

# In the Supreme Court of Florida

CASE No.: SC14-185

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CITIZENS PROPERTY INSURANCE CORPORATION,  
Petitioner,

v.

PERDIDO SUN CONDOMINIUM ASSOCIATION, INC.,  
Respondent.

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ON REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL  
Case No.: 1D13-1951

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BRIEF OF THE STATE OF FLORIDA  
AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER

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## **IDENTITY OF AMICUS AND STATEMENT OF INTEREST**

The Attorney General, Pamela Jo Bondi, submits this brief on behalf of the State of Florida as amicus curiae in support of Respondent, Citizens Property Insurance Corporation. The Attorney General is authorized by law to appear in any suit in which the State has an interest. § 16.01(4), Fla. Stat.

The State has a strong interest in preserving its sovereign immunity from suit, absent a clear waiver. When there is doubt, the default is to protect the State's immunity. As a "government entity that is an integral part of the state," § 627.351(6)(a)1., Fla. Stat., Citizens has sovereign immunity. The Legislature has expressly waived Citizens' immunity in very limited circumstances, none of which includes the bad faith claim advanced by Petitioner, Perdido Sun Condominium Association. This Court should quash the First District's decision because it ignores the bedrock principles surrounding the State's sovereign immunity and significantly expands Citizens' liability for suit.

## **SUMMARY OF ARGUMENT**

As a governmental entity that is an integral part of the state, Citizens has sovereign immunity. In the absence of a clear, express, and unequivocal waiver, this immunity is total and absolute. If there is any uncertainty or ambiguity as to whether a waiver exists for specific claim, then it must be resolved in favor of Citizens and against Perdido Sun.

Perdido Sun advances a statutory claim against Citizens based upon the first-party bad faith cause of action established by section 624.155(1), Florida Statutes. But this claim is barred because the Legislature has not expressly waived Citizens' sovereign immunity for this cause of action. Although the Legislature has expressly waived Citizens' immunity for a limited set of claims, none of these include a statutory bad faith claim under section 624.155, Florida Statutes.

The First District failed to strictly construe section 627.351(6)(s)1., Florida Statutes, and broadly read the "willful tort" exception to permit a claim that is not a tort. First, this Court and others have repeatedly recognized bad faith claims as contract-based actions, not willful torts. Second, if there is any uncertainty as to whether a statutory bad faith claim can be a willful tort, then it must be resolved in favor of upholding Citizens' sovereign immunity.

Because Perdido Sun's claim is barred by Citizens' sovereign immunity, this Court should quash the First District's decision.

## ARGUMENT

### I. CITIZENS' SOVEREIGN IMMUNITY BARS PERDIDO SUN'S STATUTORY BAD FAITH CLAIM

At issue in this case is whether Citizens' sovereign immunity—which is the State's sovereign immunity—can be overcome by mere inference and speculation. Citizens' immunity flows not from any statute, because the Legislature does not “grant” sovereign immunity. Rather, sovereign immunity is a common law doctrine that has exempted the State from suit since its founding. This immunity applies equally to all State entities, including Citizens. Accordingly, the exacting standards governing waivers of sovereign immunity should apply to bar Perdido Sun's claim.

#### A. Any Waiver of Citizens' Sovereign Immunity Must Be Strictly Construed Against Perdido Sun

As a “government entity that is an integral part of the state,” Citizens has sovereign immunity. *Citizens Prop. Ins. v. San Perdido Ass'n*, 104 So. 3d 344, 355 (Fla. 2012) (quoting § 627.351(6)(a)1., Fla. Stat.) (internal quotation marks omitted). This immunity is total and absolute. *See Cauley v. City of Jacksonville*, 403 So. 2d 379, 381 (Fla. 1981). However, the Legislature is vested with the authority to waive this immunity. Art. X, § 13, Fla. Const.; *Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 471-72 (Fla. 2005).

Importantly, any valid waiver must be 1) “clear and unequivocal;” 2) express and

not reached by inference or implication; and 3) strictly construed in favor of the State against the challenging party. *Spangler v. Fla. State Tpk. Auth.*, 106 So. 2d 421, 424 (Fla. 1958).

This exacting threshold for waivers exists because sovereign immunity from suit is “part of the public policy of the State.” *Id.* This Court has noted three main considerations justifying this policy. First, sovereign immunity preserves the constitutional principle of separation of powers. *See Commercial Carrier Corp. v. Indian River Cnty.*, 371 So. 2d 1010, 1022 (Fla. 1979) (recognizing that “certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance”). Second, sovereign immunity protects the public treasury from “profligate encroachments.” *See Spangler*, 106 So. 2d at 424. Third, sovereign immunity aids in maintaining the orderly administration of government. *See State Rd. Dep’t v. Tharp*, 1 So. 2d 868, 869 (Fla. 1941) (“If the State could be sued at the instance of every citizen, the public service would be disrupted and the administration of government would be bottlenecked.”).

