IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-1394

CITIZENS PROPERTY INSURANCE CORPORATION, Petitioner, vs. MANOR HOUSE, LLC, *et al.*, Respondents.	L.T. Case No.: 5D17-2841

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

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This case is here on review of a decision of the Fifth DCA holding that Florida law allows Respondents—Manor House, LLC, Ocean View, LLC, and Merritt, LLC ("Manor House")—to recover consequential damages for breach of an insurance policy against Petitioner, Citizens Property Insurance Corporation, and certifying a question of great public importance. The Fifth DCA acknowledged that Citizens "is immune from bad faith claims," but found Manor House's claim to be "based squarely on breach of contract"—even though it alleged that Citizens failed to timely adjust and pay a claim, which is the essence of a bad-faith claim (A. 13).[1]

The Fifth DCA also held that Florida law allows an insured to recover consequential damages on a breach-of-contract claim if the parties contemplated such damages. But Florida has rejected the doctrine of reasonable expectations; and this Court has repeatedly warned that an insurer's obligations must be derived from the language of the policy itself—not from what a party may have "contemplated." Moreover, consequential damages are not available to an insured in an action for breach of an insurance contract when the insurer's only obligation is the payment of money. The only additional remedy for a delay in payment is prejudgment interest from the date the amount is owed. The Fifth DCA's opinion should be quashed and the certified question answered in the negative.

[1] "A. #" refers to the page number of the appendix. "R. #" refers to the page number of the trial court record. "DCA R. #" refers to the page number of the DCA record.

A. Facts Relevant to the Appeal

This case involves both a novel issue—whether an insurance company sued for breach of contract can be held liable for first-party consequential damages—and a unique insurer—a government-created entity established as Florida's property insurer of last resort. Therefore, we first summarize the creation of and purpose behind Citizens. We then summarize the policy, the claim, and the proceedings.

Florida's Response to the Lack of Affordable Windstorm Coverage

The frequency of hurricanes and other windstorms damaging Florida property generated a crisis in the availability and affordability of property insurance, especially along the coast. In 1970, the Florida Legislature created the Florida Windstorm Underwriting Association ("FWUA") composed of property insurers licensed to do business in the state "because the voluntary market was unable to provide windstorm-only insurance in high-risk coastal areas." MacGregor, *An Overview of Seven State-Sponsored Property Insurance Programs*, Appleman on Insurance: Current Critical Issues in Insurance Law, Fall 2011, at 55-56. After Hurricane Andrew in 1992, the Legislature "established The Residential Property and Casualty Joint Underwriting Association ('FPCJUA')" as a "temporary, [] short term safety net" to address the "property insurance crisis in the aftermath of Hurricane Andrew." *Id.* Notwithstanding its temporary designation, FPCJUA "continued in existence and became the second largest property insurance carrier in

the state." *Id.* In July of 2002, the Legislature established Citizens Property Insurance Corporation to replace the FWUA and FPCJUA. *Id.*

The Florida Legislature created Citizens to "increase the availability of affordable property insurance" for property owners unable to obtain coverage in the private market. § 627.351(6)(a)1., Fla. Stat. (2019). Citizens' enabling statute included several legislative findings: that private insurers are unwilling or unable to provide affordable property insurance coverage to the extent needed; that the absence of affordable property insurance threatens not only the public health, safety, and welfare but also the state's economic health; that the state has a compelling interest in assuring that property is insured at affordable rates; and that a government mechanism is necessary to allow property owners to procure insurance when they are otherwise unable to do so. § 627.351(6)(a)1., Fla. Stat. Citizens is funded first through policyholders premiums; and if a deficit occurs, then through assessments of policyholders and private insurers. § 627.351(6)(b), Fla. Stat.

To enable Citizens to pay insurance claims to the maximum extent possible, the legislature expressed its intent that Citizens be exempted from federal taxes and did exempt Citizens from state sales and use taxes. § 627.351(6)(a)1., (6)(t), Fla. Stat. It also granted Citizens immunity for actions taken while performing its duties. § 627.351(6)(s)1., Fla. Stat. Only a handful of acts are exempted—such as "breach of contract or for benefits under a policy issued by the corporation."

§ 627.351(6)(s)1.e., Fla. Stat. Therefore, this Court has held that Citizens is immune from first-party bad-faith claims that are otherwise authorized by section 624.155, Florida Statutes. *Citizens Prop. Ins. Corp. v. Perdido Sun Condo. Ass'n*, 164 So. 3d 663, 666 (Fla. 2015).

