IN THE SUPREME COURT OF FLORIDA

CITIZENS PROPERTY INSURANCE CORPORATION, a Florida Government Entity,

Petitioner,

Case No.: SC19-1394
L.T. Case No.: 5D17-2841

vs.

MANOR HOUSE, LLC, OCEAN VIEW, LLC, and MERRITT, LLC,

Respondents.
_____/

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

ANSWER BRIEF ON BEHALF OF RESPONDENTS

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STATEMENT OF THE CASE AND FACTS

A. The Policy

Citizens Property Insurance Corporation ("Citizens") insured Manor House, LLC, Ocean View, LLC, and Merritt, LLC (collectively "Manor House") under a commercial property policy ("Policy"). (R. at pg. 695). The Policy covers nine separate buildings described as being in the "Apartment" business. (R. at pg. 695-704).

The Policy contains an appraisal provision. (R. at pg. 722). The appraisal provision makes appraisal mandatory if demanded. (R. at pg. 722). An appraisal award triggers the Policy's loss payment provision, which obligates Citizens to pay the appraisal award within thirty days from issuance of the award. (R. at pg. 730).

B. Hurricane Frances and the resulting claim

Hurricane Frances damaged each of the insured buildings. (R. at pg. 675 ¶13-15). Manor House timely submitted a claim to Citizens. (R. at pg. 675 ¶16-17).

Citizens sent a field adjuster to inspect the buildings and prepare a loss estimate (the "2006 Estimate"). (R. at pg. 675 ¶19). The 2006 Estimate placed the total replacement cost value for the buildings at $6,410,456.01 ("RCV"). (R. at pg. 675 ¶19). Replacement cost is the difference between what the property is actually worth and the cost to rebuild or repair the property. *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 438 (Fla. 2013). Citizens' field adjuster and Manor House's

representative agreed that the undisputed minimum combined actual cost value for the buildings was $5,489,061.91 ("ACV"). (R. at pg. 675 ¶19-20). Actual cost value is the replacement cost minus normal depreciation. *Trinidad*, 121 So. 3d at 438.

On March 23, 2007, Manor House demanded that Citizens pay the undisputed ACV. (R. at pg. 677 ¶26). Citizens refused to pay the undisputed ACV. (R. at pg. 682 ¶58, 683 ¶62). Manor House then demanded appraisal. (R. at pg. 677 ¶26). Citizens refused to go to appraisal. (R. at pg. 677 ¶27, 678 ¶30, 767, 770).

C. Appraisal: How the process commenced and Citizens' failure to pay the award

Because Citizens refused to appraise the claim, Manor House moved to compel appraisal. (R. at pg. 72-154). The trial court deferred ruling on the motion to compel appraisal so Manor House could provide Citizens certain information. (R. at pg. 466-467, 470-71).

Manor House provided Citizens with all the required information and demanded appraisal again. (R. at pg. 4490:17-22). Citizens did not respond to Manor House's appraisal demand. (R. at pg. 4490:22-23). Manor House sent Citizens a second appraisal demand. (R. at pg. 4490:24-4491:2). Again, Citizens never responded. (R. at pg. 4490:24-4491:2).

Manor House re-set the motion to compel appraisal for hearing. (R. at pg. 4485-4516). At the hearing, Citizens conceded that Manor House had provided it

with all required documentation but refused to go to appraisal. (R. at pg. 4492:20-4493:6). The trial court compelled appraisal. (R. at pg. 511-513).

The appraisal award was dated November 27, 2007. (R. at pg. 777). The Policy's loss payment provision obligates Citizens to pay the award within thirty days. (R. at pg. 730). Citizens conceded it breached the loss payment provision:

> Ms. Smith: … It was due on – it should have been due December 29th or 30th, *so there's an eight-day late payment*.

(R. at pg. 4549:16-18) (emphasis added).

D. Post-Appraisal Litigation

Manor House's Second Amended Complaint contains three counts: (1) breach of contract; (2) common-law fraud; and (3) breach of the implied covenant of good faith and fair dealing. (R. at pg. 682-690). Manor House premised the breach of contract claim on Citizens' failure to: (1) honor the appraisal demand; (2) pay the appraisal award; and (3) pay the undisputed ACV. (R. at pg. 682-683).

Citizens never alleged immunity against Manor House's breach of contract claim on the grounds that it sounded in bad faith. (R. at pg. 1198-1202). Instead, Citizens alleged immunity against the fraud and implied covenant of good faith and fair dealing counts on the grounds that these counts allegedly sounded in bad faith. (R. at pg. 1202). In fact, Citizens acknowledged that Manor House appropriately premised Count I on breach of contract allegations:

> *Clearly, Count I is appropriate* to answer the only viable question posed by the Second Amended Complaint: *did Citizens breach the policy*?

(R. at pg. 2658) (emphasis added).

Manor House sought lost rent as a consequential damage because Citizens breached the aforementioned Policy provisions. (R. at pg. 3725). Without any summary judgment evidence showing lost rents were not contemplated at the time it issued the Policy, Citizens moved for summary judgment arguing Manor House could not recover lost rents because consequential damages are only recoverable in bad faith claims—not in breach of contract claims. (R. at pg. 3613-3614). Manor House argued that Florida common law allows insureds to recover consequential damages in a breach of insurance contract action independent of a bad faith claim. (R. at pg. 3595-3598, 3930-3933). It argued Citizens contemplated lost rent as a damage if it breached the Policy because the Policy's declaration pages said Manor House was in the apartment business. (R. at pg. 3932).

