disregarded as San Perdido urges.

San Perdido argues that "Citizens exists to pay claims" and that holding that bad faith claims are not exempt from Citizens' immunity would be inconsistent with that purpose. [San Perdido Brief, pp. 20-21] In support of this argument, San Perdido quotes a portion of Section 627.351(a)(1), Florida Statutes, which states that the purpose of Citizens is to meet the state's compelling interest

> . . . in assuring that property in this 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. . . .

Citizens agrees that the quotation is an important statement of legislative intent that provides guidance in this case, but not in the direction suggested by San Perdido. The provision does not say that Citizens was created simply to "pay claims" regardless of the nature of the claims. It is quite explicit that the purpose is to provide insurance "at affordable rates so as to facilitate the **remediation, reconstruction, and replacement of damaged or destroyed property . . . ."** Bad faith claims do not seek money to pay for the remediation, reconstruction, and replacement of damaged or destroyed property. That money has already been awarded before a bad faith judgment can be entered.

In the case of Citizens and other similar last-resort insurance pools, the Legislature made a judgment that reducing costs in order to pay more claims and lower premiums for the insureds as a whole was more important than permitting a few insureds to enjoy rewards above the compensation necessary to rebuild based on a cause of action that didn't even exist at common law. That judgment is not surprising considering that the statute doesn't even allow claims against the pools for simple negligence.

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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 18th day of April, 2011:

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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.

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BARRY RICHARD

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