

IN THE SUPREME COURT OF FLORIDA

Case No. SC14-185

CITIZENS PROPERTY INSURANCE
CORPORATION,

Petitioner,

L.T. Case No. 1D13-1951

vs.

PERDIDO SUN CONDOMINIUM
ASSOCIATION, INC.,

Respondent.

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

Kara Berard Rockenbach
METHE & ROCKENBACH, P.A.
1555 Palm Beach Lakes Blvd., Ste. 1200
West Palm Beach, Florida 33401
Telephone: (561) 727-3600
Facsimile: (561) 727-3601

Raoul G. Cantero
David P. Draigh
Ryan A. Ulloa
WHITE & CASE LLP
Southeast Financial Center
200 S. Biscayne Blvd., Ste. 4900
Miami, Florida 33131-2352
Telephone: (305) 371-2700
Facsimile: (305) 358-5744

Counsel for Petitioner

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE FIRST DCA CERTIFIED A DIRECT CONFLICT, AND ITS OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE FIFTH DCA BECAUSE IT HOLDS THAT CITIZENS IS NOT IMMUNE FROM BAD FAITH LAWSUITS	4
II. THIS COURT SHOULD ACCEPT JURISDICTION TO DETERMINE WHETHER CITIZENS IS IMMUNE FROM BAD FAITH CLAIMS, WHICH IS AN ISSUE OF STATEWIDE IMPORTANCE	5
CONCLUSION	8
CERTIFICATE OF SERVICE	9
CERTIFICATE OF COMPLIANCE	10

TABLE OF CITATIONS

PAGE

CASES

Aravena v. Miami-Dade Cnty.,
928 So. 2d 1163 (Fla. 2006) 5

Citizens Prop. Ins. Corp. v. Garfinkel,
25 So. 3d 62 (Fla. 5th DCA 2009)..... passim

Citizens Prop. Ins. Corp. v. San Perdido Ass'n,
104 So. 3d 344 (Fla. 2012) 1, 7

Citizens Prop. Ins. Corp. v. San Perdido Ass'n,
46 So. 3d 1051 (Fla. 1st DCA 2010) 2, 6

Citizens Prop. Ins. Corp. v. San Perdido Sun Condo. Ass'n,
22 So. 3d 71 (Fla. 1st DCA 2009) 2

Citizens Prop. Ins. v. La Mer Condo. Ass'n,
37 So. 3d 988 (Fla. 5th DCA 2010)..... 5

STATUTES AND RULES

Fla. R. App. P. 9.030(a)(2)(A)(iv)-(vi) 1

§ 624.155, Fla. Stat. (2013)..... passim

§ 627.351, Fla. Stat. (2013)..... passim

OTHER AUTHORITY

Art. V, § 3(b)(3)-(4), Fla. Const..... 1

JURISDICTIONAL STATEMENT

In this case, Perdido Sun Condominium Association, Inc. (“Perdido”) sued Citizens Property Insurance Corporation (“Citizens”), alleging a first-party bad faith claim under section 624.155(1)(b)1., Florida Statutes. Adopting the reasoning of *Citizens Property Insurance Corp. v. Garfinkel*, 25 So. 3d 62 (Fla. 5th DCA 2009), *disapproved on other grounds*, *Citizens Property Insurance Corp. v. San Perdido Ass’n*, 104 So. 3d 344 (Fla. 2012), the circuit court granted Citizens’ motion to dismiss with prejudice, holding that the action is barred by section 627.351(6)(s)1., Florida Statutes—which grants Citizens immunity from suit subject to certain exceptions—because a bad faith claim is not a “willful tort” under that section, and therefore not an exception to Citizens’ immunity. In its January 23, 2014 opinion (the “Opinion”), the First DCA reversed, holding—contrary to the Fifth DCA in *Garfinkel*—that a bad faith claim under section 624.155(1)(b)1. *is* a willful tort under section 627.351(6)(s)1., and therefore that Citizens is not immune from such a claim.

This Court has jurisdiction under Article V, Section 3(b)(3)-(4) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv)-(vi) because the Opinion conflicts with decisions of the Fifth DCA. Indeed, the First DCA certified a direct conflict with *Garfinkel*, and the First DCA also certified a question of great public importance.

STATEMENT OF THE CASE AND FACTS¹

After its property was damaged by a hurricane in 2004, Perdido made a claim on its insurance policy with Citizens (A. 3). Unsatisfied with the amount of Citizens' payment on the claim, Perdido sued for breach of contract (A. 3). Perdido prevailed, and the judgment in its favor was affirmed in *Citizens Property Insurance Corp. v. San Perdido Sun Condominium Ass'n*, 22 So. 3d 71 (Fla. 1st DCA 2009) (A. 3-4). Perdido then filed a second lawsuit against Citizens under section 624.155(1)(b)1., Florida Statutes, alleging that Citizens did not in good faith attempt to settle Perdido's claims against it (A. 4).