On appeal, Manor House framed the issue as "[w]hether an insured, such as Appellants, is entitled to recover consequential damages against a carrier, such as Appellee, under a breach of insurance contract claim." (DCA R. at pg. 37). Citizens never argued Manor House's breach of contract claim sounded in bad faith; instead, Citizens argued, "consequential damages are grounded in bad faith and, therefore, are not recoverable" because "the damages recoverable in *this action for breach of*

an insurance policy are limited to the contracted amount plus interest." (DCA R. at pg. 92-93) (emphasis added).

The Fifth District held an insured's measure of damages in a breach of insurance contract action includes consequential damages. (DCA R. at pg. 324-26). Because the trial court used the incorrect standard to determine Manor House's entitlement to consequential damages, the Fifth District reversed and remanded for further proceedings on the breach of contract claim consistent with the correct damages standard. (DCA R. at pg. 325-26).

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

> In a first-party breach of insurance contract action brought by an insured against its insurer, not involving a suit under section 624.155, Florida Statutes, does Florida law allow the insured to recover extra-contractual, consequential damages.

(DCA R. at pg. 370-71).

SUMMARY OF THE ARGUMENT

This Court should answer the certified question in the affirmative and hold that an insured can recover consequential damages in a breach of insurance contract action without resorting to section 624.155, Florida Statutes.

An insurance policy is a contract. As with other contracts, consequential damages are a common law breach of insurance contract action remedy. This common law remedy existed prior to the enactment of section 624.155, Florida Statutes. Section 624.155(8) states "[t]he civil remedy specified in this section *does not preempt any other remedy* or cause of action *provided for pursuant to…the common law of this state*." FLA. STAT. §624.155(8) (emphasis added). Thus, section 624.155 does not eradicate the consequential damage remedy afforded insureds in a breach of insurance contract action at common law.

Citizens argues that Manor House's breach of contract claim sounds in bad faith. But Citizens never raised this argument in the trial court or at the Fifth District. In fact, Citizens told the trial court that, "[*c*]*learly, Count I is appropriate to answer the only viable question posed by the Second Amended Complaint: did Citizens breach the policy*?" (R. at pg. 2658) (emphasis added). Thus, Citizens waived this argument.

Preservation aside, Manor House properly pleaded a breach of contract claim. Manor House alleged that Citizens breached the Policy because it failed to perform

three express provisions: (1) honor the appraisal demand under the appraisal provision; (2) pay the appraisal award under the loss settlement provision; and (3) pay the undisputed ACV. (R. at pg. 682-683). Proving Citizens breached the Policy does not present a threshold question of "good faith" versus "bad faith" because if Manor House is correct, Citizens "exercised no faith at all" when it failed to perform each provision. *Thomas v. Western World Ins. Co.*, 343 So. 2d 1298, 1304 (Fla. 2d DCA 1977).

Finally, Citizens contends that public policy supports limiting the common law remedies available against it in a breach of insurance contract action. The legislature did not immunize Citizens against breach of insurance contract actions or limit the remedies available against Citizens in such an action. Indeed, the legislature made Citizens liable for breach of contract. If the offered policy justifications warrant limiting the breach of insurance contract remedies available against Citizens, the legislature, not the judiciary, should engage in that enterprise.

STANDARD OF REVIEW

The correct measure of damages is a question of law reviewed *de novo*. *Asset Mgmt. Holdings, LLC v. Assets Recovery Ctr. Investments, LLC*, 238 So. 3d 908, 911 (Fla. 2d DCA 2018). "'Statutory interpretation is a question of law subject to *de novo* review.'" *City of Parker v. State*, 992 So. 2d 171, 176 (Fla. 2008) (quoting *BellSouth Telecomm., Inc. v. Meeks,* 863 So. 2d 287, 289 (Fla. 2003)).

ARGUMENT

I. CONSEQUENTIAL DAMAGES ARE RECOVERABLE IN A FIRST-PARTY BREACH OF INSURANCE CONTRACT ACTION.

This is a breach of insurance contract case—not a bad faith case. Florida has long recognized consequential damages as a breach of insurance contract remedy. Citizens wants to replace the common law rule with a special rule that insulates insurers from an exposure every other contracting party in Florida, absent an exculpatory provision, faces: consequential damages. The Policy does not exclude consequential damages. Thus, Florida's rules of insurance policy interpretation require the Policy be interpreted to permit recovery of consequential damages because "[i]t seems only fair that an insurer whose contracts are by their very nature 'adhesive' should be held to at least the same standard of damages applicable to other contracting parties." *Thomas v. Western World Ins. Co.*, 343 So. 2d 1298, 1304 (Fla. 2d DCA 1977).

A. CONSEQUENTIAL DAMAGES ARE A COMMON LAW BREACH OF INSURANCE CONTRACT REMEDY UNCONNECTED TO THE REASONABLE EXPECTATION DOCTRINE.

Florida common law recognizes consequential damages as a breach of insurance contract action remedy independent of any bad faith claim (common law or statutory). Therefore, *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 94 So. 3d 541 (Fla. 2012), which equated the reasonable expectation doctrine with a

bad faith claim rather than consequential damages, does not preclude consequential damages as a breach of insurance contract remedy.

