

**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.

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ON DISCRETIONARY REVIEW OF A DECISION  
OF THE FIRST DISTRICT COURT OF APPEAL

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**REPLY BRIEF OF PETITIONER,  
CITIZENS PROPERTY INSURANCE CORPORATION**

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Petitioner, Citizens Property Insurance Corp. (“Citizens”) submits this reply brief in support of its appeal.

### **ARGUMENT**

Perdido does not dispute that this case presents an issue of statutory construction, and does not challenge Citizens’ authority holding that statutes should be construed to give effect to the statute’s actual language, whether or not the court agrees with the Legislature (*see* initial br. at 6). Indeed, Perdido’s own authority holds that the “‘cardinal rule’ of statutory construction is ‘that a statute should be construed so as to ascertain and give effect to the intention of the Legislature as expressed in the statute.’” *Dennis v. State*, 51 So. 3d 456, 461 (Fla. 2010) (citation omitted).

As we show below, Perdido does not disturb Citizens’ showing that, under the plain terms of section 627.351, (I) Citizens is immune from Subsection (1)(b)1 Claims because they are not listed as an exception to Citizens’ immunity; (II) Subsection (1)(b)1 Claims are not “willful torts”; and (III) the Legislature did not intend for Citizens to be subject to Subsection (1)(b)1 Claims.

#### **I. SECTION 627.351 MAKES CITIZENS IMMUNE FROM SUIT SUBJECT TO ONLY FIVE EXCEPTIONS, NOT INCLUDING SUBSECTION (1)(b)1 CLAIMS**

Perdido does not address Citizens’ authority holding that statutes waiving sovereign immunity must be clear and unequivocal, and that waiver will not be

found by inference or implication (initial br. at 7). Rather, Perdido argues that a particular sentence in section 627.351—“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”—only “exempt[s] Citizens from federal taxes,” and does “not blanket it with full sovereign immunity” (ans. br. at 5, 9-12 (quoting § 627.351(6)(a)1, Fla. Stat.)). Perdido is simply wrong. This Court has held that, “as section 627.351(6)(a)1. has designated that Citizens is a ‘government entity that is an integral part of the state and . . . is not a private insurance company,’ the immunity granted by this provision is a form of sovereign immunity.” *Citizens Prop. Ins. Corp. v. San Perdido Ass’n*, 104 So. 3d 344, 355 (Fla. 2012) (alteration in original). Indeed, as Perdido and the Opinion concede, section 627.351 gives Citizens statutory immunity subject only to five listed exceptions, and Subsection (1)(b)1 Claims are not among them (*see* initial br. at 7; ans. br. at 9-15).

Moreover, Perdido’s federal tax argument is demonstrably false. Citizens was created in 2002 by Chapter 2002-240, Laws of Florida, which provided that: “Because it is essential for the corporation to have the maximum financial resources to pay claims following a catastrophic hurricane, it is the intent of the Legislature 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.” Ch. 2002-240, § 2, at 1768, Laws of Fla. (amending § 627.351(6)(a), Fla. Stat.). Prior to enactment, the “Internal Revenue Service (IRS) in a private letter ruling to the Department of Insurance and after reviewing the provisions of the act creating Citizens determined that Citizens would be exempt from federal taxes.” Fla. S. Comm. on Banking & Ins., CS for SB 2498 (2007) Staff Analysis 4 n.14 (Apr. 9, 2007) [hereinafter SB 2498 Staff Analysis] (citing I.R.S. P.L.R. 16364001 (Feb. 20, 2002)), *available at* <http://archive.flsenate.gov/data/session/2007/Senate/bills/analysis/pdf/2007s2498.bi.pdf>. Thus, Citizens was exempt from federal taxes at its inception in 2002, and the sentence that Perdido claims created the exemption—that Citizens is a “government entity that is an integral part of the state, and that is not a private insurance company”—was not added until 2007. *See* Ch. 2007-90, § 11, at 1097, Laws of Fla. Moreover, the purpose of the amendment was to “[r]evis[e] Citizens’ legislative intent language by emphasizing the need for affordable property insurance to be provided by Citizens.” SB 2498 Staff Analysis at 1; *see also id.* at 4 (“The proposed Legislative findings emphasize the importance of affordable property insurance . . . and that . . . it is the Legislature’s intent that Citizens *continue* to be an integral part of the state and that its income be exempt from federal income taxation . . . .”) (emphasis supplied).

