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IN THE SUPREME COURT
OF THE
STATE OF FLORIDA

Case No. SC14-185
First District Court of Appeals Case No. ID13-1951

CITIZENS PROPERTY INSURANCE CORPORATION,

Petitioner,

v.

PERDIDO SUN CONDOMINIUM ASSOCIATION, INC.,

Respondent.

ANSWER BRIEF ON THE MERITS

On Discretionary Review of A Question Certified
by the First District Court of Appeals

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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* resulting from disputes over payments due to Respondent, Perdido Sun Condominium Association, Inc. (hereinafter, "Perdido Sun") pursuant to a policy of insurance issued by Petitioner, Citizens Property Insurance Corporation (hereinafter, "Citizens"), for damage caused by Hurricane Ivan. Like all bad faith actions, the instant case is based upon an underlying judgment for breach of the insurance policy and it is from that underlying case that the facts of the instant case are derived. See, *Perdido Sun Condominium Assoc., Inc. v Citizens Prop Ins. Corp.,* Escambia County Case No. 2005-CA-000831. Citizens issued policy number 1362751 (hereinafter, the "Policy") to Perdido Sun insuring the Association property and the common elements against damage by windstorm in the amount of $9,512,000.00. The Policy was in full force and effect on September 16, 2004, when Perdido Sun's property was severely damaged by Hurricane Ivan. (See, Complaint at R1 at 2-3). Disputes arose over payment of Perdido Sun's claim and Perdido Sun demanded appraisal pursuant to the policy. (See, Complaint at R1). Citizens refused to engage in appraisal, and on May 5, 2005, Perdido Sun filed suit against Citizens, seeking declaratory relief in the form of an order compelling appraisal of its claim (Count I), damages for breach of the Policy by Citizens (Count II), and damages for the

negligent mishandling of Perdido Sun's claim. (R1 at 1-13). A companion case was filed simultaneously by San Perdido Association, Inc. ("San Perdido"). *San Perdido Association, Inc. v. Citizens Property Insurance Corporation*, Escambia County Case No. 2005-CA-000835. The two cases involved nearly identical facts and legal issues and were consolidated by the trial court and were later appealed as a single case. *Citizens Property Ins. Corp. v San Perdido Assoc., Inc.*, 22 So. 3d 71 (Fla. 1st DCA 2009).

After previously refusing to engage in appraisal, in August of 2005, Citizens filed a "Motion To Dismiss or, in the Alternative, Motion to Stay and Compel Appraisal", attempting to invoke appraisal in order to try to halt the litigation. When its Motion was denied, Citizens finally agreed in open court to submit to appraisal while the litigation progressed concurrently. (See, Complaint at R1). Appraisal was conducted and after a final evidentiary hearing the trial court entered final summary judgment in Perdido Sun's favor affirming the appraisal award in the amount of $5,000,240.23, finding that the undisputed evidence showed that Citizens had breached the policy and awarding additional damages in Perdido Sun's favor in the amount of $666,403.04, including attorney fees and costs. (R1 at 7, 9, 10). The award was later affirmed on appeal by the First DCA. *Citizens Property Ins. Corp. v San Perdido Assoc., Inc.*, 22 So. 3d 71 (Fla. 1st DCA 2009).

Subsequently, Perdido Sun filed the instant case on May 27, 2009, alleging a single count of bad faith failure by Citizens to pay benefits under the Policy pursuant to §624.155 *Florida Statute.* (R1 at 1-13). Simultaneously San Perdido filed an identical bad faith action. *San Perdido Association, Inc. v. Citizens Property Insurance Corporation,* Escambia County Case No. 2009-CA-001666. Citizens immediately moved to dismiss both cases asserting that Citizens enjoys sovereign immunity from bad faith liability. (R2 at 246-260). The San Perdido case was heard first (the two bad faith cases had not been consolidated at that point as the breach of contract cases had been). The trial Court denied Citizens' motion to dismiss in the San Perdido case.

Citizens appealed the San Perdido case to the First DCA, which denied Citizens' appeal based upon the procedural ground that an interlocutory appeal did not lie for denial of a motion to dismiss. *Citizens Prop. Ins. Corp. v. San Perdido Assoc., Inc.*, 46 So. 3d 1051, (Fla. 1st DCA., 2010). This Court affirmed, adopting in part First DCA's rationale and remanding *San Perdido* to the trial court for further proceedings. *Citizens Property Ins. Corp. v. San Perdido Assoc. Inc.,* 104 So. 3d 344 (Fla. 2012).

