IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC10-2433
L.T. Case No. 1D09-6183

CITIZENS PROPERTY INSURANCE CORPORATION, A GOVERNMENTAL ENTITY OF THE STATE OF FLORIDA,

Petitioner,

v.

SAN PERDIDO ASSOCIATION, INC., A FLORIDA NOT-FOR-PROFIT CORPORATION,

Respondent.

INITIAL BRIEF ON THE MERITS

On Discretionary Review from a Decision of the
First District Court of Appeal

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STATEMENT OF THE FACTS AND CASE

Petitioner Citizens is a state governmental entity created by the Florida Legislature to fill a need for affordable property insurance coverage that was not being adequately met by private insurance companies. *See* § 627.351, Fla. Stat. The legislative purpose behind the creation of Citizens was explicitly set forth as follows:

> It is the public purpose of this subsection to ensure the existence of an orderly market for property insurance for Floridians and Florida businesses. 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 by this subsection 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, Citizens Property Insurance 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 Citizens Property Insurance 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(a)1, Fla. Stat.

In keeping with its expressed purpose of maximizing the financial resources available to Citizens to pay claims and of providing insurance coverage at affordable rates, the Legislature granted Citizens immunity from both liability and suit for all but a short list of causes of action:

> 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.

Respondent San Perdido obtained an award against Citizens on a claim for insurance coverage under a windstorm policy. The circuit court entered judgment on the award plus additional damages in the amount of $1,386,467.50, plus costs and attorneys fees in the amount of $44,851.75. [App. 20-23] After the judgment was affirmed, San Perdido filed a first-party bad faith claim against Citizens seeking damages alleged to have been caused by the delay in payment of the award.[1] Citizens moved to dismiss on the ground of sovereign immunity pursuant to section 627.351(6)(s)1, Florida Statutes.

The circuit court denied Citizens' motion and Citizens sought a writ of prohibition or, alternatively, certiorari from the district court. The district court denied the petition, but certified the case to this Court as being in conflict with *Citizens Property Ins. Corp. v. Garfinkel*, 25 So. 3d 62 (Fla. 5th

[1] The Complaint sought "loss of use of its property, interest paid on loans to reconstruct its facilities, lost profits from rentals, excess costs caused by reconstruction delays, and costs associated with pursuing its claim with Citizens." [App. 1-6]

DCA 2009), [App. 3], and certified the following question as one of great public importance:

> Whether, in light of the Supreme Court's ruling in *Department of Education v. Roe*, 679 So. 2d 756 Fla. 1996), review of the denial of a motion to dismiss based on a claim of sovereign immunity should await the entry of a final judgment in the trial court?

[App. 3]

SUMMARY OF ARGUMENT

The decision of the First District has the unprecedented effect of denying Citizens a material right with no meaningful opportunity for appellate review at any time. The decision would also enable trial courts to frustrate the legislative will with no appellate recourse. For this reason, and because the First District's interpretation of applicable statutory provisions is inconsistent with a number of fundamental rules of statutory construction, this Court should adopt the position of the Fifth District.

The Florida Legislature has granted Citizens absolute immunity from suit as well as from liability. This Court has held that, in the absence of an exception, such language requires dismissal.

The exception in the immunity statute for commission of a "willful tort" should not be held to encompass bad faith actions. The Fifth District

held that the language should not be construed to encompass bad faith actions because there was no first-party cause of action for bad faith recognized at common law and the "willful tort" exception should properly be characterized as a statutory cause of action rather than a tort. In addition to the Fifth District's reasoning, there is an important distinction between willful torts and bad faith actions. In the absence of an exception, a willful tort claimant would have no right to compensation of any kind. On the other hand, a claimant cannot receive bad faith damages unless he or she has already established a right to compensation for breach of the insurance contract. It cannot be assumed that the Legislature intended to permit such ancillary compensation in addition to recovery of the insurance proceeds. Such an assumption would be inconsistent with the legislative declaration that the purpose of the statute creating Citizens was to provide Floridians with property insurance at affordable rates and to maximize the availability of revenue for payment of claims.