The Insurance Claim

Manor House is the named insured on a property insurance policy Citizens issued for an apartment complex in Brevard County (A. 16-60). After Hurricane Frances, Manor House submitted a claim (R. 675). Citizens acknowledged coverage and issued payments totaling almost $2 million (R. 1929, 4370). Two years later, Manor House sought to re-open the claim (R. 339). Citizens agreed to re-evaluate it and assigned a new adjuster (R. 340). Manor House submitted a supplemental claim estimating repairs at over $10 million (R. 1929). After reinspection of the property Citizens paid another $345,192.40 (R. 1929, 4370, 4398). In response, a purported agent of Manor House demanded appraisal (R. 156, 615-16). Citizens requested additional information about the purported agent's authority to demand appraisal on Manor House's behalf (R. 159, 624).

B. Course of Proceedings Below

Before responding to Citizens' request for information, Manor House sued (R. 158, 623-28). The circuit court abated the case twice because plaintiff refused to provide the requested information (R. 466-67, 470-72). Finally, after Plaintiffs

provided the information, the trial court ordered the parties to appraisal (R. 491-95, 511-13, 527). The appraisal panel issued an award of $8,649,816.12 in replacement cost value and $8,388,752.06 in actual cash value (R. 621). Citizens satisfied the award, bringing the total amount paid to $7,725,961.43 (R. 4373, 4401, 4549).

Despite these payments, Manor House filed a Second Amended Complaint alleging claims for breach of contract (count I), common-law fraud (count II), and breach of the implied covenant of good faith and fair dealing (count III) (R. 673-90). This appeal concerns only Count I, which alleged that Citizens breached the policy because it "failed and refused to fairly, honestly, or properly adjust the loss with its insured" (R. 682), and demanded "consequential damages" based on Citizens' alleged "delay and failure to timely pay this claim" (R. 684). During discovery, Manor House clarified that its demand for consequential damages was based on the alleged breach of the policy, which prevented the repair of numerous apartments and resulted in lost rents of $2,507,955.00 (R. 3724-25).

Citizens filed a motion for judgment on the pleadings on counts II and III (R. 2654-80), and two motions for partial summary judgment addressing the relief requested in count I (R. 3610-777, 3781-3922). The trial court granted the motions (R. 2797; 4366-67). As relevant here, the court found that "[n]othing in the insurance contract provides coverage for lost rents . . . . The Court finds no ambiguity in the insurance contract and concludes there is no coverage as a matter of

law for these damages sought by Plaintiff" (R. 4367). The court entered judgment in Citizens' favor (R. 4430-31).

C. Disposition in the Fifth DCA

Manor House appealed (DCA R. 5-6). The Fifth DCA affirmed as to most issues, but reversed the determination that Manor House could not recover lost rental income as consequential damages (the "Opinion") (A. 9, 11).

The Fifth DCA acknowledged that the trial court had "granted Citizens' motion for partial summary judgment on the breach of contract claim regarding lost rental income, based on the fact that the insurance policy essentially provided for property damage coverage, but did not provide coverage for lost rent" (A. 11). The Fifth DCA also acknowledged that "that is an accurate reading of the insurance policy" (*id.*). Nevertheless, it held that the trial court's ruling "ignores the more general proposition that 'the injured party in a breach of contract action is entitled to recover monetary damages that will put it in the same position it would have been had the other party not breached the contract'" (A. 11-12) (quoting *Capitol Envtl. Servs., Inc. v. Earth Tech, Inc.,* 25 So. 3d 593, 596 (Fla. 1st DCA 2019)). The court also held that "when an insurer breaches an insurance contract, the insured 'is entitled to recover more than the pecuniary loss involved in the balance of payments due under the policy' in consequential damages, provided the damages 'were in contemplation of the parties at the inception of the contract'" (A. 12) (quoting *Life*

Inv'rs Ins. Co. of Am. v. Johnson, 422 So. 2d 32, 34 (Fla. 4th DCA 1982)). And it held that the trial court had "denied Manor House the opportunity to prove whether the parties contemplated that Manor House . . . would suffer consequential damages in the form of lost rental income if Citizens breached its contractual duties to timely adjust and pay covered damages" (A. 12). Finally, the Opinion held that Citizens was not immune from the recovery of consequential damages because the damages "are based squarely on breach of contract claims requiring no allegation or proof that Citizens acted in bad faith" (A. 13).