Perdido next argues that 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” (ans. br. at 13). But it cites no authority for that proposition other than the workers’ compensation case of *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912 (Fla. 2001), which it cites only for the noncontroversial proposition that statutes should be interpreted to give effect to all their terms (ans. br. at 13). And Perdido is wrong on the law. As this Court has held, where a statute sets forth exceptions, no other exceptions may be implied (initial br. at 7 (citing *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952))). Perdido concedes that Subsection (1)(b)1 Claims are not listed as an exception to Citizens’ immunity, but does not address *Dobbs* or the bedrock legal principle expressed in it, which controls here. Perdido’s statement that “[t]here simply is no requirement under Florida law that the Legislature must create a ‘laundry list’ of exceptions in order to effectuate its purpose” (ans. br. at 14-15) is inadvertently correct, because the law is precisely the opposite: where, as here, the Legislature lists exceptions, the courts have no power to imply additional ones.

Without citing anything, Perdido dismisses as “meritless” Citizens’ showing that legislative history from 2007 confirms that the Legislature intended only five exceptions to Citizens’ immunity, arguing that “inviting the Court to speculate on

why particular language was omitted or changed . . . is neither helpful nor proper legal analysis of the statute” (*id.* at 21-22). But this Court has held that legislative history is often a “helpful” tool for corroborating the Legislature’s intent. *State v. Jefferson*, 758 So. 2d 661, 665 (Fla. 2000). Indeed, “[t]he courts may properly take notice of changes made to a bill during the process of enactment.” *Don King Prods., Inc. v. Chavez*, 717 So. 2d 1094, 1095 (Fla. 4th DCA 1998) (“The deletion of the language specifically supporting [a party’s] construction of the statute is one of the surest signs of its rejection by the legislature.”). And there is further corroborating legislative history from two years later. In the 2009 legislative session, bills were filed in both the Florida House and Senate proposing to expand the scope of section 624.155(1) to include Citizens. *See* Fla. HB 1051, § 1 (2009) (“Any person may bring a civil action against an insurer, including Citizens Property Insurance Corporation, when such person is damaged . . . .” (underscored text is proposed amendment to § 624.155(1), Fla. Stat.)); Fla. SB 960, § 1 (2009) (same). Both bills died in committee.

Thus, the Legislature considered making, but did not make, Citizens subject to Subsection (1)(b)1 Claims, and it is another established principle of statutory construction, as this Court has recognized, that “the mention of one thing implies the exclusion of another.” *Young v. Progressive Se. Ins. Co.*, 753 So. 2d 80, 85 (Fla. 2000) (internal quotation marks omitted); *see also Prewitt Mgmt. Corp. v.*

*Nikolits*, 795 So. 2d 1001, 1005 (Fla. 4th DCA 2001) (“[W]hen a law expressly describes a particular situation where something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded.”). That is precisely the situation here. The text of section 627.351, and the legislative history, show the Legislature’s intention not to include Subsection (1)(b)1 Claims among the five exceptions to Citizens’ statutory immunity. *Cf. XL Specialty Ins. Co. v. Aircraft Holdings, LLC*, 929 So. 2d 578, 586 (Fla. 1st DCA 2006) (“Because the legislature did not provide an exception to the attorney-client privilege for a bad faith action in its list of exceptions, we decline to create one.”).