In sum, the default position is that total and absolute sovereign immunity applies. The State may waive its immunity, but that waiver must be clear and express. And if there is any uncertainty or ambiguity as to whether a waiver exists for specific claim, then it must be resolved in favor of the State and against the

challenging party. *See Tampa-Hillsborough Cnty. Expressway Auth. v. K.E. Morris Alignment Serv., Inc.*, 444 So. 2d 926, 928 (Fla. 1983) (citing *Arnold v. Shumpert*, 217 So. 2d 116 (Fla. 1968); *Spangler*, 106 So. 2d at 421).

**B. The Legislature Has Not Expressly Waived Citizens’ Sovereign Immunity for Bad Faith Claims**

Perdido Sun advances a statutory claim against Citizens based upon the first-party bad faith cause of action established by section 624.155(1), Florida Statutes. Fatal to its claim is the fact that the Legislature has not expressly waived Citizens’ sovereign immunity for this cause of action.

The Legislature has expressly waived Citizens’ immunity for a limited set of claims—willful torts, “breach of any contract or agreement pertaining to insurance coverage,” claims relating to Citizens’ “issuance or payment of debt,” and actions for “breach of contract or for benefits under a policy” issued by Citizens.

§ 627.351(6)(s)(1)a.-c., e., Fla. Stat.<sup>1</sup> Because a statutory bad faith claim under section 624.155 is not expressly listed, sovereign immunity bars Perdido Sun’s claim.

The First District erred in its analysis because it did not strictly construe the exceptions to Citizens’ immunity. Instead, it treated section 627.351(6)(s)(1) as an ordinary statute, resorted to dictionary definitions, and speculated as to what the

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<sup>1</sup> Subparagraph (d) of this subsection addresses actions against assessable insurers to enforce obligations owed to Citizens. § 627.351(6)(s)(1)d., Fla. Stat.

Legislature intended. *See Perdido Sun Condo. Assoc., Inc. v. Citizens Prop. Ins. Co.*, 129 So. 3d 1210, 1212-13 (Fla. 1st DCA 2014). Because Citizens has sovereign immunity, “such speculation . . . does not authorize [a court] to ignore the plain language of the statute.” *Levine v. Dade Cnty. Sch. Bd.*, 442 So. 2d 210, 212 (Fla. 1983) (noting that, although there was some support in the statute for the plaintiffs’ statutory construction argument, because the statute addressed the State’s waiver of sovereign immunity it had to be strictly construed and “it would be inappropriate for this Court to give relief to the petitioner based on his or our own beliefs” about how the statute should function).

Further, although section 627.351, Florida Statutes, directs Citizens to “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,” § 627.351(6)(s)2., Fla. Stat., this neither waives Citizens’ immunity nor establishes an independent statutory cause of action. Indeed, the rest of the provision recognizes Citizens’ limited resources by acknowledging the entity’s “duty to the state to manage its assets responsibly to minimize its assessment potential.” *Id.* Moreover, this provision was not enacted until 2007, well past the date of the 2004 hurricane and resulting insurance claim which produced the present litigation. *See* Ch. 2007-90, § 11, at 1116, Laws of Fla. But regardless, nothing in section 627.351(6)(s) expressly waives Citizens’

sovereign immunity against a bad faith claim.

Strictly construing section 627.351(6)(s)1., Perdido Sun's claim is barred.

This Court should quash the First District's decision.

**C. A Statutory Bad Faith Claim Is Not a Willful Tort, and Any Ambiguity as to the Nature of the Claim Must Be Resolved in Favor of Citizens**

Beyond failing to strictly construe section 627.351(6)(s)1., the First District broadly read the "willful tort" exception to permit a claim that is not a tort. First, this Court and others have repeatedly recognized bad faith claims as contract-based actions, not willful torts. Second, if there is any uncertainty as to whether a statutory bad faith claim can be a willful tort, then it must be resolved in favor of upholding Citizens' sovereign immunity.

*1. This Court and Others Have Repeatedly Recognized Bad Faith Claims As Contract-Based Actions—Not Willful Torts.*

The First District overlooked the fact that this Court has already supplied the answer to the question of whether a bad faith claim against an insurer is a willful tort. Repeatedly, this Court and others have recognized bad faith claims as contract-based actions, not tort actions.

In *Nationwide Mutual Insurance Co. v. McNulty*, this Court examined whether a claim against an insurer for bad faith refusal to settle within policy limits was assignable. 229 So. 2d 585 (Fla. 1969). In holding that the bad faith claim was

assignable, this Court repeatedly referenced the contractual nature of the claim and approvingly cited decisions from other courts supporting this classification:

In our opinion the cause of action for recovery of such excess of the judgment over the insurance coverage limit is one *which arises out of the contract of insurance*. The *contractual duty of the insured* to defend justifies an implication that the insurer will exercise ordinary care and good faith in so proceeding. Accordingly, when an insurer *under such a policy contract* undertakes to defend an action against the insured and becomes involved in negotiations for settlement, the law imposes the duty that it act therein in good faith. It follows that *the cause of action for an "excess," where one arises from bad faith, is bottomed on the contract, and that the nature of an action thereon is ex contractu rather than in tort*. The fact that the proofs offered to establish an insurer's bad faith in this connection may include or consist of showing an act of negligence *will not take the cause of action out of the contract category*.