Citizens filed a motion for rehearing, rehearing *en banc*, and for certification (DCA R. 329-56). The Fifth DCA denied the rehearing motions but certified to this Court the following question of great public importance:

> IN A FIRST-PARTY BREACH OF INSURANCE CONTRACT ACTION BROUGHT BY AN INSURED AGAINST ITS INSURER, NOT INVOLVING SUIT UNDER SECTION 624.155, FLORIDA STATUTES, DOES FLORIDA LAW ALLOW THE INSURED TO RECOVER EXTRA-CONTRACTUAL, CONSEQUENTIAL DAMAGES?

(DCA R. 370-71). This Court granted review.

D. Standard of Review

Appellate courts review orders granting summary judgment *de novo*. *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1085 (Fla. 2005).

SUMMARY OF THE ARGUMENT

The Fifth DCA recognized that the policy did not provide coverage for lost rent (A. 11). Yet it held that an insured may be entitled to recover *more* than the balance of payments due under the policy as consequential damages, if the parties had contemplated such damages (A. 11-12). The Fifth DCA's holding is based on the premise that parties can "contemplate" remedies outside the express contractual terms. But this Court has specifically rejected the argument that parties to an insurance contract can agree to remedies other than as provided in the policy itself, declining to adopt the doctrine of reasonable expectations in the insurance context. *QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n*, 94 So. 3d 541 (Fla. 2012).

Manor House labeled Count I of its Second Amended Complaint as a count for "Breach of Contract" (R. 682). But Count I is premised on allegations that Citizens "failed and refused to fairly, honestly, or properly adjust the loss with its insured"—rather than on any breach of a policy provision (R. 682). Therefore, Count I actually alleges a first-party bad-faith claim under section 624.155, Florida Statutes. But this Court has held that Citizens is immune from such claims, and insureds cannot plead around that immunity by dressing up a bad-faith claim as one for breach of contract. This Court should reverse on that basis alone.

The Opinion also can be reversed because consequential damages are not available for breach of an insurance contract where the insurer's only obligation is

the payment of money. In such circumstances, an insured's sole remedy for delayed payment is prejudgment interest.

Moreover, subjecting Citizens to amorphous consequential damages untethered to specific contractual provisions would bring uncertainty to Citizens' ability to perform its function as a market of last resort because it would lead to increased premiums and reduce its ability to pay claims. Citizens was created to provide available and affordable property insurance while avoiding the need to assess policyholders and private insurers. This balance is fundamental to Citizens' role as Florida's property insurer of last resort. Allowing consequential damages entirely outside the contract terms would create unpredictability in Citizen's rate-making, increase its premiums, and increase the likelihood of assessments to policyholders and private insurers—thus undermining Citizens' role of providing available and affordable coverage as a last resort.

ARGUMENT

I. FLORIDA LAW DOES NOT ALLOW THE RECOVERY OF CONSEQUENTIAL DAMAGES IN A BREACH-OF-CONTRACT ACTION BASED ON AN INSURER'S ALLEGED FAILURE TO TIMELY INVESTIGATE AND PAY A CLAIM

The Fifth DCA certified the following question: "In a first-party breach of insurance contract action brought by an insured against its insurer, not involving suit under section 624.155, Florida Statutes, does Florida law allow the insured to recover extra-contractual, consequential damages?" (DCA R. 371). As we show

below, the answer to that question is "no." In an action for breach of an insurance contract, Florida law does not allow the recovery of consequential damages for lost rents based on an insurer's failure to timely investigate and pay the claim. As we explain below, (A) what the parties contemplated as a remedy for breach, outside the express policy terms, is irrelevant because Florida has not adopted the doctrine of reasonable expectations in the insurance context; (B) in reality, such damages create a remedy not for a breach of contract but for first-party bad faith under section 624.155, Florida Statutes, from which Citizens is immune; and (C) where the insurer's only obligation is the payment of money and payment is delayed, the only additional contract damages available is prejudgment interest.