Alternatively, Perdido argues that Subsection (1)(b)1 Claims are among the listed exceptions to Citizens’ immunity because all of them “are expressed in broad terms,” and because “[n]one of the immunity exceptions enumerate specific statutory provisions” (ans. br. at 13). But Perdido cites no authority. Rather, Perdido simply recites three of the exceptions—two of which allow Citizens to be sued for certain breaches of contract; the other allows suit ““with respect to issuance or payment of debt”” (*id.* at 13(citing § 627.351(6)(s)1))—none of which have anything to do with claims founded on Subsection (1)(b)1. And it is unremarkable that exceptions for *contract* actions would not identify a statute. Perdido argues that all of the exceptions “involve Citizens’ activities *as an*

*insurance company*” and, besides Subsection (1)(b)1 Claims, “what other ‘willful torts’ could the legislature have contemplated that Citizens might commit in connection with its activities *as an insurance company*” (*id.* at 13-14 (Perdido’s italics)). But Perdido again has no authority for this argument, and ignores the true intentional torts—such as fraud—that Citizens identified in its initial brief (initial br. at 12-13).

Finally, Perdido argues that, in section 627.351(6)(s)2, the “legislature specifically imposed a duty of good faith on Citizens,” and that “[a]dopting Citizens’ position would render this duty of good faith meaningless” (ans. br. at 14). But Perdido ignores Citizens’ showing that, even if section 627.351(6)(s)2 creates such a duty, section 627.351(6)(s)1—which is part of the same subsection (6) that is the source of the purported duty—immunizes Citizens for any breach of such a duty, because it immunizes Citizens for any action taken “*under this subsection.*” § 627.351(6)(s)1, Fla. Stat. (2009) (emphasis supplied). And Perdido’s only case, for the proposition that a “statute should not be construed so strictly as to defeat the obvious intent of the legislature,” is *City of Margate v. Singh*, 778 So. 2d 1080, 1081 (Fla. 4th DCA 2001) (ans. br. at 14). But *Margate* construed a *criminal* statute and applied the rule of lenity, under which, where a statute is “‘susceptible of differing constructions,’ it is construed most favorably to the defendant.” *Id.* (citing § 775.021(1), Fla. Stat. (2000)). The civil statute here is

not susceptible of differing constructions. Under the plain terms of section 627.351(6)(s), Citizens is immune from Subsection (1)(b)1 Claims because such claims are not among the five listed exceptions to Citizens' immunity. The Opinion should be reversed.

## **II. SUBSECTION (1)(b)1 CLAIMS ARE NOT "WILLFUL TORTS"**

Perdido does not dispute that chapter 627 does not define "willful tort" (initial br. at 9). Perdido does not dispute that, when terms are undefined, they should be given their plain and ordinary meaning (*id.*). Nor does Perdido dispute that this Court has defined an intentional or willful tort as "one in which the actor exhibits a deliberate intent to injure" (*id.* at 9-10 (citing *D'Amario v. Ford Motor Co.*, 806 So. 2d 424, 438 (Fla. 2001))). Perdido further does not dispute that, at common law in the first-party context, Subsection (1)(b)1 Claims did not exist, and that section 624.155(1)(b)1 both created first-party claims and codified third-party claims, which long had been held to sound in contract (*id.* at 10-11). And Perdido does not dispute, as this Court has held, that section 624.155 extended the same obligations that existed in third-party actions to first-party actions (*id.* at 11). Accordingly, Perdido sued for "Violation of § 624.155 Florida Statutes," and its Complaint nowhere includes the word "tort."