While *San Perdido* proceeded through the appellate courts, the instant case was stayed by agreement of the parties. (R2 at 298). After the remand of *San Perdido,* the stay was removed in the instant case and Citizens immediately

renewed its motion to dismiss. (R2 at 340-341). The trial court ruled in Citizens' favor entering final judgment dismissing the instant case with prejudice. (R2 at 388-389). The trial court specifically based its ruling on the reasoning set forth in *Citizens Property Ins. Corp. v. Garfinkle*, 25 So. 3d 62 (Fla. 5th DCA 2009), and Judge Wetherell's dissenting opinion in *Citizens Property Ins. Corp. v. San Perdido*, 46 So. 3d 1051 (Fla. 1st DCA 2010). (R2 at 383-387).

Perdido Sun appealed the dismissal to the First District Court of Appeals, which reversed the trial court, holding:

> "In light of the definitions of "willful" and "tort," and considering that Citizens, while not a private insurance company, is nonetheless charged by the legislature to provide affordable property insurance to policy holders and to serve the policy holders at "the highest possible level but never less than that generally provided in the voluntary market," (§ 627.351(6)(a)(4), Fla. Stat.), the "willful tort" exception to Citizens' immunity from suit allows Citizens' to be sued for the statutory civil remedy provided in section 624.155(1)(b). Of course, the plaintiff is required to prove the cause of action, including the willfulness and lack of good faith in Citizens' settlement efforts. This burden of proof does not mean that there is no cause of action available under section 624.155 against Citizens under any possible factual circumstances. Citizens' immunity does not extend to the "willful tort" of failing to attempt in good faith to settle claims as provided by section 624.155, Florida Statutes."

Perdido Sun Condominium Ass'n., Inc., v. Citizens Property Insurance Corp., 129 So. 3d 1210, 1213 (Fla. 1st DCA 2014).

The First DCA also certified conflict with the Fifth DCA's decision in *Citizens Prop. Ins. Corp. v. Garfinkel*, 25 So. 3d 62 (Fla. 5th DCA 2010), and, further, certified the following question as one of great public importance:

WHETHER THE IMMUNITY OF CITIZENS PROPERTY INSURANCE CORPORATION, AS PROVIDED IN SECTION 627.351(6)(s), FLORIDA STATUTES, SHIELDS THE CORPORATION FROM SUIT UNDER THE CAUSE OF ACTION CREATED BY SECTION 624.155(1)(b), FLORIDA STATUTES FOR NOT ATTEMPTING IN GOOD FAITH TO SETTLE CLAIMS?

Id.

These proceedings follow.

SUMMARY OF THE ARGUMENT

According to its enabling statute, §627.351(6)(s)(1) *Florida Statutes,* Citizens is a "government entity that is an integral part of the state". However, read in context, this state affiliation was only intended to provide, and only extends to, immunity to tax liability. As demonstrated below, the legislature did not cloak Citizens with full sovereign immunity. To the contrary, Citizens' enabling statute only confers a specific limited form of statutory immunity. The statute contains several exceptions to this immunity including one for commission of "willful torts", which is particularly relevant to the instant case. §627.351(6)(s)(1)(a) *Florida Statutes*. The central question to be resolved in this case is whether Citizens can be held liable for first party bad faith pursuant to §624.155 *Florida*

Statutes, in other words, whether bad faith falls within the "willful tort" exception to Citizens' limited statutory immunity.

The first step in the analysis is to define what a tort is. A "tort" is simply a breach of a duty imposed by common law or statute. *Dept. of Health and Rehabilitative Svcs. v. Wright,* 522 So. 2d 838, 841 (Fla. 1988)(Kogan, J., dissenting). In the instant case, Citizens breached the duty of good faith found in §624.155 *Florida Statutes*, Florida's Bad Faith Statute, which prohibits an insurer from "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 ..." and allows for a cause of action by the insured when damaged by the bad faith acts of the insurer. *Id.* In other words, §624.155 imposes a *legal duty* upon insurers to act in good faith towards their insureds, therefore, breach of that duty is a tort. It should be noted that the willful tort exception to Citizens' immunity contained in §627.351(6)(s)(1)(a) *Florida Statutes* makes no distinction between "common law" torts and "statutory" torts, therefore, any attempt at distinction along these lines is irrelevant, as is the genesis of bad faith under common law. If Citizens acted in bad faith in handling Perdido Sun's claim, then it breached a legal duty and committed a tort.