The inclusion in a separate section of the statute setting forth Citizens' general responsibilities of a directive that it ensure that its employees act in good faith should not be read to create an exception from immunity for bad faith actions. The Fifth District rejected such an argument based upon four separate rules of statutory construction. (A list of exceptions excludes

additional exceptions; waiver of immunity must be in clear and unequivocal language; legislative history of the act; no private right of action.) In addition, a specific provision setting forth exceptions to immunity should take precedence over a general provision setting forth the duties of Citizens.

In light of Citizens' immunity from suit, a denial of a motion to dismiss should be subject to interlocutory review by writ of certiorari or prohibition. This Court has long recognized that there is always an avenue for interlocutory review of an order denying a material right that cannot be adequately corrected on plenary appeal. The Fifth District's decision granting a writ of prohibition is consistent with this Court's decisions in *Dept. of Education v. Roe* and *Tucker v. Resha*. The *Roe* decision noted that the plaintiff was raising a defense under Florida's general sovereign immunity, which is a partial immunity from liability, not immunity from suit. The Roe Court distinguished the case from *Tucker*, which involved immunity from suit and in which the Court held that there was a right to interlocutory review.

ARGUMENT

This Court has historically recognized that there is *always* a path to meaningful review of an order that would cause material injury that cannot be corrected on plenary appeal, whether such review be by interlocutory appeal or by writ. The First District decision below departed from that principle. The Fifth District decision in *Garfinkel* adhered to it. That is the crux of the conflict now before this Court. For the reasons discussed below, the Court should adopt the reasoning of the Fifth District because the foregoing principle is a bedrock of our concept of justice and because the failure to apply the principle in this case would enable a trial court to completely frustrate legislative policy without recourse.

I. The Legislature Granted Citizens Absolute Immunity from Suit

The Florida Legislature has granted Citizens absolute immunity from both liability and suit. Subject to a short list of exceptions, section 627.351(6)(s)1, Florida Statutes, provides in pertinent part:

> There shall be no liability on the part of, **and no cause of action of any nature shall arise against**, . . . the corporation or its agents or employees . . . for any action taken by them in the performance of their duties or responsibilities under this subsection.

[emphasis added] The language is clear and unambiguous and, assuming that there is no applicable exception — which will be discussed below — the

provision stands as an absolute bar to any law suit against Citizens. Accordingly, this Court has held that the same language appearing elsewhere in the same statutory section, applicable to the Medical Malpractice Joint Underwriting Association, required dismissal of a suit filed against the JUA. *Florida Medical Malpractice Joint Underwriting Assoc. v. Indemnity Ins. Co. of North America,* 689 So. 2d 1040 (Fla. 1997).

San Perdido argued below that a bad faith claim falls within the exception in 627.351(6)(s)1a for commission of a "willful tort". The Fifth District rejected the argument in *Garfinkel,* noting that third-party bad faith claims had long been recognized in Florida as common law torts, but that first-party bad faith claims had never been recognized as a common law tort. First-party bad faith claims were first recognized as a cause of action in Florida when they were created by statute in 1982. The court concluded that a first-party bad faith claim is more properly characterized as a "statutory cause of action" than a "tort" and held that it cannot be presumed that the Legislature intended to include bad faith actions within the meaning of the willful tort exception. *Garfinkel* at 25 So. 3d 68.

There is another important distinction between causes of action for willful tort and for bad faith that bears on determination of legislative intent. In the absence of the statutory exception from immunity for willful torts, a

claimant would have no recourse against Citizens for compensation of any kind for willful torts, regardless of the egregiousness of the company's conduct. The same would not be true of a bad faith claim if it were permitted against Citizens. As a prerequisite to recovering on a bad faith claim, a plaintiff must first have established a right to recover on the underlying breach of contract claim, which is one of the causes of action that is excepted from Citizens' immunity. *See Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005); *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289 (Fla. 1991). In this case, San Perdido obtained a judgment in the amount of $1,431,319.20 on its coverage claim before filing its bad faith suit. [App. 20-23]

San Perdido's bad faith claim sought incidental damages over and above the coverage amount, attorneys' fees, costs, and prejudgment interest for which it had already received a judgment, such damages allegedly caused by Citizens' delay in payment under the policy. [App. 7-19] In light of the Legislature's expressed goal of maximizing available financial resources available to Citizens for payment of claims and of maintaining affordable rates for Citizens policyholders, it cannot reasonably be assumed that the Legislature intended to allow actions for bad faith against Citizens. The effect of such suits would be to *reduce* Citizens' financial resources *for*

payment of policy claims and to provide plaintiffs with additional damages at the expense of other Florida insurance policyholders.[2] The conclusion that such a result is contrary to legislative intent is buttressed by the fact that the Legislature's commitment to avoiding reduction of financial resources for claims payment was sufficiently compelling for it to completely bar actions against Citizens for negligence claims.