In response, Perdido argues that "one must first ask . . . what is a 'tort'?", and cites *Department of Health & Rehabilitative Services v. Wright*, 522 So. 2d

838, 841 (Fla. 1988) (Kogan, J., dissenting), for the proposition that torts are the breach of a legal duty resulting in damages (ans. br. at 15). But the majority in *Wright*—a personal jurisdiction and child-support case—refused to find the existence of a duty, and the dissent complained that the majority was following the “traditional, but unjustly limited definition of a cause of action grounded in tort.” 522 So. 2d at 840-41 (Kogan, J., dissenting). Perdido then argues that a “duty can be supplied by either common law or statute,” and string cites four cases as examples of “statutory torts” (ans. br. at 15-16). None of those cases, however, say anything about Subsection (1)(b)1 Claims. See *Miami Dairy Farms v. Tinsley*, 164 So. 528 (Fla. 1935) (wrongful death); *Reeves v. Ace Cash Express, Inc.*, 937 So. 2d 1136 (Fla. 2d DCA 2006) (Florida Consumer Collection Practices Act); *Comptech Int’l, Inc. v. Milam Commerce Park, Ltd.*, 711 So. 2d 1255 (Fla. 3d DCA 1998) (South Florida Building Code); *Sarkis v. Pafford Oil Co.*, 697 So. 2d 524 (Fla. 1st DCA 1997) (civil theft and civil RICO).

Perdido argues that the duty here “is supplied by §624.155 *Florida Statutes*,” which “codifies the duty of good faith and fair dealing in settling claims between an insurer (like Citizens) and its insured” (ans. br. at 16, 18 (Perdido’s italics)). But Perdido also argues that the duty created by section 624.155 is the “*same* duty mandated by Citizens’ own enabling statute at §627.351(6)(s)(2)” (*id.* at 18 (emphasis supplied)). The Opinion makes the same argument, holding that,

“[b]ecause the law, in section 627.351(6)(s), specifically imposes upon Citizens a duty to handle its insured’s claims in good faith, a breach of this duty falls under the broad definition of ‘tort.’” *Perdido Sun Condo. Ass’n v. Citizens Prop. Ins. Corp.*, 129 So. 3d 1210, 1212-13 (Fla. 1st DCA 2014). However, as shown above and in Citizens’ initial brief (initial br. at 8), even if section 627.351(6)(s)2 creates such a duty, Citizens is immunized from an action for breach of that duty by section 627.351(6)(s)1, which provides that Citizens shall not be liable for “any action taken by [it] in the performance of [its] duties or responsibilities *under this subsection.*” § 627.351(6)(s)1, Fla. Stat. (2009) (emphasis supplied). Although Perdido admits that first-party Subsection (1)(b)1 Claims did not exist at common law, it argues that section 627.351 “makes no distinction between ‘common law torts’ and ‘statutory torts’, the tort simply must be ‘willful’ to be excepted from Citizens’ immunity” (ans. br. at 16-17). But Perdido has no authority that Subsection (1)(b)1 Claims are a tort in the first place. As shown above and in Citizens’ initial brief, they are not (*see* initial br. at 11).

Nevertheless, although Perdido fails to show that a Subsection (1)(b)1 Claim is a tort, it argues that a “tort is ‘willful’ if the tortuous [sic] act is done intentionally, as opposed to mere negligence,” citing *Jersey Palm-Gross, Inc. v. Paper*, 658 So. 2d 531, 534 (Fla. 1995) (ans. br. at 17). But *Jersey Palm-Gross* addressed a defense of criminal usury—the “willful and knowing charge or receipt

of interest in excess of 25% per annum”—under which the necessary willful intent “is determined by existence of a corrupt purpose in the lender’s mind to get more than legal interest for the money lent.” 658 So. 2d at 534 (emphasis omitted).

Perdido’s principal argument that all Subsection (1)(b)1 Claims are willful torts is that 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” (ans. br. at 18). But Perdido’s argument makes Citizens’ point. Indeed, punitive damages are only available if a Subsection (1)(b)1 Claim is accompanied by additional, tortious behavior, including acts that “occur with such frequency as to indicate a general business practice” and are “[w]illful, wanton, and malicious.” § 624.155(5), Fla. Stat. (2009). The necessary implication is that a Subsection (1)(b)1 Claim itself is *not* willful by definition, because only a Subsection (1)(b)1 Claim accompanied by additional, tortious acts—those alleged and proven to be both willful and a general business practice—give rise to a separate claim for punitive damages. Perdido’s own authority shows that the “required misconduct [for punitive damages] goes beyond gross negligence.” *Como Oil Co. v. O’Loughlin*, 466 So. 2d 1061 (Fla. 1985); *S. Bell Tel. & Tel. Co. v. Hanft*, 436 So. 2d 40 (Fla. 1983) (punitive damages not available in contract actions). Indeed, if Subsection (1)(b)1 Claims were willful torts by definition, section 624.155(5) would not require an additional showing of