A tort is "willful" if it is done intentionally, as opposed to mere negligence. *Jersey Palm-Gross v. Paper*, 658 So. 2d 531, 534 (Fla. 1995)(quoting, *Chandler v. Kendrick*, 146 So. 551, (Fla. 1933)). Florida's Bad Faith Statute contemplates just such willful behavior, specifically mandating the imposition of punitive damages for the *willful* breach of the duty of good faith imposed by the statute. §624.155(5)(a)*Florida Statutes.* It seems beyond argument that bad faith is tortious in nature and in fact it is difficult to imagine what sort of "willful tort" the legislature contemplated that Citizens, an insurance company, might commit other than bad faith when it drafted Citizens' enabling statute. Further, in *Citizens Property Ins. Corp. v San Perdido Assoc. Inc.,* 104 So. 3d 344 (Fla. 2012) this Court expressly found that bad faith can rise to the level of a willful tort. *Id.* at 355, fn.7.

Finally, there are strong public policy considerations that weigh against allowing Citizens to be immune from bad faith liability. First and foremost, what are the people of the State of Florida going to do when the next hurricane hits and Citizens can ignore or delay paying claims indefinitely because it has nothing to lose by doing so? It takes years to get a breach of contract case to judgment and even then the insurer only pays what it should have originally paid under the policy. Without the threat of bad faith liability Citizens, like any other insurer, has no incentive to timely pay claims.

As stated in Citizens' enabling statute, the State's interest in creating it was,

> " ... 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(6)(a)(1) *Florida Statutes.*

In other words, the entire reason for Citizens' existence *is to pay claims promptly and in good faith in the event of a catastrophe*. Citizens argues that it should be able to deny or delay paying claims ... *in bad faith* ... and be immune from any penalty. This position is totally contrary to the legislative intent behind Citizens' creation and the reason for its continued existence. The argument that such immunity is necessary to preserve Citizens' reserves is also entirely circular, "In order to preserve our assets so that we can pay claims ... we should be able to improperly deny claims in bad faith." Citizens' position simply defies logic.

The legislature even expressly incorporated a duty of good faith into Citizens' 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* (emphasis added).

To now judicially cloak Citizens with immunity to bad faith would nullify the entire legislative scheme that created Citizens and put the property owners of the State of Florida in peril.

For these reasons, this Court should uphold the court below and hold that Citizens is not immune to bad faith liability.

ARGUMENT

I. CITIZENS IS NOT IMMUNE TO LAIBILITY FOR BAD FAITH PURSUANT TO §624.155, THEREFORE, THE COURT BELOW SHOULD BE AFFIRMED.

A. CITIZENS IS NOT CLOAKED BY SOVEREIGN IMMUNITY.

Citizens begins its brief by stating that it has "sovereign immunity". Based upon this assertion, Citizens argues that it is immune to bad faith liability because §624.155 bad faith was not specifically mentioned as part of a "laundry list" of exceptions to the immunity scheme contained in Citizens' enabling statute. Citizens' argument is incorrect because it does not enjoy sovereign immunity.

In the proceedings below, Citizens has repeatedly relied upon the following segment of its enabling statute, lifted out of context, for the proposition that it enjoys "sovereign immunity" from suit:

> "The Legislature intends, therefore, that affordable property insurance be provided and that it continue to be provided, as long as necessary, through Citizens Property Insurance Corporation, a government entity that is an integral part of the state, and that is not a private insurance company."

§627.351(6)(a)(1) *Florida Statutes.*

The foregoing passage must be analyzed in context in order to determine the legislature's true intent. The entire passage reads:

> "1. The Legislature finds that private insurers are unwilling or unable to provide affordable property insurance coverage in this state to the extent sought and needed. The absence of affordable property insurance threatens the public health, safety, and welfare and likewise threatens the economic health of the state. The state therefore has a compelling public 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. It is necessary, therefore, to provide affordable property insurance to applicants who are in good faith entitled to procure insurance through the voluntary market but are unable to do so. The Legislature intends, therefore, that affordable property insurance be provided and that it continue to be provided, as long as necessary, through Citizens Property Insurance Corporation, a government entity that is an integral part of the state, and that is not a private insurance company. To that end, the corporation shall strive to increase the availability of affordable property insurance in this state, while achieving efficiencies and economies, and while providing service to policyholders, applicants, and agents which is no less than the quality generally provided in the voluntary market, for the achievement of the foregoing public purposes. **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 the 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(6)(a)(1) *Florida Statutes* (emphasis added).