1. CONSEQUENTIAL DAMAGES ARE A COMMON LAW BREACH OF INSURANCE CONTRACT REMEDY.

An insurance policy is a contract. *E.g. State Farm Fire & Cas. Ins. Co. v. Deni Associates of Florida, Inc.*, 679 So. 2d 397, 400 (Fla. 4th DCA 1996). That is why contract law governs the rights and obligations of parties to an insurance policy. *Lumbermens Mut. Cas. Co. v. August*, 530 So. 2d 293, 295 (Fla. 1988); *Washington Nat. Ins. Corp. v. Ruderman*, 117 So. 3d 943, 954 (Fla. 2013) (Polston, J.) (dissenting) (quoting *August*, 530 So. 2d at 295). Accordingly, Florida treats a breach of insurance contract action "*the same as any other breach of contract*." *State Farm Mut. Auto Ins. Co. v. Laforet*, 658 So. 2d 55, 58 (Fla. 1995) (emphasis added).

To recover consequential damages in a breach of contract case, the plaintiff must satisfy *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854), by proving the parties contemplated the damage at the time of contracting. *W.U. Tel. Co. v. Wilson*, 14 So. 1, 2 (Fla. 1893) (citation omitted); *Hardwick Properties, Inc. v. Newbern*, 711 So. 2d 35, 40 (Fla. 1st DCA 1998) (citation omitted); Fla. Std. Jury Instr. (Cont. & Bus.) 504.2.

Similarly, an insured's damages in a common law breach of insurance contract action include those damages contemplated by the parties at the time of contracting. *Laforet*, 658 So. 2d at 58 (citing Roger C. Henderson, *The Tort of Bad*

Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute, 26 MICH. J. L. REFORM 1, 17 (Fall 1992)); *Allstate Indem Co. v. Ruiz*, 899 So. 2d 1121, 1125 (Fla. 2005) (citations omitted); *Talat Enterprises, Inc. v. Aetna Cas. and Sur. Co.*, 753 So. 2d 1278, 1281 (Fla. 2000) (stating at common law an insured's remedy "was to file a breach of contract claim against its insurer and recover only those damages contemplated by the parties to the policy.").

Laforet's reliance on Professor Roger Henderson's article shows this Court recognizes consequential damages as a common law breach of insurance contract remedy. In his article, Professor Henderson states "[w]ith regard to the possibility of recovery for consequential damages, an indemnity contract was governed by the rule in *Hadley v. Baxendale*." Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. MICH. J. L. REFORM at 17.

Professor Henderson's assessment is consistent with Florida common law at the time of *Laforet*. At that time, Florida's district courts of appeal held an insured's breach of insurance contract damages "are limited to those which are the natural and proximate result of the breach, or such as may…have been within the contemplation of the parties at the time they made the contract." *Travelers Indem. Co. v. Parkman*, 300 So. 2d 284, 285 (Fla. 4th DCA 1974). Thus, "[c]onsequential…damage may

also be recovered if it can be sufficiently proved." *Travelers Ins. Co. v. Wells*, 633 So. 2d 457, 461-62 (Fla. 5th DCA 1993); *Life Investors Ins. Co. of America v. Johnson*, 422 So. 2d 32, 33-34 (Fla. 4th DCA 1982); *Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 27-30 (Fla. 3d DCA 1990). Insurance policy interpretation principles inform this rule: "[i]t seems only fair that an insurer whose contracts are by their very nature 'adhesive' should be held to at least the same standard of damages applicable to other contracting parties." *Thomas v. Western World*, 343 So. 2d 1298, 1303-04 (Fla. 2d DCA 1977).

Consistent with the decisions of Florida's state courts, Florida's federal courts also hold that Florida law permits an insured "to recover extra-contractual consequential damages if she can prove such damages were within the contemplation of the parties when the contract was formed[]" in a breach of insurance contract action. *Martin v. Monarch Life Ins. Co.*, 1995 WL 127157, *1 (M.D. Fla. 1995); *Trident Hospitality Fla., Inc. v. Am. Economy Ins. Co.*, 2008 WL 11334515, *2 (M.D. Fla. 2008).

Florida federal courts followed this rule when a first-party bad faith claim did not exist. *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F. 2d 1520, 1527-28, 1531 n.11 (11th Cir. 1985). Florida federal courts continue to follow this rule despite the enactment of section 624.155, Florida Statutes. *Rondolino v. Northwestern Mut. Life Ins. Co.*, 788 F. Supp. 553, 555 (M.D. Fla. 1992); *Essex Builders Group, Inc. v.*

Amerisure Ins. Co., 485 F. Supp. 2d 1302, 1306-07 (M.D. Fla. 2006) (citing *Wells*, 633 So. 2d 457). And Florida federal courts follow this rule post-*Chalfonte*. *E.g. Marram Corp. v. Scottsdale Ins. Co.*, 2018 WL 3729044, *2 (M.D. Fla. 2018).

The Fifth District followed this uninterrupted line of cases to hold that the trial court erred in denying Manor House the ability to establish its consequential damages by proving the parties contemplated lost rent as a damage flowing from a breach of the Policy. (DCA R. at pg. 324-26). Because the trial court applied the incorrect standard, it never reached the question of whether the parties contemplated Manor House's loss of rent at the time the Policy was issued. (R. at pg. 4366-4367).

