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.
_____/

MOTION FOR REHEARING

Respondents, Manor House, LLC, Ocean View, LLC, and Merritt, LLC, move for rehearing pursuant to rule 9.330, Florida Rules of Appellate Procedure, and states:

INTRODUCTION

Respondents move for rehearing because this Court overlooked three things in its opinion. First, Citizens conceded it had a contractual obligation to pay the appraisal award within 30 days. Second, a policy's coverages restrict what an insurer must pay when it performs—not when it breaches. And the Policy's express terms do no eliminate consequential damages as a remedy if Citizens breached the Policy. Third, this Court ignored the plain language of section

624.155(8), Florida Statutes, by relying on *Talat Enters., Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1228 (Fla. 2000), and its interpretation of section 624.155(2)(d), Florida Statutes, to eliminate the consequential damage remedy afforded to policyholders at common law in a breach of insurance contract action.

ARGUMENT

I. CONSEQUENTIAL DAMAGES WERE SOUGHT BASED ON BREACHED CONTRACTUAL OBLIGATIONS.

This Court found that Respondents sought consequential damages "based on Citizens' alleged...wrongful denial of the claim, and delay and failure to pay the claim." (Opinion at 8). This Court then concluded that "[t]hese allegations are found in a first-party bad faith action where an insured sues his or her insurance company for improper denial of benefits." *Id.*

A bad faith claim is "separate and independent" of a breach of contract claim. *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991). A bad faith claim "is grounded upon a legal duty to act in good faith." *Id.* Conversely, a breach of contract claim is grounded upon a "contractual obligation to perform." *Id.*

This case is a breach of contract claim, not a bad faith case. Citizens conceded in its initial brief that it was contractually obligated to pay the appraisal award within 30 days: "Citizens *contractual obligation* is solely for the payment of money, due within 30 days of the [appraisal award], and any prejudgment interest. (Initial Br. 21) (emphasis added). In its reply brief, Citizens conceded that "Count I alleged some contract breaches…." (Reply Br. 12). Finally, Citizens told the trial court that Count I was a "pure breach of contract action":

> This is a pure breach of contract action. What is before Your Honor is breach of contract.

(R. 4807:18-20).

Citizens' repeated concessions make sense. Count I alleged Citizens breached the very contractual obligation it agrees it owed Respondents—payment of the appraisal award within 30 days:

> 51. To date, Citizens has refused to pay the plaintiff the amount of the Appraisal Award in full, which is beyond the thirty (30) day Loss Payment time stated in the Policy.

(R. 681). Paragraph 51 cites the Policy and references the form and form page number that obligates payment within 30 days. (R. 681).

Paragraph 64 also alleges Citizens failed to timely pay the appraisal award:

> Citizens' failure to timely and appropriately pay the amount of the Appraisal Award…was in breach of the Policy….

(R. 683).

The Policy obligates Citizens to timely pay an appraisal award within 30 days. (R. 730). Payment of an appraisal award is timely if done within 30 days. (R. 730). Failure to timely pay the appraisal award is not a bad faith allegation because the Policy obligates Citizens to perform within a set time—30 days. *Blanchard*, 575 So. 2d at 1291. Instead, failure to timely pay the appraisal award is a contractual obligation and the resulting consequential damages from this breach are likewise contractual. *See Blanchard*, 575 So. 2d at 1291; *Thomas v. Western World Ins. Co.*, 343 So. 2d 1298, 1305 (Fla. 2d DCA 1977).

Citizens is liable for damages caused by its breach of contract. FLA. STAT. §627.351(6)(s)1.b. The legislature did not limit the remedies recoverable against Citizens in a breach of contract claim. *Id.* Thus, consequential damages are recoverable against Citizens. *Accord Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So.

2d 4 (Fla. 1984) *with Life Investors Ins. Co. of America v. Johnson*, 422 So. 2d 32, 33-34 (Fla. 4th DCA 1982).

Changes to this exposure based on Citizens being "a government entity that is an integral part of the state, and…not a private insurance company" should be done by the legislature. Reason being, "such policy-laden line drawing should be a legislative, not a judicial, enterprise." *American 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).

II. THE POLICY'S EXPRESS TERMS DO NOT LIMIT THE REMEDIES AVAILABLE IF CITIZENS BREACHES THE POLICY.

Because this is a breach of contract case, the remedies for breach of contract include consequential damages. By holding a policyholder's remedies are limited to a policy's coverage sections, this Court overlooked that: (1) coverages only restrict what an insurer must pay when it performs—not the damages recoverable for its breach of contract—and (2) the Policy does not expressly preclude consequential damages as a remedy if Citizens breaches the Policy.

There is no distinction between a contract of insurance and any other contract that justifies giving an insurance company a better

rule of damages than every other contracting party in Florida. For policy interpretation purposes, the only pertinent distinction is that an insurance contract is a contract of adhesion. But the adhesive nature of an insurance contract does not justify limiting a policyholder's remedies if an insurer breaches the policy:

> [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, 343 So. 2d at 1305.

Such was the case at common law in Florida "[p]rior to the enactment of section 624.155" where a policyholder's measure of damages included "breach of contract damages and attorney's fees." *Time Ins. Co., v. Burger*, 712 So. 2d 389, 392 (Fla. 1998); *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 58-59 (Fla. 1995) ("Until this century, actions for breaches of insurance contracts were treated the same as any other breach of contract action and damages were generally limited to those contemplated by the parties at the time they entered into the contract.") (citation omitted)). Breach of contract damages include consequential damages—insurance contract or otherwise. *Compare Hardwick Properties, Inc. v. Newbern*, 711 So. 2d

35, 39-40 (Fla. 1st DCA 1998) *with Life Investors Ins. Co. of America v. Johnson*, 422 So. 2d 32, 34 (Fla. 4th DCA 1982); *Thomas*, 343 So. 2d at 1305; *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F. 2d 1520, 1532 n.11 (11th Cir. 1985).