willfulness and general business practice before allowing a plaintiff to seek punitive damages. Perdido has not pleaded such a claim.

For the same reason, Perdido cannot rely on a footnote in *Citizens Property Insurance Corp. v. San Perdido Ass'n*, 104 So. 3d 344, 355 n.7 (Fla. 2012) (*see ans. br. at 20*). In that footnote, this Court stated that it had “previously recognized that where a plaintiff claims a defendant engaged in egregious and outrageous actions, bad faith can be elevated to a willful tort.” 104 So. 3d at 355 n.7. The clear implication of that footnote is that Subsection (1)(b)1 Claims are *not* willful torts, but may become a willful tort—a different claim—if they are accompanied by additional conduct that is “egregious and outrageous.” Perdido itself concedes that point, admitting that “bad faith is a willful tort *when accompanied by sufficiently outrageous acts* (ans. br. at 21 (Perdido’s underlining; emphasis supplied)). The Opinion should be reversed.

### **III. SUBJECTING CITIZENS TO SUBSECTION (1)(b)1 CLAIMS WOULD LIMIT ITS ABILITY TO EXPAND AFFORDABLE COVERAGE AND PAY INSUREDS’ CLAIMS**

In four pages largely consisting of rhetorical questions, Perdido argues that “Citizens exists to *pay claims* when people’s [sic] homes and businesses are destroyed in a disaster” (ans. br. at 22 (Perdido’s emphasis)). But Citizens does not argue that it cannot be sued at all; indeed, it was sued in this case and the trial court determined that Perdido had suffered more property damage than Citizens

had previously paid. Citizens accepts that determination. The only issue is whether Citizens can be exposed to paying *more than* its policy requires.

Citizens' enabling legislation principally focuses on expanding and decreasing the cost of coverage. *See* § 627.351(6)(a)1, Fla. Stat. (2009) (stating the purpose of "assuring that property in the state is insured," and "that it is insured at affordable rates"). Achieving those objectives facilitates the "remediation, reconstruction, and replacement of damaged or destroyed property." *Id.* Indeed, the statute states the goal of increasing access to affordable coverage four more times in the same paragraph. *See id.* ("[t]he absence of *affordable property insurance* threatens the public health, safety, and welfare"; "[i]t 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"; "[t]o that end, the corporation shall strive to increase the availability of *affordable property insurance* in this state, while achieving efficiencies and economies") (emphasis supplied). Subjecting Citizens to increased liability exposure beyond what its policies require will increase its costs and prevent it from delivering the affordable coverage that it was created to provide.

In short, as this Court has held, it "does not question the wisdom of a statute but instead applies the statute according to the Legislature's direction" (initial br.

at 6 (quoting *Metro Cas. Ins. Co. v. Tepper*, 2 So. 3d 209, 213 (Fla. 2009))). Here, the Legislature intended only five exceptions to Citizens' immunity, and Subsection (1)(b)1 Claims are not among them. The statute shows the balance the Legislature struck between enabling Citizens to expand affordable coverage and protecting the interests of Citizens' policyholders. The Opinion disregards that balance and should be reversed.

**CONCLUSION**

For the reasons stated above, the Court should reverse the Opinion of the First DCA and answer the certified question "yes."

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**CERTIFICATE OF SERVICE**

I CERTIFY that on June 24, 2014, a copy of this brief was filed with the Court and was served on the same day by e-mail upon the following:

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**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.

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