It is difficult to imagine how Citizens could deny it never contemplated Manor House would suffer lost rent if it breached the Policy. The declaration pages describe the buildings as part of an "[a]partment" business. (R. at pg. 695-704). And the lost rent relates to units in those very buildings. (R. at pg. 3725).

At bottom, Florida common law has recognized consequential damages as a breach of insurance contract remedy for forty-plus years. *Parkman*, 300 So. 2d 284; *Thomas*, 343 So. 2d at 1303-04. The Fifth District's opinion is consistent with this well-established precedent. The Fifth District's opinion also comports with long-standing Florida precedent holding that contract law governs the rights and obligations of the parties to an insurance contract. *August*, 530 So. 2d at 295. Consequently, this Court should answer the certified question in the affirmative.

2. THE ENACTMENT OF SECTION 624.155, FLORIDA STATUTES, DID NOT TRANSFORM COMMON LAW BREACH OF CONTRACT CONSEQUENTIAL DAMAGES INTO BAD FAITH DAMAGES.

The lack of an implied covenant of good faith and fair dealing differentiates first-party insurance policies from other contracts. Traditionally, all insurance products were indemnity-based. *Laforet*, 658 So. 2d at 58. Under an indemnity, or first-party insurance policy, a creditor-debtor relationship exists between the insured and insurer. *Id.* Consequently, Florida common law refuses to impose an implied covenant of good faith and fair dealing into first-party policies. *Id.* And since the covenant of good faith and fair dealing is synonymous with bad faith, Florida common law does not recognize a first-party bad faith claim. *Id.* at 58-59.

Gradually, third-party, or liability policies, replaced most indemnity policies. *Id.* at 58. Under a liability policy, the insurer controls the insured's defense and settlement. *Id.* To protect the reasonable expectations of the parties, Florida imposes a covenant of good faith and fair dealing into liability policies. *Id.* Through this duty, Florida common law recognizes a third-party bad faith claim. *Id.*

With section 624.155, the legislature rectified this disparity and "created a first-party bad-faith cause of action [that] codified prior decisions authorizing a third party to bring a bad-faith action under common law." *Chalfonte*, 94 So. 3d at 546. And since "good faith" and "bad faith" are "'two sides of the same coin,'" *Chalfonte*

declined to recognize a common law first-party duty of good faith and fair dealing since the legislature imposed the duty via section 624.155. *Id.* at 548-49.

Chalfonte's reasoning does not foreclose recovery of consequential damages because Florida common law recognizes consequential damages as a breach of insurance contract remedy. *Johnson*, *Parkman*, and *T.D.S.*, were decided when section 624.155 did not apply. *Johnson*, 422 So. 2d 32; *Parkman*, 300 So. 2d at 285-86; *T.D.S.*, 760 F. 2d at 1527-28. Without an available bad faith claim, the insureds still recovered consequential damages. *Johnson*, 422 So. 2d at 34; *Parkman*, 300 So. 2d at 285-86; *T.D.S.* 760 F. 2d at 1532 n.11. Thus, "[b]efore the enactment of section 624.155, an insurer that breached its contract with a first-party claimant, whether in good faith or in bad faith, was subject only to a common law action for breach of contract *in which the insured could recover all the consequential damages caused by the breach*." *McLeod v. Continental Ins. Co.*, 591 So. 2d 621, 626 (Fla. 1992) (Barkett, J., dissenting) (emphasis added).

This distinction triggers section 624.155(8), Florida Statutes. Section 624.155(8), states that "[t]he civil remedy specified in this section *does not preempt any other remedy* or cause of action *provided for pursuant to…the common law of this state*." FLA. STAT. §624.155(8) (emphasis added).

"The fact that the legislature has specifically authorized first parties to recover damages in bad faith suggests that it may have contemplated more than the recovery

of the same damages already available in a breach of contract action." *Time Ins. Co., Inc. v. Burger*, 712 So. 2d 389, 392 (Fla. 1998); *Marraccini v. Clarendon Nat'l Ins. Co.*, 2003 WL 22668842, *2 (S.D. Fla. Oct. 1, 2003) (citation omitted). Florida courts cite section 624.155(8) for the proposition that section 624.155 does not affect common law breach of contract rights. *E.g. Lutz v. Protective Life Ins. Co.*, 951 So. 2d 884, 887-88 (Fla. 4th DCA 2007).

Unlike the duty of good faith then, section 624.155 neither precludes, preempts, nor subsumes consequential damages since Florida common law recognizes consequential damages as a breach of insurance contract remedy. Therefore, *Chalfonte* does not foreclose consequential damages as a breach of insurance contract remedy.

The same logic applies to *Talat*. *Talat* answered the question of whether an insurer must pay bad faith damages to cure an alleged violation of section 624.155(1)(b)(1), Florida Statutes (the statutorily imposed duty to settle). *Talat*, 753 So. 2d at 1280. This Court answered the question in the negative. *Id.* at 1280-84. This Court noted that an insured could not recover bad faith damages at common law. *Id.* at 1280-81, 1284.[1] Without a common law remedy, the insured could only recover bad faith damages under section 624.155. *Id.* Accordingly, this Court

[1] The insured in *Talat* did not have any remaining contractual damages—actual or consequential. *Talat*, 753 So. 2d at 1280.

reasoned that it is illogical to require an insurer pay bad faith damages under section 624.155 when those bad faith damages are only available if the failure to settle is not cured. *Id.* at 1284.

