

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

CASE NO.: 5D17-2841  
L.T. CASE NO.: 05-2007 CA 007058

CITIZENS PROPERTY INSURANCE  
CORPORATION,

Defendant/Appellee/Petitioner,

v.

MANOR HOUSE LLC, OCEAN VIEW  
LLC, MERRITT LLC,

Plaintiffs/Appellants/Respondents.

\_\_\_\_\_ /

**NOTICE TO INVOKE DISCRETIONARY JURISDICTION**

NOTICE IS GIVEN that Citizens Property Insurance Corporation, Defendant/Appellee/Petitioner, invokes the discretionary jurisdiction of the supreme court to review the decision of this court rendered August 2, 2019. The decision is within the supreme court's jurisdiction because this Court certified a question of great public importance, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v):

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 ALLOW THE INSURED TO RECOVER EXTRA-CONTRACTUAL, CONSEQUENTIAL DAMAGES?

RECEIVED, 08/14/2019 09:07:29 AM, Clerk, Supreme Court  
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to the attorneys listed on the service list below on this 13<sup>th</sup> day of August, 2019, through the Court's e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1): Christopher N. Mammel, Esq., Merlin Law Group, 222 Lakeview Ave., Suite 950, West Palm Beach, FL 33401-6173 Email: [cmammel@merlinlawgroup.com](mailto:cmammel@merlinlawgroup.com). (Co-Counsel for Plaintiffs); Alexander L. Brockmeyer, Esq., Boyle & Leonard, P.A., 2050 McGregor Blvd., Fort Meyers, FL 33901 Emails: [EService@insurance-counsel.com](mailto:EService@insurance-counsel.com); [ABrockmeyer@Insurance-Counsel.com](mailto:ABrockmeyer@Insurance-Counsel.com); [ESarver@Insurance-Counsel.com](mailto:ESarver@Insurance-Counsel.com). (Co-counsel for Appellants); and J. Pablo Caceres, Esq., Butler, Weihmuller, Katz and Craig, LLP, 400 N. Ashley Drive, Suite 2300, Tampa, FL 33602-4305; Emails: [pcaceres@butler.legal](mailto:pcaceres@butler.legal); and [eservice@butler.legal](mailto:eservice@butler.legal) (Trial Counsel for Defendant).

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

MANOR HOUSE, LLC, OCEAN VIEW,  
LLC AND MERRITT, LLC,

Appellants,

v.

Case No. 5D17-2841

CITIZENS PROPERTY INSURANCE  
CORPORATION,

Appellee.

\_\_\_\_\_ /

Opinion filed August 2, 2019

Appeal from the Circuit Court  
for Brevard County,  
Charles J. Roberts, Judge.

Mark Boyle, Alexander Brockmeyer, and  
Molly Chafe Brockmeyer, of Boyle &  
Leonard, P.A., Ft. Myers, and Christopher  
N. Mammel of Merlin Law Group, P.A.  
West Palm, for Appellants.

Kara Berard Rockenbach, and Rachel  
Jenny Glasser, of Link & Rockenbach, P.A.,  
West Palm Beach, and J. Pablo Caceres, of  
Butler, Weihmuller, Katz and Craig, LLP,  
Tampa, for Appellee.

EDWARDS, J.

ON MOTION FOR REHEARING, REHEARING EN BANC, AND CERTIFICATION

We deny Appellee's motion for rehearing and rehearing en banc. However, we  
certify the following question as one of great public importance to the Florida Supreme  
Court:

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?

MOTION FOR REHEARING AND FOR REHEARING EN BANC DENIED;  
QUESTION CERTIFIED.

ORFINGER and EISNAUGLE, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

MANOR HOUSE, LLC, OCEAN VIEW,  
LLC AND MERRITT, LLC,

Appellants,

v.

Case No. 5D17-2841

CITIZENS PROPERTY INSURANCE  
CORPORATION,

Appellee.

\_\_\_\_\_ /

Opinion filed May 31, 2019

Appeal from the Circuit Court  
for Brevard County,  
Charles J. Roberts, Judge.