The policy's coverages represent a policyholder's general damages. *Machan v. UNUM Life Ins. Co. of America*, 116 P. 3d 342, 345 (Utah 2005). Those general damages only "restrict the amount the insurer may have to pay in performance of the contract, not the damages that are recoverable for its breach." *Lawton v. Great Southwest Fire Ins. Co.*, 392 A. 2d 576, 611 (N.H. 1978); *see Rockford Mut. Ins. Co. v. Pirtle*, 911 N.E. 2d 60, 67-68 (Ind. Ct. App. 2009); *Reichert v. Gen. Ins. Co.*, 428 P. 2d 860, 864-67 (Cal. 1967) *vacated on other grounds on reh'g* 442 P. 2d 377 (Cal. 1968). Thus, "in addition to [these] general damages…an insured is entitled to consequential damages…" where an insurer breaches a contract of insurance. *Manchan*, 116 P. 3d at 345.

The express terms of the Policy do not limit or exculpate Citizens from paying consequential damages if it breaches the Policy. The express terms of the Policy, therefore, allow for the recovery of consequential damages. An insured's "reasonable expectations" are

thus irrelevant to the availability of common law remedies. *See QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n*, 94 So. 3d 541 (Fla. 2012).

Such is the result in every other breach of contract action absent a consequential damage waiver. *Newbern*, 711 So. 2d at 39-40; *Paul Gottileb & Co., Inc. v. Alps South Corp.*, 985 So. 2d 1 (Fla. 2d DCA 2007). Application of Florida's rules of policy interpretation compels the same result for breach of an insurance contract. *Thomas*, 343 So. 2d at 1305.

III. THE LEGISLATURE MADE CLEAR THAT NOTHING IN SECTION 624.155 WOULD RESULT IN A COMMON LAW RIGHT OR REMEDY BEING ELIMINATED.

Neither *Macola v. Gov't Emps. Ins. Co.*, 953 So. 2d 451 (Fla. 2006), nor *Talat Enters., Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1228 (Fla. 2000), preclude consequential damages as a breach of contract remedy. *Macola* did not address what remedies were available in a first-party breach of contract action at common law. *Macola*, 953 So. 2d at 452. *Macola's* gratuitous remark quoted in this Court's opinion was, therefore, obiter dicta. *Bunn v. Bunn*, 311 So. 2d 387, 389 (Fla. 4th DCA 1975).

Macola cited page 1281 of *Talat* in making its gratuitous remark. Nothing on page 1281 of *Talat* says consequential damages

were unavailable at common law. The portion of *Talat* cited by *Macola* says breach of contract damages included "those damages contemplated by the parties *to* the policy." *Talat*, 753 So. at 1281. "To," as used in *Talat*, is a function word describing the parties' relationship with the policy—not available remedies.

Talat is likewise inapplicable. *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. To answer this question, this Court interpreted "damages" used in section 624.155(2)(d), Florida Statutes.[1]

This Court expanded *Talat's* limited interpretation beyond section 624.155 to affect a common law remedy. But *Talat's* interpretation cannot be expanded to affect common law breach of contract remedies.

[1] Now section 624.155(3)(c).

The legislature said as much in section 624.155(8):

> (8) *The civil remedy specified in this section does not preempt any other remedy* or cause of action *provided for* pursuant to any other statute or pursuant to *the common law of this state.*

FLA. STAT. §624.155(8) (emphasis added).

Consequential damages were available at common law if an insurer breached an insurance contract. *Johnson*, 422 So. 2d at 33-34. Citizens did not dispute this at oral argument. Instead, Citizens labeled *Johnson* an outlier.

But *Johnson* is not an outlier. Florida courts, state and federal, have consistently held consequential damages are a permissible breach of insurance contract remedy—just like *Johnson*. *Travelers Ins. Co. v. Wells*, 633 So. 2d 457, 461-62 (Fla. 5th DCA 1993); *Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 27-30 (Fla. 3d DCA 1990); *Thomas*, 343 So. 2d at 1303-04; *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F. 2d 1520, 1527-28, 1531 n.11 (11th Cir. 1985); *Harter v. Ohio Security Ins. Co.*, 2020 WL 6384159 (M.D. Fla. 2020); *Marram Corp. v. Scottsdale Ins. Co.*, 2018 WL 3729044, *2 (M.D. Fla. 2018); *Trident Hospitality Fla., Inc. v. Am. Economy Ins. Co.*, 2008 WL 11334515, *2 (M.D. Fla. 2008); *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); *Martin v. Monarch Life Ins. Co.*, 1995 WL 127157, *1 (M.D. Fla. 1995); *Rondolino v. Northwestern Mut. Life Ins. Co.*, 788 F. Supp. 553, 555 (M.D. Fla. 1992).

Talat's interpretation of section 624.155(2)(d) cannot be expanded to eliminate the common law remedy of consequential damages based on the plain language of section 624.155(8). Yet this Court relied on *Talat* to do just that. By relying on *Talat*, this Court overlooked the plain language of section 624.155(8), Florida Statutes, and eliminated a common law remedy in contravention of the legislature's will.

CONCLUSION

Manor House, LLC, Ocean View, LLC, and Merritt, LLC, respectfully request this Court grant rehearing, vacate its opinion quashing the Fifth District's decision and answering the certified question in the negative, and issue an opinion approving the Fifth District's decision and answering the certified question in the affirmative.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 5, 2021, I electronically filed the foregoing document with the Clerk of Court by using the Florida Courts E-Filing Portal system with copies served via an automatic email generated by the Florida Courts E-filing Portal system to the following parties:

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