A. What the parties contemplated as a remedy for breach, outside the express policy terms, is irrelevant because Florida has not adopted the doctrine of reasonable expectations in the insurance context

As this Court has held, "[i]n the context of a first-party insurance claim, the contractual amount due the insured is the amount owed pursuant to the express terms and conditions of the policy." *Talat Enters. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1283 (Fla. 2000). *See also Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467, 472 (Fla. 1993) (noting that courts "give effect to the intent of the parties *as expressed in the policy language*") (emphasis added). Any ambiguity "must be construed against the insurer and in favor of coverage *without resort to consideration of extrinsic evidence*." *Wash. Nat'l Ins. Corp. v. Ruderman*, 117

So. 3d 943, 952 (Fla. 2013) (emphasis added). And in a common-law breach of contract action against an insurer, "damages [are] limited to those contemplated by the parties *in the insurance policy*." *Macola v. Gov't Empls. Ins. Co.*, 953 So. 2d 451, 455-56 (Fla. 2006) (emphasis added).

Neither the Fifth DCA nor Manor House has identified any policy provision allowing for consequential damages—that is, damages beyond payment to repair actual damage to the property. In fact, the Fifth DCA recognized that the trial court had read the policy accurately when it concluded that the policy provided coverage for property damage but not for lost rent (A. 11).

Despite the contract language, the Fifth DCA held that an insured may be entitled to recover as consequential damages *more* than "the balance of payments due under the policy" if the parties had contemplated such damages (A. 11-12). And it held that the trial court had "denied Manor House the opportunity to prove whether the parties contemplated that Manor House . . . would suffer consequential damages in the form of lost rental income if Citizens breached its contractual duties to timely adjust and pay covered damages" (A. 12).

The Fifth DCA's holding is based on the premise that parties can "contemplate" remedies outside the policy's express terms. But this Court has rejected the argument that the relationship of the parties to an insurance contract is governed by anything other than the policy language. *Chalfonte Condo. Apt. Ass'n*,

94 So. 3d 541. In *Chalfonte*, this Court analyzed, among other questions, whether insurance contracts in Florida include the implied duty of good faith and fair dealing. Its opinion "recounted the evolution of insurance contract litigation in Florida." *Id.* at 545. For example, it noted that the common law did not allow insureds (as opposed to third parties) to file bad-faith claims against their insurers. *Id.* Such claims were only available under section 624.155, Florida Statutes. *Id.* at 546-47. And they cannot be brought until the underlying coverage (or breach-of-contract) action concludes. *See, e.g., Allstate Indem. Co. v. Ruiz,* 899 So. 2d 1121, 1130 (Fla. 2005). And *Chalfonte* rejected the insured's argument that a claim for a violation of the implied contractual warranty of good faith and fair dealing was somehow different from a first-party bad-faith claim. 94 So. 3d at 547.

As this Court noted in *Chalfonte*, the implied covenant of good faith and fair dealing is intended to protect "'the reasonable expectations of the contracting parties in light of their express agreement.'" 94 So. 3d at 548 (quoting *Barnes v. Burger King Corp.,* 932 F. Supp. 1420, 1438 (S.D. Fla. 1996)). But "this Court has specifically declined to adopt the doctrine of reasonable expectations in the context of insurance contracts, concluding that construing insurance policies under this doctrine 'can only lead to uncertainty and unnecessary litigation.'" *Id.* at 549 (quoting *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.,* 711 So. 2d 1135, 1140 (Fla.1998)). *See also Lenhart v. Federated Nat'l Ins. Co.,* 950 So. 2d

454, 461 (Fla. 4th DCA 2007) (explaining that a reasonable belief contrary to the plain meaning of a policy, or even unclear text capable of being read to provide coverage, is irrelevant to construing the policy); *State Farm Fire & Cas. Co. v. Castillo,* 829 So. 2d 242, 247 (Fla. 3d DCA 2002) (explaining that "it is the policy's terms which define [insurance] coverage, not the insureds' reasonable expectations").

Thus, Florida law *forbids* granting Manor House the "opportunity to prove" what the parties contemplated at the time of contracting: Manor House cannot use extrinsic evidence to gain additional coverage under the policy without having bargained for it and paid an additional premium. That is precisely the "uncertainty and unnecessary litigation" this Court warned against in *Chalfonte.* Coverage for lost rents or loss of use is widely available, and countless insureds include it in their coverage—but it is a specific policy term; it is not "implied" or "contemplated."