The availability of a common law remedy served as the distinguishing basis of *Talat* in *Macola v. Gov't Employees Ins. Co.*, 953 So. 2d 451 (Fla. 2006). Relying on *Talat*, the insurer argued its payment of policy limits in response to a civil remedy notice precluded a common law bad faith claim. *Macola*, 953 So. 2d at 456-58. This Court framed the issue as whether tendering policy limits in response to a civil remedy notice precludes a common law bad faith claim. *Id.* at 452. Citing section 624.155(8), this Court held such conduct does not preclude a common law bad faith claim because the bad faith claim and corresponding damages existed at common law. *Id.* at 456-58.

Like the common law bad faith claim in *Macola*, Florida common law recognizes consequential damages as a breach of insurance contract remedy independent of the civil remedy afforded by section 624.155. Like *Macola* then, neither *Talat* nor section 624.155 preclude recovery of common law consequential damages based on the plain language of section 624.155(8). *See Macola*, 953 So. 2d at 456-58.

The standard an insured must satisfy to recover common law breach of insurance contract consequential damages further differentiates the remedy from

section 624.155, bad faith damages. Under section 624.155, an insured can recover all "damages which are a foreseeable result of a violation of section 624.155…." FLA. STAT. §624.155(8); *Laforet*, 658 So. 2d at 60. This broad, tort-like standard permits recovery *without* connecting the damages to what the parties contemplated at the time the policy was created. FLA. STAT. §624.155(8); *B-K Cypress Log Homes Inc. v. Auto-Owners Ins. Co.*, 2012 WL 13018751, *3-4 (N.D. Fla. 2012) ("[A]n insured's recovery for its insurer's bad faith conduct is not limited to damages within the contemplation at the time of the insurance contract."). Such damages include punitive damages, court costs, attorney's fees, or emotional distress. *McLeod*, 591 So. 2d at 623; *Burger*, 712 So. 2d at 392-93; *Marraccini*, 2003 WL 22668842 at *2.

Common law breach of contract consequential damages, however, do not employ this tort-like standard. *B-K Cypress Log Homes*, 2012 WL 13018751 *3-4. To recover an insured must satisfy the traditional, stricter standard that requires proof that the parties contemplated the damages at the time of contracting. *Id.*

At bottom, the plain language of section 624.155(8) prevents section 624.155 from preempting the common law consequential damage remedy available in a breach of insurance contract action.

3. CITIZENS KNOWS CONSEQUENTIAL DAMAGES EXPOSURE EXISTS IF IT BREACHES AN INSURANCE POLICY BECAUSE IT UTILIZES A CONSEQUENTIAL DAMAGE EXCLUSION.

Florida allows contracting parties to use exculpatory clauses to limit or waive consequential damages. *Paul Gottileb & Co., Inc. v. Alps South Corp.*, 985 So. 2d 1 (Fla. 2d DCA 2007); *Cooper v. Meridian Yachts, Ltd.*, 575 F. 3d 1151, 1166-67 (11th Cir. 2009) (applying Florida law); *Council Bros., Inc. v. Ray Burner Co.*, 473 F. 2d 400 (5th Cir. 1973) (same); *Bartram, LLC v. Contractors, LLC,* 2011 WL 1299856, *2 (N.D. Fla. Mar. 31, 2011) (same). Citizens, like any other insurer, controls its policy and can use a consequential damage exclusion—like other contracting parties.

Not surprisingly, Citizens does just that. Citizens employed a consequential damage exclusion in this Policy's Leasehold Coverage Form:[2]

> **3. Special Exclusions**
> The following provisions apply only to the specified Coverage Forms.
> * * *
> b. Leasehold Interest Coverage Form
> * * *
> (2) We will not pay for any loss cause by:
> (a) Your cancelling the lease;
> (b) The suspension, lapse or cancellation of any license; or
> (c) *Any other consequential loss*.

[2] A leasehold interest coverage form is a form of insurance coverage that protects a tenant against a loss caused by damage to the leased premises. IRMI, https://www.irmi.com/term/insurance-definitions/leasehold-interest (last visited March 9, 2020).

(R. at pg. 735) (emphasis added). Citizens is not alone in using consequential damage exclusions. Insurance companies regularly use waivers or exclusions to limit consequential damages exposure. *E.g. Bartram LLC v. Landmark American Ins. Co.*, 864 F. Supp. 2d 1229, 1238-40 (N.D. Fla. 2012).

In *Bartram*, the insured sought to recover lost rent, loan expenses, and diminution in value, among other damage, from: (1) Landmark Insurance Company; and (2) Westchester Surplus Lines Insurance Company. *Id.* The Landmark and Westchester policies provided they would "not pay for a loss or damage caused by or resulting from…[d]elay, loss of use, loss of market or *any other consequential loss*." *Id.* at 1238 (emphasis added). The court held this provision in the Landmark and Westchester policies precluded the insured from recovering consequential damages. *Id.* at 1240.

Language limiting consequential damage exposure existed within the insurance marketplace for Citizens to use. Citizens could have used this language in its adhesive Commercial Property Coverage Form—just like it did with its Leasehold Interest Coverage Form and just like the insurers in *Bartram*. Citizens did not. Absent a consequential damage waiver, Florida's rules of policy interpretation preclude Citizens from limiting Manor House's breach of insurance contract remedies. *See Thomas*, 343 So. 2d at 1304.