In the District Court, San Perdido argued that a first-party bad faith suit such as the one in the case at bar was an exception to the immunity provision because of a directive in section 627.351(6)(s)2 that:

> The corporation shall manage its claim employees, independent adjusters, and others who handle claims to ensure they carry out the corporation's duty to 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.

San Perdido argued that the requirement that Citizens ensure that its employees act "in good faith" created an exception from immunity for bad faith actions. The same argument was made by the plaintiff in *Garfinkel* and rejected by Fifth District based on several fundamental rules of statutory construction.

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[2] Deficits in Citizens' projected budget are made up by surcharges imposed on policyholders of Citizens and other insurance companies writing in Florida. § 627.351(6)(b)3i, Fla. Stat.

First, the court noted that the section immediately preceding the above-quoted directive expressly set forth five specific exceptions to immunity, none of which included bad faith claims. The court cited this Court's decision in *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341 (Fla. 1952) for the well established rule that where a statute articulates exceptions, no other exceptions may be implied. *Garfinkel* at 25 So. 3d 65.

Second, the court noted that a waiver of immunity must be set forth in clear and unequivocal language, citing *Spangler v. Florida State Turnpike Auth.*, 106 So. 2d 421 (Fla. 1958). The general directive in subsection (s)2 directing Citizens, among other things, to manage its employees so as to ensure that they act in good faith is surely not a clear and unequivocal waiver of immunity, particularly when the provision appears immediately after the list of five exceptions in which a cause of action for bad faith is not included. *Id.*

Third, the Fifth District found that the legislative history of the immunity provision is inconsistent with the idea that bad faith claims were exempted from immunity. The court noted that during the 2007 legislative session, the Senate considered language that would have added bad faith claims to the list of exceptions, but ultimately rejected the language in favor of a bill that included the current language. *Garfinkel* at 25 So. 3d 66.

Fourth, the Fifth District noted that the provision directing Citizens to ensure that its employees act in good faith contains no language creating a private right of action for failure to abide by the directive. The court cited *Villazon v. Prudential Healthcare Plan, Inc.*, 843 So. 2d 842 (Fla. 2003) for the proposition that "absent an explicit expression of legislative intent to create a private right of action, none will be implied." *Citizens Property Ins. Corp. v. Garfinkel*, 25 So. 3d at 68. Since the directive contained in subsection (s)2 cannot be held to have created a private cause of action, it cannot be read to create an exception from immunity.

There is an additional rule of construction not mentioned by the Fifth District that applies here. The immunity provision in section 627.351(6)(s)1 includes a provision devoted specifically to exceptions from immunity. The "good faith" provision in the subsection (s)2 is just a general statement of Citizens' obligations in handling claims. It does not purport to deal with the grant of immunity or exceptions to the grant. Where provisions of a statute are in conflict, one specific as to the matter at issue and one more general, the more specific provision prevails. *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067 (Fla. 2006).

II. Citizens is Entitled to an Appropriate Writ to Protect it from the Irreparable Loss of its Right to Immunity from Suit

A common theme underlies most of the circumstances giving rise to an interlocutory appeal as set forth in Rule 9.130, Florida Rules of Appellate Procedure. Six of the nine listed circumstances involve a material denial of a right that cannot be adequately remedied by plenary appeal.[3] This Court has recognized that there are other circumstances not covered by Rule 9.130 that place a defendant in the same jeopardy of losing a material right without meaningful appellate recourse. Under such circumstances, the Court has held that common law certiorari is available. *See, e.g., Belair v. Drew*, 770 So. 2d 1164 (Fla. 2000) (petitioner was entitled to certiorari review of order granting grandmother visitation rights with child); *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097 (Fla. 1987) (orders requiring production of "cat out of the bag" information that "may reasonably cause material injury of an irreparable nature" would justify certiorari review).