Because Citizens did not violate an express contract provision and insurance contracts contain no implied duties based on the parties' reasonable expectations, Manor House's request for consequential damages cannot be based on a breach-of-contract claim. What the parties "contemplated" as damages is irrelevant; what matters is the policy language. And as the Fifth DCA conceded, the policy does not contemplate consequential damages resulting from delayed payment.

B. Manor House's claim for consequential damages, based on Citizens' alleged failure to timely investigate and pay the claim, alleges a bad-faith claim, against which Citizens is immune

Although Count I is titled "Breach of Contract," and the Fifth DCA appeared to analyze it as such, the "substance of the allegations made, and not what they are labeled, determines the action." *Iezzi Fam. Ltd. P'ship v. Edgewater Beach Owners Ass'n*, 254 So. 3d 584, 587 (Fla. 1st DCA 2018); *see also Regal Marble, Inc. v. Drexel Invest., Inc.*, 568 So. 2d 1281, 1282 (Fla. 4th DCA 1990) ("Courts should be concerned with the substance of pleadings and not the labels which the parties place on them."). The substance of the allegations demonstrate that Count I is a bad-faith claim dressed in breach-of-contract clothing.

Although the Opinion finds that the claim is "based squarely on breach of contract," it does not identify any policy provision that Citizens is alleged to have breached. Count I alleges merely that Citizens denied Manor House's requests to "assist it in adjusting this loss;" that Citizens' "failure to pay" was a "wrongful denial of this claim;" and that Citizens' "failure to timely . . . pay the amount of the Appraisal Award" was a "wrongful denial of this claim" (R. 683). Indeed, the entire claim is premised on the allegation that "Citizens has failed and refused to fairly, honestly, or properly adjust the loss with its insured" (R. 682). And the only basis for the demand for consequential damages is Citizens' alleged "delay and failure to timely pay this claim" (R. 684). The complaint itself suggests a violation of some

duty outside the policy—Count I repeatedly alleges that Citizens' conduct is "in breach of the Policy *and Florida law*" (R. 683, 684 (emphasis added)).

Thus, Count I is really not a claim for breach of contract but a classic claim for first-party bad faith under section 624.155. That section provides that "[a]ny person may bring a civil action against an insurer when such person is damaged" by the insurer's failure to "attempt[] 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." § 624.155(1)(b)1., Fla. Stat. (2019). As this Court has held, however, the Legislature "chose to immunize Citizens for 'any action taken by it in the performance of its duties or responsibilities,'" and Citizens is therefore immune from first-party bad-faith claims. *Perdido Sun Condo. Ass'n*, 164 So. 3d at 666 (alterations omitted; quoting § 627.351(6)(s)1., Fla. Stat.).

It is apparent, therefore, that Manor House seeks extra-contractual damages. The Fifth DCA's certified question concedes as much—asking whether Florida law allows "the insured to recover *extra-contractual*, consequential damages" (DCA R. 371 (emphasis added)). Courts have rejected similar efforts to plead around a statuory bad-faith claim by alleging a purported contract claim. For example, in *Portofino South Condominium Association of West Palm Beach, Inc. v. QBE Insurance Corp.*, 664 F. Supp. 2d 1265 (S.D. Fla. 2019), the court found that

plaintiff's "allegations that QBE failed to 'reasonably' and 'promptly' investigate and pay its claim are analogous to the term 'wrongful' which would imply a statutory bad faith claim under § 624.155," and found that the claim "is one for statutory bad faith dressed in [breach of contract] clothing." *Id.* at 1269 (quoting *Quadomain Condo. Ass'n v. QBE Ins. Corp.*, No. 07-60003-Civ-Moreno, 2007 U.S. Dist. LEXIS 34972, at *21 (S.D. Fla. May 14, 2007)). *See also Quadomain Condo. Ass'n*, 2007 U.S. Dist. LEXIS 34972, at *21 (holding that plaintiff's allegation that QBE "failed to 'fairly' pay its claim . . . is analogous to . . . a statutory bad faith claim under § 624.155"); *Trief v. Am. Gen. Life Ins. Co.*, 444 F. Supp. 2d 1268, 1270 (S.D. Fla. 2006) (describing plaintiff's allegations that an insurer failed to adjust, investigate, and pay claims as "resembl[ing] a claim for statutory bad faith rather than one for breach of implied obligation of good faith").