4. THE REASONABLE EXPECTATION DOCTRINE IS NOT SYNONYMOUS WITH FLORIDA'S CONSEQUENTIAL DAMAGES STANDARD.

Citizens contends *Chalfonte* precludes recovery of consequential damages in a breach of insurance contract action because it rejected the reasonable expectation doctrine. (Initial Br., at pg. 11-13). *Chalfonte* does not support this contention.

Chalfonte addressed whether Florida recognized a claim for breach of the covenant of good faith and fair dealing—not the remedies available in a first-party breach of contract case. *Chalfonte*, 94 So. 3d at 545. Because this Court found the claim did not exist, *Id.* at 545-49, it necessarily did not decide any question related to breach of insurance contract remedies. *See PDK Labs. Inc. v. U.S. D.E.A.*, 362 F. 3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment) ("[T]he cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further."). *Chalfonte* is a contractual duty case—not a damages case—and is inapplicable to the certified question, which concerns damages.

Chalfonte's discussion of the reasonable expectation doctrine does not alter this conclusion. *Chalfonte* equated the reasonable expectation doctrine with the duty of good faith and fair dealing (e.g. a bad faith claim). *Chalfonte*, 94 So. 3d at 549. Any rejection of the reasonable expectation doctrine in *Chalfonte* does not equate to a rejection of consequential damages as a breach of insurance contract remedy. The

rejection is straightforward: the duty of good faith and fair dealing does not exist in a first-party insurance policy. *See Id.* Therefore, *Chalfonte* does not preclude consequential damages as a breach of insurance contract remedy.

B. MANOR HOUSE SEEKS CONSEQUENTIAL DAMAGES FOR CITIZENS' BREACH OF EXPRESS POLICY PROVISIONS.

Citizens acknowledges the Fifth District found Manor House's consequential damages are "'based squarely on breach of contract….'" (Initial Br., at pg. 14). Citizens contends this was error because Manor House's breach of contract claim sounds in bad faith. (*Id.*). But Citizens did not preserve this argument.

In the trial court, Citizens never alleged Manor House's breach of contract claim sounded in bad faith. (R. at pg. 1200-02). Citizens only raised immunity from bad faith claims as a defense to Count II and Count III. (R. at pg. 1202). In fact, Citizens admitted that "Count I is for breach of contract and alleges that Citizens failed to pay all benefits due, honor Plaintiff's demand for appraisal, and timely pay the appraisal award." (R. at pg. 2655). Thus, Citizens concluded, *"[c]learly, Count I is appropriate to answer the only viable question posed by the Second Amended Complaint: did Citizens breach the policy*?" (R. at pg. 2658) (emphasis added).

Consistent with this thinking, Citizens never raised this argument at the Fifth District. Instead, Citizens argued, "consequential damages are grounded in bad faith and, therefore, are not recoverable" because "the damages recoverable in this action

for breach of an insurance policy are limited to the contracted amount plus interest." (DCA R. at pg. 92-93).

Arguing consequential damages are an impermissible measure of damage in a breach of contract claim acknowledges that Count I is a valid breach of contract claim and something Citizens could be liable for. On the other hand, by now arguing Count I is a bad faith claim, Citizens takes a broader position that says the entire claim is improper. The former argument acknowledges the validity of Count I and the potential for liability but says it is not liable for a certain category of damages (consequential damages) whereas the latter argument does not recognize the validity of Count I from the start. Consequently, Citizens' argument is waived. *Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010).

Preservation aside, the Fifth District correctly held Manor House premised Count I on breach of contract allegations. A "claim arising from bad faith is grounded upon a legal duty to act in good faith, and is *thus separate and independent* of the claim arising *from the contractual obligation to perform*." *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991) (emphasis added). The duty to act in good faith concerns an insurer's claim adjustment methodology or how an adjuster exercised his or her discretion while adjusting a claim. *Citizens Prop. Ins. Corp. v. Mendoza*, 250 So. 3d 716 (Fla. 4th DCA 2018), *Citizens Prop. Ins. Corp. v. Sampedro*, 275 So. 3d 744 (Fla. 3d DCA 2019); *Citizens Prop. Ins. Corp.*

v. Calonge, 246 So. 3d 447 (Fla. 3d DCA 2018) (Rothenberg, J., dissenting). A lawsuit alleging an insurer failed to perform a contractual provision sounds in breach of contract. *Blanchard*, 575 So. 2d at 1291; *Thomas*, 343 So. 2d at 1303-04.

Citizens ignores these principles and casts Manor House's breach of contract claim as a bad faith claim because some allegations used the word "wrongful." But "wrongful" does not equate to bad faith. *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1215-16 (Fla 2016). Instead, "a 'wrongful' denial in this context means an incorrect denial, not one made in bad faith." *Id.* at 1216.

At bottom, Manor House's breach of contract claim concerns Citizens' failure to perform three express Policy provisions: (1) honor the appraisal demand under the appraisal provision; (2) pay the appraisal award under the loss settlement provision; and (3) pay the undisputed ACV. (R. 682 ¶58, 683 ¶59-60, 62-64).

