

IN THE SUPREME COURT OF FLORIDA

CITIZENS PROPERTY INSURANCE
CORPORATION,

Petitioner,

v.

Case No.: SC14-185
L.T. No.: 1D13-1951

PERDIDO SUN CONDOMINIUM
ASSOCIATION, INC.,

Respondent,

**ANSWER BRIEF ON JURISDICTION OF RESPONDENT,
PERDIDO SUN CONDOMINIUM ASSOCIATION, INC.**

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JURISDICTION

Respondent, Perdido Sun Condominium Association, Inc. (hereinafter, “Perdido Sun”) hereby agrees with and adopts the “Jurisdictional Statement” contained in Petitioner Appellee, Citizens Property Insurance Corporation’s (hereinafter, “Citizens”) Brief on Jurisdiction with one exception: While the First District Court of Appeals did certify conflict with the opinion in *Citizens Prop. Ins. Corp. v. Garfinkle*, 25 So. 3d 62 (Fla. 5th DCA 2010), (Opinion A. 7-8)¹, Perdido Sun asserts that *Garfinkle, supra*, had been expressly overruled by this Court before Citizens filed its appeal and before the First District Court of Appeals rendered its decision in the instant case. Therefore, Perdido Sun asserts that there is no conflict between the districts and this Court does not have jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution (conflict jurisdiction).

However, it is also true that the First District Court of Appeals certified the following as a question 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?”

¹ For convenience, Perdido Sun adopts Citizens’ reference system to the Appendix to its Brief containing the Opinion from the Court below.

(Opinion, A. 8).

Since pursuant to Rule 9.120(d) *Florida Rules of Appellate Procedure* briefing concerning matters in which jurisdiction is invoked under Rule 9.030(a)(2)(A)(v) (matters certified as “of great public importance”) is not allowed, it is presumed that jurisdiction in such matters is purely discretionary with the Court and Perdido Sun offers no argument on the subject.

STATEMENT OF THE CASE AND THE FACTS

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 Perdido Sun pursuant to a policy of insurance issued by 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-000831.²

² 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).

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. The award was later affirmed on appeal by the First District Court of Appeal. *Citizens Property Ins. Corp. v. San Perdido Assoc., Inc.*, 22 So. 3d 71 (Fla. 1st DCA 2009).

Subsequently, the instant case was filed by Perdido Sun 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*. 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. The San Perdido case was heard first (the two bad faith cases had not been consolidated at that point as had the breach of contract cases). The trial court denied Citizens' motion to dismiss in the San Perdido case.

Citizens appealed the *San Perdido* case and the First District Court of Appeal 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 this Court'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. After the remand of *San Perdido*, the stay was removed in the instant case and Citizens immediately renewed its motion to dismiss. The trial court ruled in Citizens' favor entering final judgment dismissing the instant case with prejudice. 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).

The First District Court of Appeals reversed, holding that a bad faith claim pursuant to §624.155(1)(b)(1) is a willful tort and therefore falls within the exception to Citizens statutory immunity contained in its enabling statute at §627.351(6)(s)(1)(a) *Florida Statutes*. (Opinion A. 5-7). This appeal follows.

SUMMARY OF THE ARGUMENT

Citizens seeks to invoke this Court's jurisdiction pursuant to (1) Article V, Section 3(b)(3)-(4) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv)-(vi) ("conflict jurisdiction") and (2) Article V, Section 3(b)(5) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v) ("question of great public importance").

In regard to conflict jurisdiction, the First District Court of Appeal certified conflict between its decision and that of the Fifth District in *Citizens Property Ins. Corp. v. Garfinkle*, 25 So. 3d 62 (Fla. 5th DCA 2009). However, *Garfinkle* itself was expressly overruled by this Court in *Citizens Property Ins. Corp. v. San Perdido Assoc. Inc.*, 104 So. 3d 344 (Fla. 2012). This Court held that the *Garfinkle* Court never had jurisdiction to hear the case in the first place. *San Perdido*, 104 So. 3d at 346. Therefore, the "substantive holding" in *Garfinkle* is void and has no precedential value whatsoever and cannot be the basis of conflict jurisdiction.

In regard to public importance jurisdiction, as stated above, whether a matter is "of great public importance" is purely within the discretion of this Court and as briefing of this issue is not allowed by Rule 9.120(d) *Florida Rules of Appellate Procedure*, that portion of Citizens' Brief should be stricken and not considered by the Court.

ARGUMENT

I. There are no Legal Grounds for Conflict Jurisdiction.

In *Citizens Property Ins. Corp. v. San Perdido Assoc. Inc.*, 104 So. 3d 344 (Fla. 2012), this Court held:

“We resolve the certified conflict by concluding that a writ of prohibition is not available to challenge a non-final order denying a motion to dismiss based on a claim of sovereign immunity where sovereign immunity has been partially waived. We therefore approve *San Perdido* to the extent that it recognized a writ of prohibition is unavailable and disapprove *Garfinkel* and *La Mer* to the extent that those cases use a petition for writ of prohibition to reach the issue pertaining to this type of sovereign immunity. We decline to answer the extremely broad certified question, which could apply to many different types of claims of sovereign immunity,¹ but rather rephrase it as follows to address the circumstances of this case:

Should appellate review of a claim of immunity by Citizens Property Insurance Corporation, a state-created entity, from a bad faith action arising out of the handling of a property damage claim await the entry of a final judgment in the trial court?

For the reasons explained in this opinion, we answer that rephrased certified question in the affirmative.”

Id. at 346 (emphasis added).

Garfinkle concerned, “The petitioner, Citizens Property Insurance Corporation, seeks a writ of prohibition directed to the trial court to prevent the court from taking any further action with respect to a first-party bad faith claim brought by the respondent, Alan B. Garfinkel.” *Citizens Property Ins. Corp. v. Garfinkle*, 25 So. 3d

62, 63 (Fla. 5th DCA 2009). In other words, jurisdiction for the entire Garfinkle opinion was based upon an application for a writ of prohibition and in accordance with this Court's holding in *San Perdido* the Fifth District Court of Appeals had no jurisdiction to hear the Garfinkle case in the first place. Without jurisdiction, the Fifth District Court of Appeals' opinion is a legal nullity. *See, State ex rel. v. Morphinos*, 253 So. 2d 428 (Fla. 1971). Therefore, there are no legal grounds for conflict jurisdiction.

II. Citizens' Arguments Pertaining to Public Importance Should be Stricken.

Perdido Sun recognizes that the First District Court of Appeal certified the following question to be one of great public importance in its opinion:

“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?”

Whether this Court takes jurisdiction on the basis of “great public importance” is purely a matter of this Court's exercise of its discretion.

However, briefing of this issue is prohibited by Rule 9.120(d) Florida Rules of Appellate Procedure which provides in pertinent part:

“... If jurisdiction is invoked under Rule 9.030(a)(2)(v)(certifications of questions of great public importance by the district courts to the supreme court), no briefs on jurisdiction shall be filed.”

Citizens’ brief on this issue is full of self serving argument on policy issues that have nothing to do with the basic question of jurisdiction and, further, is prohibited by the rule cited above. Therefore, Section II of Citizens’ brief is due to be stricken and not considered by this Court.

CONCLUSION

For the reasons cited above, Respondent, Perdido Sun, respectfully submits that this Court does not have a sufficient jurisdictional basis to review the instant case on grounds of conflict jurisdiction.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Brief on Jurisdiction has been served on the following via electronic mail this the 21st day of February, 2014:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Respondent's Brief on Jurisdiction complies with the font requirements set forth in Rule 9.210(a)(2) Florida Rules of Appellate Procedure.

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