Florida courts have rejected similar extra-contractual claims against Citizens in a breach-of-contract action. In *Citizens Property Insurance Corp. v. Mendoza*, 250 So. 3d 716 (Fla. 4th DCA 2018), *review denied*, No. SC18-1665, 2019 Fla. LEXIS 2232 (Dec. 3, 2019), the court rejected a jury instruction "on whether the adjuster properly investigated or properly adjusted the claim," because "[w]hile such considerations may be appropriate in a bad faith case, they have no place in a simple breach of contract action." *Id.* at 719 (internal quotation marks omitted). Consequently, the Fourth DCA concluded that "[t]he insureds were free to criticize

the adjuster's" rationale for denying the claim—*i.e.*, whether or not the insureds' loss fell under a policy exclusion—but were prohibited from "arguing that he breached a duty or obligation" to properly adjust or investigate the claim in a breach of insurance contract action. *Id.* As the Court noted: "If an adjuster makes a mockery of the code of ethics but the insurance company correctly denies a claim, there is no action for *breach of contract*." *Id.*

The Opinion, on the other hand, remands the case to litigate such issues. Count I alleged that Citizens breached the policy because it "failed and refused to fairly, honestly, or properly adjust the loss with its insured" (R. 682), and demanded consequential damages based on Citizens' alleged "delay and failure to timely pay this claim" (R. 684). The Fifth DCA concluded that "the trial court denied Manor House the opportunity to prove whether the parties contemplated that Manor House, an apartment complex, would suffer consequential damages in the form of lost rental income if Citizens breached its contractual duties to timely adjust and pay covered damages, which in this case allegedly resulted in a significant delay in completing repairs so that units could once again be rented. We hold that the trial court erred in so ruling, and we reverse that partial summary judgment so that the parties may litigate all issues related to Manor House's claim of lost rent" (A. 12-13).

Such a holding cannot co-exist with *Mendoza*. The Fourth DCA recognizes the distinction between issues that can be raised in breach-of-contract actions and

those that may only be asserted in a subsequent bad-faith action. And as noted earlier, Citizens is immune from bad-faith actions. The Fifth DCA conflated breach of contract with bad faith. The Opinion would allow Manor House to litigate a classic bad-faith claim for failure to timely adjust and pay, even though Citizens is immune from such claims. *See Perdido Sun*, 164 So. 3d at 666.

In *Mendoza*, the Fourth DCA cited Judge Rothenberg's dissent in *Citizens Property Insurance Corp. v. Calonge*, 246 So. 3d 447, 461 (Fla. 3d DCA 2018) (Rothenberg, J., dissenting). Judge Rothenberg noted that, although claims were labeled "breach of contract," they were "**premised** on . . . allegations that Citizens 'failed to satisfy its duty to adjust' and failed to 'properly investigate' the claims," and therefore were in fact first-party bad-faith claims. She also opined that the "notion that these are not statutory bad-faith claims simply because they contain a fleeting reference to a breach of contract or because they are not called statutory bad-faith claims should be rejected." *Id.* (Rothenberg, J., dissenting). *See also Citizens Prop. Ins. Corp. v. Sampedro*, 275 So. 3d 744, 746 (Fla. 3d DCA 2019) (finding that, although the insureds' policy and the immunity statute allow a breach-of-contract action, "neither the policy nor the statute authorize creatively-drafted private claims for 'breach of the duty to adjust' in other provisions of the Florida Insurance Code").

Finally, the Opinion would severely prejudice Citizens in at least two ways. First, the immunity granted Citizens is not only an immunity from liability but an immunity *from suit*. § 627.351(6)(s)1., Fla. Stat. ("There shall be no liability on the part of, *and no cause of action of any nature shall arise against*, [Citizens] for any action taken by [it] in the performance of [its] duties or responsibilities under this subsection.") (emphasis added). If Citizens is compelled to litigate Count I, that immunity from suit is eliminated. Second, Citizens would be compelled to litigate a bad-faith claim under section 624.155 at the same time that it litigates coverage and scope of damage, even though "bringing a cause of action in court for violation of section 624.155(1)(b)1 is premature until there is a determination of liability and extent of damages owed on the first-party insurance contract." *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1276 (Fla. 2000) (internal quotation marks omitted). Combining such lawsuits is prohibited because "if there is no insurance coverage, nor any loss or injury for which the insurer is contractually obligated to indemnify, the insurer cannot have acted in bad faith in refusing to settle the claim," and "because the evidence used to prove either bad faith or unfair settlement practices could jaundice the jury's view on the coverage issue." *Md. Cas. Co. v. Alicia Diagnostic, Inc.*, 961 So. 2d 1091, 1092 (Fla. 5th DCA 2007).