Clearly, all the legislature was attempting to achieve was to *exempt Citizens from federal taxes*, not blanket it with full sovereign immunity. This intent to insulate Citizens from tax liability is repeated later in the statute:

"(t) For the purposes of s.199.183(1), the corporation shall be considered a political subdivision of the state and shall be exempt from the corporate income tax." §627.351(6)(t) *Florida Statutes.*

The conclusion that the legislature never intended to grant Citizens full sovereign immunity is reinforced by the fact that <u>sovereign immunity is never even mentioned in the statute</u>. Instead the legislature gave Citizens a specific limited grant of statutory immunity:

> "(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 had intended to grant Citizens full sovereign immunity then the entire quoted section would be utterly meaningless and redundant.

> "It is a basic rule of statutory construction that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.'"
>
> *Dennis v. State*, 51 So.3d 456, 463 (Fla. 2010).

Further, the legislature carved out specific exceptions to Citizens' grant of immunity for willful torts, breaches of its insurance contracts, and payments of its contractual debts. §627.351(6)(s)(1)(a-e) *Florida Statutes*. This is in contrast to Citizens sister organizations, the Florida Insurance Guarantee Association ("FIGA") and The Florida Medical Malpractice Joint Underwriting Association ("FMMJUA"). FIGA, FMMJUA and Citizens are all "insurance risk appointment plans" created to provide affordable insurance to applicants who are entitled, but who are unable to procure insurance from private insurers. However, while the FIGA and the FMMJUA statutes contain immunizing language identical to that contained in the first paragraph of §627.351(6)(s)(1) *Florida Statutes,* above, only Citizens' enabling statute contains the exceptions to immunity embodied in

§627.351(6)(s)(1)(a – e), indicating a deliberate intent on the part of the legislature to give Citizens something far less than full immunity.

The assertion that the legislature had to cite every possible statutory exception to Citizens' immunity in order to effectuate its purpose is incongruent with the structure and substance of the statute as written and leads to an absurd result.

> "A statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts and is not to be read in isolation, but in the context of the entire section."

Jones v. ETS of New Orleans, Inc., 793 So. 2d 912, 914-15 (Fla. 2001).

Structurally, *all* of the immunity exceptions contained in §627.351(6)(s)(1) are expressed in broad terms. Subsection (b) allows suit against Citizens for "breach of any contract or agreement pertaining to insurance coverage"; subsection (c) allows Citizens to be sued "with respect to issuance or payment of debt"; and, subsection (e) " ... for breach of contract or for benefits under a policy issued by the corporation." §627.351(6)(s)(1) *Florida Statutes*. None of the immunity exceptions enumerate specific statutory provisions, so why would subsection (a) (the willful tort exception) be any different?

Substantively, all of the other immunity exceptions in §627.351(6)(s)(1) either directly or indirectly involve Citizens' activities *as an insurance company.* As the First District Court of Appeals once asked, besides bad faith, what other

"willful torts" could the legislature have contemplated that Citizens might commit in connection with its activities *as an insurance company?*

Finally, the legislature specifically imposed a duty of good faith on Citizens when dealing with its policyholders:

> "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.*

Adopting Citizens' position would render this duty of good faith meaningless. What purpose is there in imposing a duty of good faith on Citizens if there is no mechanism to enforce it? Even applying the "strict construction standard" urged by Citizens, a statute should not be construed so strictly as to defeat the obvious intent of the legislature or bring about an absurd result. *City of Margate v. Singh*, 778 So. 2d 1080, 1081 (Fla. 4th DCA 2001). Citizens was created for the sole purpose of paying claims to property owners in the event of a disaster. To now say that Citizens may deny those claims in bad faith with impunity subverts the expressed intent of the legislature.

The inescapable conclusion is that, read as a whole, the legislature intended to and did indeed grant Citizens a *limited form of statutory immunity* in its enabling statute, not sovereign immunity. There simply is no requirement under Florida law

that the legislature must create a "laundry list" of exceptions in order to effectuate its purpose under a statutory immunity scheme.