229 So. 2d at 585-86 (quoting and approving *McNulty v. Nationwide Ins. Co.*, 221 So. 2d 208, 211 (Fla. 3d DCA 1969)); *see also id.* at 586-87 ("The decision of the District Court herein refers to a recent similar decision of the Supreme Court of Pennsylvania . . . holding the claim against insurer resulting from breach of its duty to act in good faith in settling claim against insured is a contract right and properly assignable. The District Court of Appeal, Fourth District, has reached the same result in its recent decision . . . wherein it was held: 'Since we find that an insured's cause of action against his insurer for wrongful failure to settle within policy limits is not based on a personal tort, and is therefore assignable, and since such an assignment is not against public policy, we reverse and remand this case

for further proceedings.” (citations and notes omitted)); *see also Gov’t Emps. Ins. Co. v. Grounds*, 332 So. 2d 13, 14 (Fla. 1976) (rejecting the First District’s ruling that a bad faith claim is a “hybrid” between contract and tort law and explaining that “the obligation of the contract breached by petitioner was the obligation to provide respondent a good faith defense to the action,” and “[s]uch goes to petitioner’s performance under the contract (or lack thereof)”); *Swamy v. Caduceus Self Ins. Fund, Inc.*, 648 So. 2d 758, 760 (Fla. 1st DCA 1994) (“In Florida, when an insured brings an action against his carrier for failure to settle a third party’s claim, the action sounds in contract. Florida is in the minority in this respect, as most states treat this as a tort claim or as a combination of tort and contract.” (citation omitted)).

Although *McNulty* was decided before the Legislature enacted the statutory cause of action in section 624.155(1)(b)1., Florida Statutes, subsequent courts have extended *McNulty*’s reasoning to the resulting statutory first-party bad faith claims. *See, e.g., Pastor v. Union Cent. Life Ins. Co.*, 184 F. Supp. 2d 1301, 1305-06 (S.D. Fla. 2002), *aff’d*, 128 F. App’x 100 (11th Cir. 2005) (“Pastor contends that *McNulty* is inapplicable to this case because it involved a third party’s common law claim for good faith, whereas this case involves a first party’s statutory claim for good faith. Such an argument presents a distinction without a difference, for []§ 624.155 does nothing more than extend the common law remedy of third parties to

insurance contracts to first parties. . . . Both types of actions are similar because they arise from an insurer's implied obligations under a contract. . . . Because an action for statutory bad faith sounds in contract, not tort, the doctrine of *lex loci contractus* determines the applicable law in this case.”). As the Southern District reasoned, “the language used in [] § 624.155(b)(1)-(3) to describe the insurer's statutory duties makes it clear that, as in common law third party claims, the good faith obligation in first party claims stems from an insurer's duties under the insurance contract—the duty to settle claims with due regard to an insured's interests; making payments to an insured as set forth in the coverage; and promptly settling claims when the obligation to settle is clear under the ‘insurance policy coverage.’” *Id.* at 1306; *cf. Macola v. Gov't Emps. Ins. Co.*, 953 So. 2d 451, 456 (Fla. 2006) (“[T]he same obligations of good faith that existed for insurers dealing with their insureds in the third-party context were extended by [§ 624.155(1), Florida Statutes,] to the first-party context.”).

Because bad faith claims sound in contract rather than tort, the claim advanced by Perdido Sun must fail. A statutory bad-faith claim under section 624.155 is not a willful tort, and this Court should quash the First District's decision, which held to the contrary.

*2. If There Is Any Uncertainty As to Whether a Statutory Bad Faith Claim Falls Under the Willful Tort Exception, Then It Must Be Resolved in Favor of Upholding Citizens' Sovereign Immunity.*

If there is any uncertainty as to whether a first-party bad faith claim brought under section 624.155(1), Florida Statutes, is a willful tort, then the exacting principles governing waivers of sovereign immunity require that doubt to be resolved in favor of the State. Here, as a State entity, Citizens is entitled to the full panoply of protection from suit, except for the extremely limited claims for which the Legislature has explicitly waived immunity. Perdido Sun cannot point to an express waiver for its claim, because there is none. And it is well-settled that waiver cannot be reached by inference, implication, or speculation. Perdido Sun's claim is barred, and this Court should quash the First District's decision.

### **CONCLUSION**

This Court should answer the certified question in the affirmative and quash the First District's decision because Citizens' sovereign immunity bars the bad faith claim advanced by Perdido Sun.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief was prepared in Times New Roman,  
14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal on this 30th day of May, 2014, to the following:

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