In sum, Manor House's "breach of contract" claim for consequential damages is a disguised bad-faith claim under section 624.155, from which Citizens is

immune. The judgment can be reversed on that basis alone. As we show below, the judgment also can be reversed because Florida law does not allow consequential damages for lost rents on a claim for breach of an insurance contract, where the insurer's only obligation under the policy is the payment of money.

C. Florida law does not allow the recovery of consequential damages for lost rents in a breach-of-contract action where the insurer's only obligation is the payment of money

Florida courts have explained the only extracontractual damages allowed when an insurer delays payment under a policy: Where the "only contractual obligation of the insurer . . . [is] the payment of money," and the parties dispute the amount due, an insured is entitled to "additional damages . . . in the form of prejudgment interest" for any "delay in the payment of money due." *Md. Cas. Co. v. Fla. Produce Distribs., Inc.*, 498 So. 2d 1383, 1384 (Fla. 5th DCA 1986); *see also Baxter v. Royal Indem. Co.*, 285 So. 2d 652, 657 (Fla. 1st DCA 1973) ("The penalty imposed by law on the insurer for its failure to settle the claim of its insured within a reasonable time is the payment of interest at the legal rate."). Prejudgment interest is "a means to transfer to the prevailing party the gain the losing party realized, or could have realized, from the use of the money during the relevant time period." *Shideler v. Conn. Gen. Life Ins. Co.*, 563 So. 2d 1082, 1084 (Fla. 5th DCA 1990). And the policy terms "determine the date from which the coverage payment is due,

as well as when interest is due on the amounts payable." *Citizens Prop. Ins. Corp. v. Mallett*, 7 So. 3d 552, 556 (Fla. 1st DCA 2019).

Here, Citizens agreed to "pay for covered loss or damage within 30 days after we receive the sworn proof of loss, if you have complied with all of the terms of this Coverage Part and: (1) We have reached agreement with you on the amount of loss; or (2) An appraisal award has been made" (A. 45). The parties resorted to appraisal to resolve the disputed amount of loss. Therefore, Citizens owed Manor House the amount of the appraisal award (less deductibles and amounts paid) within 30 days of the award (R. 681-82; A. 45). Citizens' contractual obligation is solely for the payment of money, due within 30 days of the award, and any prejudgment interest. The policy does not contemplate payment of damages for lost rent.

Nevertheless, the Opinion held that, "when an insurer breaches an insurance contract, the insured 'is entitled to recover more than the pecuniary loss involved in the balance of the payments due under the policy' in consequential damages, provided the damages 'were in contemplation of the parties at the inception of the contract'" (A. 12) (quoting *Johnson,* 422 So. 2d at 34).

The Opinion relies on five cases. *All of them* pre-date this Court's opinion in *Chalfonte*, which confirmed that Florida has rejected the doctrine of reasonable expectations in insurance contracts. And none of them supports the Fifth DCA's holding. *Travelers Insurance Co. v. Wells*, 633 So. 2d 457, 461 (Fla. 5th DCA

1993), involved only the breach of a contract "to procure and issue . . . worker's compensation insurance"—not the breach of an insurance contract for failure to timely adjust and pay a claim. In *Johnson*, 422 So. 2d at 33-34, the insured's "credit disability insurance policy," purchased to ensure "satisfaction of her car payments in the event of her disability," required payment of a *daily* benefit even before the insured submitted a proof of loss. And *Johnson* was wrongly decided, allowing damages for both loss of use *and* prejudgment interest on that amount—"mak[ing] the insurer pay twice for essentially the same thing." *Fla. Produce Distribs., Inc.*, 498 So. 2d at 1384-85.

The two federal cases the Opinion cites rely exclusively on *Johnson* to predict Florida law, and they do not support the court's holding. In *T.D.S., Inc. v. Shelby Mutual Insurance Co.*, 760 F.2d 1520, 1531-32 & n.11 (11th Cir. 1985), the court did not hold that special damages were available in a breach-of-contract action. Rather, "neither party object[ed]" to a special-damages instruction. The parties disputed only whether the evidence "support[ed] an award of special damages." And the dissent noted that "consequential or special damages [are] not cognizable under Florida law in a suit on fire insurance policy." *Id.* at 1546 (Tjoflat, J., dissenting). In *Rondolino v. Northwestern Mutual Life Insurance Co.*, 788 F. Supp. 553, 555 (M.D. Fla. 1992), the court reviewed a motion to strike, requiring it to

decide whether the claims "have no possible relation to [the] controversy and may cause prejudice to the Defendant." That standard does not apply here.