B. BAD FAITH PURSUANT TO §624.155 IS A WILLFUL TORT AND IS THEREFORE EXCEPTED FROM CITIZENS' LIMITED GRANT OF STATUTORY IMMUNITY.

Perdido Sun asserts, and has asserted throughout the proceedings below, that bad faith pursuant to §624.155 is a "willful tort" and thus falls within the exception to Citizens' statutory immunity contained in §627.351(6)(s)(1)(a) *Florida Statutes*, reproduced above. (R2 at 274-276). To reach this conclusion, one must first ask, what is a "willful tort" or, more generally, what is a "tort"? A tort is a breach of a duty, imposed by common law, statute, or the circumstances of the case, 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).

As stated above, the duty can be supplied either by common law or statute. Indeed, the examples of causes of action deemed to be "statutory torts" by Florida courts are many and varied. *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).

In the instant case, the duty is supplied by §624.155 *Florida Statutes*, Florida's Bad Faith Statute, which prohibits an insurer from "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 ..." and allows for a cause of action by the insured when damaged by the bad faith acts of the insurer. *Id.* In other words, §624.155 imposes a *legal duty* upon insurers to act in good faith towards their insureds.

There can be little doubt that Citizens is an insurer, albeit a statutorily created insurer. It charges premiums and issues insurance policies, and, sometimes, pays claims. (R1 at 1-13). Therefore, if Citizens acted in bad faith in handling Perdido Sun's claim it breached a legal duty and committed a tort.

In its brief, Citizens argues that first-party bad faith is not a willful tort because it did not exist at common law. This argument is meritless because the willful tort exception in Citizens' enabling statute, §627.351(6)(s)(1)(a) makes no distinction between "common law torts" and "statutory torts", the tort simply must

be "willful" to be excepted from Citizens' immunity. 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)).

Therefore, a "willful tort" is the intentional breach of a legal duty imposed either by common law or statute.

§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) <u>**Willful**</u>, 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(1) *Florida Statutes* (emphasis added).

§624.155 codifies the duty of good faith and fair dealing in settling claims between an insurer (like Citizens) and its insured. This is the same duty mandated by Citizens' own enabling statute at §627.351(6)(s)(2) *Florida Statutes*, reproduced above. §624.155 authorizes a civil action for breach of 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.

Citizens argues that the "mere breach of the duty of good faith" does not describe a "willful" or "intentional" tort. However, §624.155 specifically proscribes the *willful* breach of the duty of good faith in settling insurance claims and authorizes the imposition of punitive damages in such circumstances. §624.155(5)(a)*Florida Statutes*.

Not only is willful conduct proscribed by the plain language of the statute, the legislature specifically authorized the imposition of punitive damages for bad faith, therefore, bad faith cannot be based upon merely negligent conduct nor breach of a contract. It is well settled under Florida law that punitive damages cannot be assessed for negligence, or even gross negligence, rather, it must be

shown that the defendant was guilty of "willful and wanton misconduct". *Como Oil Co. Inc. v. O'Loughlin*, 466 So. 2d 1061 (Fla. 1985). Nor can the action sound in contract because contract actions cannot allow for the imposition of punitive damages without an accompanying intentional tort. *Southern Bell Tel. & Tel. Co. v. Hanft*, 436 So. 2d 40, (Fla. 1983). This also disposes of Citizens' argument that because common law third party bad faith has been held to sound in contract, by analogy, first party bad faith must also be a contract action. Clearly what the legislature did instead was create a new cause of action, tortious in nature, based upon breach of a statutorily created duty.

It seems self evident that bad faith pursuant to §624.155 is a statutorily created willful tort, as it requires breach of a duty, has an element of willful intent, and is designed to curb a specific set of behaviors rather than merely compensate for the lost benefits of a bargain. Further, the statute allows for imposition of punitive damages.