[3] Non-final orders that determine jurisdiction of the person; right to immediate possession of property; right to immediate monetary relief or child custody in family law matters; entitlement to arbitration; entitlement to workers' compensation immunity; and entitlement to absolute or qualified immunity in federal civil rights cases.

The case at bar cannot rationally be distinguished from the class of cases represented by *Belair* and *Martin-Johnson*. The legislative grant of immunity from suit is an important factor in enabling Citizens to fulfill its core responsibility of maximizing available revenue to pay claims and providing insurance to Floridians at affordable rates. As with the grandparent visitation in *Belair* and the cat-out-of-the-bag discovery discussed in *Martin-Johnson*, the order below is beyond correction on plenary appeal. Once Citizens has been forced to fully litigate a case and defend a trial, the purpose of immunity from suit has been irretrievably lost. In his dissenting opinion in the district court below, Judge Wetherell recognized that "the trial court's erroneous order denying Citizens immunity from Respondent's suit will cause material injury to Citizens that cannot be fully remedied upon plenary appeal." *Citizens Property Ins. Corp. v. San Perdido* at 46 So. 3d 1053.

The majority in the district court below did not discuss the irreparable effect of the trial court order or the application of this Court's holdings in cases such as *Belair* and *Martin-Johnson*. Instead, the majority concluded that its decision was controlled by this Court's holding in *Dept. of Education v. Roe*, 679 So. 2d 756 (Fla. 1996). In *Roe*, the trial court denied a motion to dismiss the defendant Florida Department of Education based upon the

state's sovereign immunity. The Court held that an agency subject to Florida's partial waiver of sovereign immunity under section 768.28, Florida Statutes, was not entitled to a writ of certiorari to review a trial court order denying a motion to dismiss based upon sovereign immunity.

In reaching its decision in *Roe*, this Court distinguished the case from its earlier decision in *Tucker v. Resha,* 648 So. 2d 1187 (Fla. 1995). Responding to a certified question, the *Tucker* Court had held that a government official asserting qualified immunity should be afforded interlocutory review of an order denying a motion to dismiss. The Court's reasoning in *Tucker* has direct application to the case at bar:

> "The central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.'" Consistent with this purpose, the qualified immunity of public officials involves "*immunity from suit* rather than a mere defense to liability." The entitlement "is effectively lost if a case is erroneously permitted to go to trial." Furthermore, an order denying qualified immunity "is effectively unreviewable on appeal from a final judgment [citation omitted] as the public official can not be "re-immunized" if erroneously required to stand trial or face the other burdens of litigation.

Tucker v. Resha at 648 So. 2d 1189. [emphasis by court; internal citations omitted] The court further noted that erroneously lost qualified immunity had a negative impact upon society as a whole because of "social costs", among them "the expenses of litigation". *Id.* at 1191. The Court concluded:

> Thus, if orders denying summary judgment based upon claims of qualified immunity are not subject to interlocutory review, the qualified immunity of the public officials is illusory and the very policy that animates the decision to afford such immunity is thwarted.

Id.

In holding that agencies claiming the state's general sovereign immunity were not entitled to interlocutory review, the *Roe* court discussed several factors that distinguished *Roe* from *Tucker*. Among them were the fact that the applicability of the sovereign immunity waiver is often inextricably tied to the underlying facts, requiring a trial on the merits, and that permitting interlocutory appeals in such cases would add substantially to the caseloads of the district courts of appeal. *See Dept. of Education v. Roe* at 679 So. 2d 758.

The distinctions between *Roe* and *Tucker* made sense. Because the state's waiver of sovereign immunity under section 768.28 replaces immunity from suit with a limitation on liability, the basis for interlocutory review in *Tucker*, and the case at bar did not exist in *Roe*. In most cases involving the assertion of sovereign immunity, the existence of the limitation on liability would not foreclose the necessity of a trial. Denial of a motion to dismiss in a sovereign immunity case results in no irreparable material injury, and allowing interlocutory review would result in multiple piecemeal

appeals on issues that could all be handled in a single final appeal. On the other hand, in cases such as *Tucker* and the case at bar, where the defendant is entitled to immunity from suit, there is not only irreparable material injury, but the degree of unnecessary litigation is increased when the defendant is forced to fully litigate and try a case that will inevitably be reversed if the plaintiff prevails at the trial level.