Citizens moved to dismiss Perdido's complaint on grounds that it is immune from suit under section 627.351(6)(s)1., which grants Citizens immunity from suit subject to certain exceptions, among them one for claims alleging a "willful tort." § 627.351(6)(s)1., Fla. Stat. (2013). The circuit court dismissed Perdido's complaint with prejudice, "adopting the reasoning and statutory analysis of Citizens' immunity from suit" set forth in *Garfinkel* and in Judge Wetherell's dissent in *Citizens Property Insurance Corp. v. San Perdido Ass'n*, 46 So. 3d 1051, 1053 (Fla. 1st DCA 2010) (A. 4).

The First DCA reversed, holding that a bad faith claim under section 624.155(1)(b)1. is a "willful tort" under section 627.351(6)(s)1., and therefore that

¹ The Statement of the Case and Facts is taken from the Opinion, which is attached in the Appendix. "A. #" refers to the page number of the Appendix.

Citizens is not immune from bad faith actions under section 624.155(1)(b)1. (A. 7). In the Opinion, the First DCA acknowledged the contrary holding of *Garfinkel*, 25 So. 3d 62, in which the Fifth DCA held that a bad faith action under section 624.155(1)(b)1. is *not* a “willful tort” under 627.351(6)(s)1., and therefore that Citizens is immune from first-party bad faith lawsuits (A. 4).

The First DCA certified conflict with *Garfinkel* “[t]o the extent that” it “expressly and directly conflicts with” the Opinion (A. 7-8). In addition, “in light of Citizens’ status as a government entity serving the compelling public purpose described in its enabling statute,” the First DCA also certified 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?” (A. 8).

SUMMARY OF ARGUMENT

The Opinion expressly and directly conflicts with decisions of the Fifth DCA. The Opinion holds that section 627.351(6)(s)1., Florida Statutes, does not immunize Citizens from bad-faith claims under section 624.155(1)(b)1., Florida Statutes, because bad-faith claims are “willful torts” and therefore an exception to immunity. In sharp contrast, the Fifth DCA held that bad-faith actions are *not* “willful torts,” and that section 627.351(6)(s)1. makes Citizens immune from first-

party bad faith actions under section 624.155(1)(b)1. The Court has jurisdiction to review this clear conflict. Moreover, the Court has recognized that the issue of Citizens' immunity from bad-faith actions needs to be answered. It declined to answer the question in 2012 only because it was presented on interlocutory review. The issue is now before the Court on review of a final order, and the Court has jurisdiction to determine this question of statewide importance.

ARGUMENT

I. THE FIRST DCA CERTIFIED A DIRECT CONFLICT, AND ITS OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE FIFTH DCA BECAUSE IT HOLDS THAT CITIZENS IS NOT IMMUNE FROM BAD FAITH LAWSUITS

The Opinion addresses the interplay between section 624.155, which provides a civil remedy for persons damaged by an insurer's alleged failure to settle claims in good faith, and section 627.351, which immunizes Citizens from suit subject to five exceptions, among them an exception for the commission of a "willful tort." See §§ 624.155(1)(b)1., 627.351(6)(s)1., Fla. Stat. (2013). The Opinion clearly holds that "failing to attempt in good faith to settle claims as provided by section 624.155, Florida Statutes," is a "willful tort," and that 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)." (A. 7).

Thus, the Opinion directly conflicts with *Garfinkel*, in which the Fifth DCA held that "[n]owhere in section 627.351(6)[(s)]1[.] is there a specific exception

stated for statutory bad faith claims under section 624.155(1)(b)[1.],” and that a “bad faith claim . . . is not considered to be a willful tort that would give rise to a claim for damages.” 25 So. 3d at 66, 68. The Fifth DCA further held that “first-party bad faith causes of action now exist in Florida not because they are torts, but because they are a statutory cause of action,” and “cannot be wedged into the statutory exception for willful torts.” *Id.* at 68-69. The Fifth DCA held similarly about six months later. *See Citizens Prop. Ins. v. La Mer Condo. Ass’n*, 37 So. 3d 988 (Fla. 5th DCA 2010), *disapproved on other grounds, Citizens Property Insurance Corp. v. San Perdido Ass’n*, 104 So. 3d 344 (Fla. 2012).