Put another way, what else besides a willful tort could bad faith be? Or, as the First DCA once observed, what other sort of "willful tort" could the legislature have had in mind that an insurance company (like Citizens) could commit when they put the exception into Citizens' enabling statute? The *Garfinkle* case, relied upon by the trial court as persuasive authority for its dismissal of the instant action, simply skirted this issue by labeling bad faith under §624.155 as a "statutory cause

of action". *Citizens Prop. Ins. Co. v. Garfinkle*, 25 So. 3d 62, 68 (Fla. 5th DCA 2009)(expressly disapproved by *Citizens Property Ins. Corp. v. San Perdido Assoc. Inc.,* 104 So. 3d 344 (Fla. 2012)). This approach is problematic because it fails to address the underlying *nature* of the cause of action. All that the label "statutory cause of action" tells you is that the *legal duty* was created by the legislature rather than by common law. The *Garfinkle* opinion simply never explains why the bad faith "statutory cause of action" isn't tortious in nature (a "statutory tort" as noted in Section B above). No analysis of the elements of the bad faith statute is undertaken, nor is any explanation offered as to what distinguishes a "statutory cause of action" 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, bad faith under §624.155 is a "willful tort".

Fortunately, this central question was answered by this Court in the first appeal of the *San Perdido* case:

> **"We have previously recognized that where a plaintiff claims a defendant engaged in egregious and outrageous actions, bad faith can be elevated to a willful tort, an issue that could turn on the facts of the case.** *See, e.g., Aguilera v. Inservices, Inc.,* 905 So. 2d 84 (Fla. 2005) (holding that while generally workers' compensation legislation immunizes an insurance carrier for simple bad faith claims, the carrier is not cloaked with a shield of immunity if it engages in outrageous actions and conduct that constitute an intentional tortuous act while processing the compensation claim.)"
>
> *Citizens Property Ins. Corp. v San Perdido Assoc. Inc.,* 104 So. 3d 344, 355 at fn.7 (Fla. 2012)(emphasis added).

In other words, *Garfinkle* was incorrectly decided and bad faith is a willful tort when accompanied by sufficiently outrageous acts.

Given the foregoing analysis, liability for bad faith pursuant to §624.155 *Florida Statutes* is encompassed by the exception to Citizens' limited grant of statutory immunity contained in §627.351(6)(s)(1)(a) *Florida Statutes*, therefore, the trial court erred by granting Citizens' Motion to Dismiss and Perdido Sun respectfully requests this Court to affirm the court below and hold that Citizens can be held liable for bad faith pursuant to §624.155 *Florida Statutes.*

II. THE LEGISLATIVE HISTORY OF CITIZENS' ENABLING STATUTE DOES NOT SUPPORT THE CONCLUSION THAT THE LEGISLATURE INTENDED CITIZENS TO BE IMMUNE FROM BAD FAITH LAIBILITY.

In its brief, Citizens cites language in a proposed amendment to Citizens' enabling statute, SB 2498, to bolster its argument that the legislature intended that Citizens be immune to bad faith liability. The proposed language of *one iteration* of the bill contained the phrase that Citizens, "shall remain subject to all remedies available against an insurer". Citizens attempts to argue that the fact that this language was *omitted* from the final version of the bill is somehow "proof" that the legislature intended for Citizens to be immune to bad faith. This argument is meritless. There is simply no way to know why the language was omitted. It could just as easily be argued that the legislature felt that all such remedies (including

bad faith) were already covered by the exceptions already embodied in the statute making such language unnecessary surplusage. In any event, inviting the Court to speculate on why particular language was omitted or changed during the many iterations of the lawmaking process is neither helpful nor proper legal analysis of the statute as it was written and enacted, which is what is at issue in this case.

III. IMMUNITY TO BAD FAITH LAIBILITY IS NOT CONGRUENT WITH CITIZENS' ENABLING LEGISLATION AND THE POLICY REASONS FOR CREATING CITIZENS.

Why was Citizens created? More importantly, why does it continue to exist? According to the legislature, Citizens exists because:

> " … The state therefore has a compelling public 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(6)(a)(1) *Florida Statutes* (emphasis added).

In other words, Citizens exists to *pay claims* when people's homes and businesses are destroyed in a disaster. But Citizens has taken the position that it should be allowed to deny claims in bad faith, with no recourse for the policyholder. How would this "facilitate the remediation, reconstruction, and replacement of damaged or destroyed property" or otherwise serve the legislative intention behind creating Citizens? Citizens argues that in order to "preserve its

assets to pay claims" it should be immune to bad faith liability ... for failure to pay claims. The logic is completely circular and does not comport with the legislature's stated reasons for creating Citizens in the first place. The legislature did not create Citizens simply to preserve its own existence, nor is it a jobs program for the insurance industry. Citizens was created to pay claims, *promptly and fully*, in the event of a disaster to aid the citizens and businesses of Florida to recover as quickly as possible.