Citizens concedes in its Initial Brief that the Policy obligated it to pay the appraisal award within 30 days. (Initial Br., at pg. 21); (R at pg. 730). Manor House alleged Citizens breached this contractual obligation. (R. at pg. 681 ¶51, 683 ¶64). Consistent with *Blanchard* and *Thomas* then, a "threshold question of 'good faith' vs. 'bad faith'" does not exist. Citizens either performed its contractual obligation or did not. *Blanchard*, 575 So. 2d at 1291; *Thomas*, 343 So. 2d at 1303-04.

Similarly, the Policy contains an appraisal provision that obligates each side to go to appraisal if demanded by the other. (R. at pg. 722). Unlike other appraisal provisions used by Citizens, this provision makes appraisal mandatory—not permissive. *See Citizens Prop. Ins. Corp. v. Casar*, 104 So. 3d 384, 385-86 (Fla. 3d DCA 2013) (holding that appraisal provision required consent of both parties before appraisal could commence). Citizens had no discretion—the Policy obligated it to proceed to appraisal if demanded. The jury question is straightforward: did Citizens breach the Policy by refusing to go to appraisal.

Finally, Manor House alleged Citizens failed to pay the undisputed ACV under the Policy. Citizens' argument would have this Court hold an insurer acts in bad faith any time it fails to pay a claim. That argument contradicts the very dissent Citizens heavily relies upon, which identifies the quintessential breach of insurance contract claim as concerning "the failure to pay for the loss[]…." *Calonge*, 246 So. 3d at 463-64 (Rothenberg, J., dissenting).

Manor House's predicating Count I, in part, on Citizens' failure to pay the undisputed ACV is just a breach of contract allegation. (R. at pg. 675 ¶19-20, 682 ¶58, 683 ¶62). Manor House alleged Citizens agreed the undisputed ACV was $5,489,061.91 but never paid that sum. (R. at pg. 675 ¶19-20, 682 ¶58, 683 ¶62). Proving this allegation does not hinge on establishing Citizens poorly adjusted, evaluated, or investigated claim. Instead, the allegation asks did Citizens perform by

paying an amount it agreed it undisputedly owed. Where performance is a threshold question, bad faith is not implicated because a failure to perform reflects no faith at all. *Thomas*, 343 So. 2d at 1303-04.

Therefore, the Fifth District correctly concluded Manor House's breach of contract claim was just that—a breach of contract claim.

C. CONSEQUENTIAL DAMAGES ARE A PERMISSIBLE MEASURE OF DAMAGE WHEN AN INSURER BREACHES A CONTRACT OF INSURANCE.

Consequential damages and prejudgment interest are not mutually exclusive remedies. Neither *Md. Cas. Co. v. Fla. Produce Distribs., Inc.*, 498 So. 2d 1383 (Fla. 5th DCA 1986), nor *Baxter v. Royal Indem. Co.*, 285 So. 2d 652 (Fla. 1st DCA 1973), prohibit consequential damages in breach of insurance contract actions.

Baxter held a claim for breach of fiduciary duty does not exist under a first-party insurance policy. *Baxter*, 285 So. 2d 656. The insured in *Baxter* sought to recover punitive damages; however, the insured could not recover punitive damages absent a breach of fiduciary duty or some other tort. *Id.* at 655.

Reason being, *Baxter*, following Florida contract law, held that in a breach of contract case, a plaintiff cannot recover punitive damages absent an independent tort. *Compare Baxter*, 285 So. 2d at 655-56 *with Lewis v. Guthartz*, 428 So. 2d 222, 223 (Fla. 1982). The insured needed to connect the punitive damages to tortious conduct. *See Baxter*, 285 So. 2d at 655. The insured could not and therefore, could not recover

punitive damages. *See Id.* at 655-56. But because the punitive damages hinged on the existence of tortious conduct, nothing in *Baxter* holds that consequential damages are not recoverable in a breach of contract action. Instead, *Baxter* shows that Florida applies common law contract damage rules to insurance policies. *See Id.*

Like *Baxter*, *Florida Produce* does not hold consequential damages are an impermissible breach of insurance contract remedy. In *Florida Produce*, the insured sought damages for loss of use of a vehicle when it, as opposed to the insurer, controlled the vehicle. *Florida Produce*, 498 So. 2d at 1384. The insured could not recover loss of use damages because it could not prove the insurer caused the damage. *Id.*

The court distinguished its case from *Parkman*—a case where the insured recovered consequential damages—because in *Parkman*, the insurer caused the consequential damage. *Florida Produce*, 498 So. 2d at 1384. By distinguishing *Parkman* on failure of proof grounds, *Florida Produce* acknowledges an insured can recover consequential damages if proven. *See Id.* However, because the insured in *Florida Produce* could not satisfy its burden, *Florida Produce* is just a lack of proof case.

At most, *Florida Produce* suggests prejudgment interest and loss of use damages are duplicative in some circumstances. *See Florida Produce*, 498 So. 2d at 1384-85. But Manor House does not seek loss of use damages. Manor House seeks

lost rent. "'[R]ent' and 'loss of use' are not interchangeable terms.'" *Meakin v. Dreier*, 209 So. 2d 252, 254 (Fla. 2d DCA 1968); *see MCI Worldcom Network Services, Inc. v. Lind*, 2003 WL 24304128, *2 (S.D. Fla. 2003) (citations omitted). Thus, *Florida Produce* does not undermine Manor House's ability to recover lost rent as a consequential damage.