The *Roe* court's concern over the volume of interlocutory cases that would burden the district courts if interlocutory review were permitted in sovereign immunity cases would apply to Citizens and similar entities. In addition to the fact that there are only three such entities in Florida, it is likely that a definitive ruling by this Court recognizing the extent of Citizens' immunity and the right to interlocutory review would significantly reduce if not eliminate denials of motions to dismiss by trial courts. Moreover, because the immunity is from suit, the interlocutory review can be expected to be the final stop in the process.

The Fifth District decision in *Garfinkel* is entirely consistent with this Court's opinions in *Tucker* and *Roe.* In *Roe*, the Court recognized the distinction between "*immunity from suit*," which *Tucker* had held would justify interlocutory review, and the "mere defense to liability" that is provided by Florida's sovereign immunity waiver statute, which it held does

not justify interlocutory review. Citizens' statutory immunity from suit undeniably falls into the *Tucker* category and, based upon both *Tucker* and *Roe*, should entitle Citizens to interlocutory review. The Fifth District recognized that distinction when it held that Citizens was entitled to a interlocutory review.[4]

In *Garfinkel*, the Fifth District issued a writ of prohibition rather than certiorari to stop the circuit court from proceeding to trial on the bad faith claim. *Garfinkel* at 25 So. 3d 68. The First District in its opinion below concluded that sovereign immunity did not raise jurisdictional issues since *Roe*:

> The supreme court in *Roe* acknowledged that questions of sovereign immunity had at one time been treated as issues of subject matter jurisdiction, but the *Roe* court rejected further application of that theory . . . .

Citizens Property Ins. Corp. v. San Perdido at 46 So. 3d 1052. If the *Roe* Court intended to hold that immunity never implicates a trial court's jurisdiction, a writ of prohibition would not be available since it rests upon

[4] The question certified by the First District confuses the issue. The court posed the question as whether, in light of *Roe*, "review of the denial of a motion to dismiss **based on a claim of sovereign immunity** should await the entry of a final judgment." [emphasis added] *Roe* would answer *that* question in the affirmative, but that is not the question posed by the trial court order denying Citizens' motion to dismiss. The motion was not based on a claim of sovereign immunity — "a mere defense to liability" — but upon "immunity from suit," which both *Tucker* and *Roe* recognized was materially different.

the trial court's lack of jurisdiction. However, *Roe's* holding was not as broad as it was interpreted by the First District. The *Roe* court stated:

> [A]t one time suits such as this would have been dismissed for lack of subject matter jurisdiction **without regard to the merits of the underlying claim**. *Department of Natural Resources v. Circuit Court of the Twelfth Judicial Circuit*, 317 So. 2d 772 (Fla. 2d DCA 1975) (Department entitled to prohibition against tort action in which trial judge had denied motion to dismiss), *Aff'd*. 339 So. 2d 1113 (Fla. 1976). **It is only because of the limited waiver of sovereign immunity in § 768.28, Florida Statutes (1995), that such a claim may now proceed in the trial court.**

Dept. of Education v. Roe at 679 So. 2d 758. [emphasis added] Thus, *Roe* held that sovereign immunity does not implicate jurisdiction because it only creates a cap on damages and, as the court noted, the immunity determination is often inextricably intertwined with the merits. Nothing in the *Roe* decision suggested that this court was holding that a trial court retained jurisdiction even where the defendant had complete immunity from suit.

In any case, whether by certiorari or prohibition, an entity such as Citizens should have some avenue to seek interlocutory review of an order that ignores its immunity and requires it to proceed to trial. A holding to the contrary would leave such an entity with no avenue of review of an order irretrievably denying it a material right, a result which is both unprecedented and intolerable.

CONCLUSION

The Court is respectfully urged to reverse the decision below and to adopt the reasoning of the Fifth District, holding that Citizens is entitled to immunity from suit in this case and that a writ of certiorari or prohibition should issue.

_____

BARRY RICHARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and U.S. Mail to counsel listed below this 14th day of March, 2011:

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BARRY RICHARD

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.

_____
BARRY RICHARD

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