As stated above, the legislature specifically imposed a duty of good faith on Citizens when handling claims. §627.351(6)(s)(2) *Florida Statutes.* If Citizens is given blanket immunity to bad faith liability this "duty" becomes meaningless. No logical purpose is served by imposing a duty of good faith without the means to enforce it. Giving Citizens blanket immunity to bad faith would negate the duty of good faith in its enabling statute and do violence to the overall legislative scheme.

Substantial public policy ramifications underlie this case. What happens when the next string of hurricanes strikes Florida and policyholders look to Citizens to help rebuild? The instant case and its companion, *San Perdido Association, Inc. v. Citizens Property Insurance Corporation*, Escambia County Case No. 2009-CA-001666, are based upon judgments for multiple breaches of contract by Citizens in its handling of Hurricane Ivan claims. *See, Perdido Sun Condominium Assoc., Inc. v. Citizens Prop Ins. Corp.,* Escambia County Case No.

2005-CA-000831; *San Perdido Association, Inc. v. Citizens Property Insurance Corporation*, Escambia County Case No. 2005-CA-000835. It took over four years of litigation in those cases just to get Citizens to pay what it owed pursuant to the contracts. In the meantime, Perdido Sun and San Perdido were left to look to their own resources to rebuild.

Citizens claims that it is in essence "self policing" and that its enabling statute contains "many other provisions to protect insureds". However, the provisions cited by Citizens, such as the Board of Governors, approval of its plan of operations by DFS, and internal audits have absolutely nothing to do with how it handles individual claims. The "no gift" law? How does that prevent bad faith denial of claims? The "Code of Ethics For Public Officers and Employees" deals with such issues as employment of relatives, the use of public funds and assets, disclosure of private information, and acceptance of bribes. None of the so called "protections" cited by Citizens even begin to address the issue at the heart of the instant litigation: bad faith claims handling practices.

Nor can Citizens be relied upon to "self police" and stop these practices. The proof of this is that to even file the instant action, Perdido Sun (and San Perdido) had to obtain judgment for breach of contract. In other words, Perdido Sun has proven that Citizens had breached its insurance policy … multiple times. The very

existence of the instant case and its companion are proof positive that Citizens cannot be trusted to be "self-policing".

What do the people of Florida do the next time a disaster strikes if Citizens is given carte blanche to deny claims without the threat of bad faith liability? How many businesses can afford to keep their doors closed for years while they are forced to litigate with Citizens simply to collect benefits that should have been paid in the first place? How many people can afford to rebuild their homes out of their own pockets? The legislative purpose for creating Citizens is not served if Citizens can simply deny claims at will or drag them out as long as it chooses to with no consequence. For these reasons this Court should affirm the court below and hold that Citizens can be held liable for bad faith pursuant to §624.155 *Florida Statutes.*

CONCLUSION

When the legislature created Citizens, its stated purpose was to create an insurer of last resort to allow those in coastal areas to obtain insurance in order to quickly rebuild after disasters. To implement this purpose the legislature explicitly imposed a duty of good faith upon Citizens when dealing with its insureds. Perdido Sun asserts that it would be self defeating to create such an entity for such a purpose without a mechanism in place to insure that Citizens pays claims timely and in good faith. To that end the legislature carved out exceptions to Citizens' limited grant of immunity, including an exception for the willful tort of bad faith.

Citizens argues that the duty of good faith in its enabling statute is meaningless, and that instead the legislature intended to fully immunize Citizens against bad faith liability. The rationale for the need to allow Citizens to deny claims in bad faith is that Citizens must preserve its assets ... so that it can pay claims.

The Court must consider: which approach is more logical, which comports with the stated goals of Citizens' enabling statute and what happens to the property owners of Florida the next time a hurricane strikes?

Based upon the reasons and authority cited above, Respondent, Perdido Sun, respectfully prays the Court to affirm Court below and hold that Citizens is not immune to liability for insurer bad faith pursuant to §624.155 *Florida Statutes*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been filed with the Court and served upon the following via electronic mail on this 30th day of May, 2014:

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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.

/s/ Richard M. Beckish, Jr.
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