Finally, *Florida Produce* does not hold prejudgment interest duplicates consequential damages. Consequential damages compensate a plaintiff for additional contemplated costs because of a breach of contract. *Wilson*, 14 So. 1 at 2; *Newbern*, 711 So. 2d at 40. Conversely, prejudgment interest compensates for the delay in recovering money during the time the defendant deprived the plaintiff use of that money. *Zucker v. Sears Roebuck and Co.*, 589 So. 2d 454, 455 (Fla. 5th DCA 1991) (citing *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212 (Fla. 1985)). If the two duplicated one another, courts would not award prejudgment interest on consequential damages.

Florida courts, however, routinely make such awards. *E.g. Capitol Environmental Services, Inc. v. Earth Tech, Inc.*, 25 So. 3d 593, 596-97 (Fla. 1st DCA 2009); *Arizona Chemical Co., LLC v. Mohawk*, 197 So. 3d 99, 104 (Fla. 1st DCA 2016). In *Earth Tech*, the plaintiff sought attorney's fees as a consequential damage. *Earth Tech*, 25 So. 3d at 596-97. The court held "the trial court should have awarded prejudgment interest on the entire verdict, including the portions

attributable to the attorney's fees and costs." *Id.* at 507. Similarly, in *Mohawk Industries*, the court held the trial court properly awarded prejudgment interest on consequential damages like diminution in value and lost profits. *Mohawk Industries*, 197 So. 3d at 104. *Earth Tech* and *Mohawk Industries* recognize prejudgment interest and consequential damages are not mutually exclusive remedies. As such, *Florida Produce* does not preclude recovery of consequential damages in a breach of insurance contract action as a matter of law.

II. THE LEGISLATURE DID NOT LIMIT THE REMEDIES AVAILABLE AGAINST CITIZENS IN A BREACH OF CONTRACT ACTION.

Citizens wants this Court to do what the legislature has not—limit the common law remedies available against it in a breach of insurance contract action based on public policy justifications. If the policy justifications offered by Citizens warrant such limitation, the legislature, not the judiciary, should engage in that enterprise. *See Citizens Prop. Ins. Corp. v. Perdido Sun Condo., Ass'n, Inc.*, 164 So. 3d 663, 667-68 (Fla. 2015) ("[L]egislative intent must be determined primarily from the language of the statute and not from this Court's view of the best policy.") (citations omitted); *Am. Southern Home Ins. Co. v. Lentini*, 286 So. 3d 157, 161 n.4 (Fla. 2019) (Muniz, J., concurring in part and concurring in the judgment).

Because the legislature did not limit the remedies available in a breach of insurance contract against Citizens, Citizens faces the same exposure as any other

insurer. *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984), is the starting point for this conclusion.

Pan-Am concerned a breach of contract claim against the Florida Department of Transportation. The Florida Department of Transportation enjoyed immunity against a number of claims but not breach of contract claims. *Id.* at 4-5. The Florida Department of Transportation argued it was immune from consequential damages. *Id.* This Court disagreed and held that "[w]here the legislature has, by general law, authorized entities of the state to enter into [a] contract…" then "the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract." *Id.* at 5.

"A necessary implication of *Pan-Am's* sovereign immunity analysis is that unless the legislature has specified that different standards apply, the government's obligations under the terms of an express written contract…are subject to the same standards of contract performance and enforcement that would apply to a private party." *Department of Transportation v. United Capital Funding Corp.*, 219 So. 3d 126, 134. (Fla. 2d DCA 2017). Otherwise, "performance and enforcement of contracts to which the government is a party would at best be indeterminate and thus contrary to the statutory authorization allowing the government to make contracts in the first place." *Id.* at 135. These principles apply to state-run insurance companies

like Citizens. *E.g. Kohl v. Blue Cross & Blue Shield of Florida*, 988 So. 2d 654, 659 (Fla. 4th DCA 2008).

The legislature authorized Citizens to enter into contracts of insurance. FLA. STAT. §627.351(6)(a)1. The legislature requires Citizens to act like a private insurance company. FLA. STAT. §627.351(6)(a)4. The legislature states "[t]he acceptance or rejection of a risk by the corporation shall be construed as the placement of private insurance…." FLA. STAT. §627.351(6)(c)8. The legislature made Citizens liable for breach of contract claims—just like private insurers. FLA. STAT. §627.351(6)(s)1.b. Finally, the legislature did not limit the remedies available in the breach of contract claims. *Id.*

Absent a limitation, Citizens should face the same remedies as a private insurer. *See Kohl*, 988 So. 2d at 659; *Pan-Am*, 471 So. 2d at 5; *United Capital*, 219 So. 3d at 314. As such, Citizens is liable for consequential damages if it breaches a contract of insurance. *Accord Wells*, 633 So. 2d at 461-62; *Johnson*, 422 So. 2d at 33-34; *T.D.S.*, 760 F. 2d at 1531 n.11; *Western World*, 343 So. 2d at 1304 *with Pan-Am*, 471 So. 2d at 5-6; *United Capital*, 219 So. 3d at 134-35.

CONCLUSION

For the reasons stated above, this Court should affirm the Fifth District's opinion and answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply is in Times New Roman 14-point font and is therefore in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the parties on below service list through the Court's e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1) on March 9, 2020:

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