The Opinion (A. 11-12) also cites *Capitol Environmental Services, Inc. v. Earth Tech, Inc.*, 25 So. 3d 593 (Fla. 1st DCA 2019), for the holding that "the injured party in a breach of contract action is entitled to recover monetary damages that will put it in the same position it would have been had the other party not breached the contract." *Id.* at 596. But that case considered a waste-transportation contract—not an insurance policy—and the injured party sought to recover the attorney's fees incurred in separate litigation.

In sum, where the insurer's only contractual obligation after a covered loss is the payment of money, and the parties dispute the amount due, the only additional damages an insured may recover for delay in payment is prejudgment interest.

II. SUBJECTING CITIZENS TO AMORPHOUS CONSEQUENTIAL DAMAGES UNTETHERED TO SPECIFIC CONTRACTUAL PROVISIONS WOULD RAISE PREMIUMS AND REDUCE THE FUNDS AVAILABLE TO PAY INSUREDS' CLAIMS

The Fifth DCA's decision is doubly troubling because it exposes Citizens—a legislatively created insurance provider specifically charged with providing affordable insurance coverage—to unpredictable liability beyond policy limits. The Legislature created Citizens to address the "compelling public interest and . . . public purpose . . . 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." § 627.351(6)(a)1, Fla. Stat.

Citizens is essentially the state's property insurer of last resort. It "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." *Id.*

The Opinion would expose Citizens to litigation expense and unpredictable exposure beyond policy limits. Those costs will ultimately be borne by both individual policyholders—those the legislature sought to assist by creating an insurer that could offer affordable rates—and, more broadly, by private insurers and by taxpayers. As one judge has recognized in the bad-faith context, subjecting Citizens to such claims "will only serve to reduce the financial resources available to Citizens to pay claims of other policyholders." *Citizens Prop. Ins. Corp. v. San Perdido Ass'n*, 46 So. 3d 1051, 1056 (Fla. 1st DCA 2010) (Wetherell, J., dissenting). The same is true with subjecting Citizens to amorphous "consequential" damages.

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. 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). And that burden would result in increased premiums to Citizens' insureds, who sought coverage from Citizens because property insurance coverage was not available in the private market. Such a result undermines Citizens' role in providing available and affordable coverage as a last resort, and places a financial burden on taxpayers and private insurers if assessments are needed to fund a Citizens' deficit.

On the other hand, affirming Citizens' immunity from consequential damages would not place it beyond oversight. Citizens' enabling statute contains many other provisions that protect insureds. Citizens' board of governors is appointed by the Governor, Chief Financial Officer, Senate President, and House Speaker. § 627.351(6)(c)4.a, Fla. Stat. Its plan of operation must be approved by the Financial Services Commission. § 627.351(6)(a)2, Fla. Stat. Its board and senior managers are subject to the code of ethics for public officers and employees, and all employees and board members are subject to the "no gift" law. § 627.351(6)(d)3, (6)(d)4, Fla. Stat. Florida's sunshine and public records laws apply to Citizens, § 627.351(6)(j), (6)(x), Fla. Stat., and it is subject to an annual review by the Office of the Internal Auditor, § 627.351(6)(i)1, Fla. Stat. The Office of the Internal Auditor's final reports must be submitted to the board of governors, the executive director, the Financial Services Commission, the President of the Senate, and the Speaker of the House of Representatives. § 627.351(6)(i)2, Fla. Stat.

These provisions show the deliberate balance the Legislature struck between enabling Citizens to achieve its policy objectives and protecting the interests of Citizens' policyholders. The Opinion would disrupt that balance and expose Citizens to nebulous, unpredictable liability.

CONCLUSION

For the reasons stated, this Court should reverse the Opinion of the Fifth DCA and answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief was generated using the 14-point Times New Roman font in the Microsoft Word program. *See* Fla. R. App. P. 9.210(a)(2).

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was filed with the Court and was served by e-mail on December 23, 2019 on:

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