Therefore, the Opinion expressly and directly conflicts with decisions of another district court of appeal, and this Court has jurisdiction. *See, e.g., Aravena v. Miami-Dade Cnty.*, 928 So. 2d 1163, 1166-67 (Fla. 2006) (granting jurisdiction on conflict grounds when the holdings of two district courts of appeal are irreconcilable). Indeed, in the Opinion, the First DCA itself certified a conflict with *Garfinkel* “[t]o the extent that the opinion in [*Garfinkel*] expressly and directly conflicts with the [Opinion]” (A. 7-8).

II. THIS COURT SHOULD ACCEPT JURISDICTION TO DETERMINE WHETHER CITIZENS IS IMMUNE FROM BAD FAITH CLAIMS, WHICH IS AN ISSUE OF STATEWIDE IMPORTANCE

There is no dispute that the Opinion exposes Citizens to liability to which other courts have held it to be immune, and would therefore subject a

governmental entity to litigation expense and additional damages exposure that would be borne by Florida taxpayers. And the courts have articulated strong reasons why the Fifth DCA's opinion in *Garfinkel* states the better rule—for example, that allowing bad faith claims against Citizens is “unsound policy because subjecting Citizens to bad faith claims of policy holders . . . who have already been paid for the losses insured by Citizens will only serve to reduce the financial resources available to Citizens to pay claims of other policyholders.” *San Perdido Ass'n*, 46 So. 3d at 1056 (Wetherell, J., dissenting). That is particularly true where Citizens' enabling statute provides that it is “essential” that Citizens “have the maximum financial resources to pay claims.” § 627.351(6)(a)1., Fla. Stat. (2013). Indeed, “because Citizens is a governmental entity (and not a private insurance company), the taxpayers will ultimately bear the burden of paying claims that Citizens is unable to pay.” *San Perdido Ass'n*, 46 So. 3d at 1056 (Wetherell, J., dissenting).

Although holding that Citizens is not entitled to immunity from statutory bad faith claims, the First DCA recognized that this Court should have the ultimate say by certifying 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?” (A. 8).

Indeed, this Court has already recognized that whether Citizens is immune from bad faith actions is an open question that needs to be answered. In *San Perdido Ass'n*, this Court recognized that the immunity in question here “involves a matter of statutory construction that once resolved will not reoccur; that is, whether Citizens’ immunity includes immunity against statutory first-party bad faith causes of action. Once this legal question is answered, there will not be a need for an interlocutory appeal to answer the same question again.” 104 So. 3d at 357. This Court declined to reach the issue only because it was raised on interlocutory appeal, and the Court “decline[d] to expand the list of non-final orders reviewable on appeal to include this discrete legal issue.” *Id.* Because the precise issue is now before the Court again, on appeal from a *final* order, and because the Opinion—which eliminates immunity—is in direct conflict with the Fifth DCA’s rule upholding immunity, this Court should exercise its conflict jurisdiction to settle the question.

CONCLUSION

For the reasons stated above, this Court should accept jurisdiction to determine whether Citizens is immune from first-party bad faith actions.

Dated: February 14, 2014

Respectfully submitted,

WHITE & CASE LLP

s/Raoul G. Cantero

Kara Berard Rockenbach
Florida Bar No. 0044903
METHE & ROCKENBACH, P.A.
1555 Palm Beach Lakes Blvd., Ste. 1200
West Palm Beach, Florida 33134
Telephone: (561) 727-3600
Facsimile: (561) 727-3601
E-mail: kbrock@flacivillaw.com

Raoul G. Cantero
Florida Bar No. 552356
David P. Draigh
Florida Bar No. 624268
Ryan A. Ulloa
Florida Bar No. 84757
Southeast Financial Center
200 S. Biscayne Blvd., Suite 4900
Miami, Florida 33131-2352
Telephone: (305) 371-2700
Facsimile: (305) 358-5744
E-mail: rcantero@whitecase.com
E-mail: ddraigh@whitecase.com
E-mail: ryan.ulloa@whitecase.com

Co-Counsel for Petitioner

CERTIFICATE OF SERVICE

I CERTIFY that on February 14, 2014, a copy of this brief was filed with the Court and was served on the same day by e-mail upon the following:

Richard M. Beckish, Jr., Esq.
Liberis Law Firm, P.A.
212 West Intendencia Street
Pensacola, Florida 32502
Telephone: (850) 438-9647
Facsimile: (850) 433-5409
E-mail: rbeckish@liberislaw.com
E-mail: gthompson@ liberislaw.com
E-mail: admin@liberislaw.com

Counsel for Respondent

s/Raoul G. Cantero
Raoul G. Cantero

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

s/Raoul G. Cantero
Raoul G. Cantero