Mark Boyle, Alexander Brockmeyer, and  
Molly Chafe Brockmeyer, of Boyle &  
Leonard, P.A., Ft. Myers, and Christopher  
N. Mammel of Merlin Law Group, P.A.  
West Palm, for Appellants.

Kara Berard Rockenbach, and Rachel  
Jenny Glasser, of Link & Rockenbach, P.A.,  
West Palm Beach, and J. Pablo Caceres, of  
Butler, Weihmuller, Katz and Craig, LLP,  
Tampa, for Appellee.

EDWARDS, J.

This case involves the snail-paced resolution of insurance claims for property  
damage caused by a hurricane in 2004. Manor House, LLC, Ocean View, LLC, and

Merritt, LLC (collectively “Manor House”), appeal the trial court’s final orders granting Citizens Property Insurance Corporation’s (“Citizens”) (1) motion for partial summary judgment to prevent Manor House from pursuing a claim for extra-contractual, consequential damages, (2) motion for partial summary judgment regarding appraiser and umpire fees, and (3) motion for judgment on the pleadings on Manor House’s claim for fraud. For the reasons set forth below, we affirm the partial summary judgment regarding appraiser and umpire fees, and affirm the judgment on the pleadings, but reverse the partial summary judgment regarding the consequential damages claim.

Citizens insured nine apartment buildings owned by Manor House that were damaged in September 2004 when Hurricane Frances struck. Manor House presented its claims under the Citizens insurance policy; following an inspection of the property, Citizens issued payments totaling \$1,927,747. In April 2006, Manor House’s public adjuster, Dietz International, asked Citizens to reopen the claim. In June 2006, Manor House presented another claim, this time for \$10,000,000. After reopening the claim and assigning a new adjuster, Citizens made additional payments in September 2006 totaling \$345,192. Then, in December 2006, Citizens’ field adjuster informally estimated the “actual cash value” of the loss at \$5,489,062 and the “replacement cost value” of the loss at \$6,410,456. Meanwhile, Manor House’s public adjuster estimated the replacement cost value at \$10,027,087.

In an effort to resolve the dispute over costs, in March 2007 Jeffrey Wells, the apartment complex’s new owner and Manor House’s litigation agent, sent Citizens a letter requesting payment of the “undisputed” amount of \$6.4 million, i.e. the field adjuster’s informal estimate of replacement costs, and demanding an appraisal. Citizens responded

by challenging Mr. Wells' authority to act on behalf of Manor House and asked for documentary proof of his authority. Citizens also asked Mr. Wells to supply documentation it said was necessary to consider the requests for appraisal and payment, including articles of incorporation, certified ownership records, invoices for actual costs of replacement, and contracts for the work in progress. Mr. Wells responded with a letter denying that the invoices and other documents requested by Citizens were necessary to trigger an appraisal; however, he provided the insurer with a copy of his appointment as Manor House's agent.

In August 2007, Manor House filed suit demanding prompt payment of the allegedly "undisputed" amount of \$6.4 million and seeking the court to compel Citizens to engage in the policy-provided appraisal procedures.<sup>1</sup> The trial court granted serial motions to abate the action based upon the failure of Manor House to provide all necessary documents to Citizens. In June 2009, the trial court ordered the action stayed and directed the parties to go forward with the appraisal process. In November 2009, the appraisal panel awarded Manor House \$8,649,816 in replacement cost value and \$8,388,752 in actual cash value. In January 2010, Citizens paid an additional \$5,502,022 to Manor House.

Manor House later filed suit against Citizens alleging, inter alia, breach of contract and fraud. On the breach claim, Manor House alleged that Citizens failed to: properly adjust the loss, pay the undisputed amount after estimates, honor Manor House's demand for appraisal, provide Manor House with documents it needed to adjust the loss,

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<sup>1</sup> Citizens maintained that its field adjustor had no authority to convey any estimate that was binding on Citizens; hence the dispute over the supposedly "undisputed" amount.



and timely pay the appraisal award. Manor House sought to recover extra-contractual damages related to rental income that it allegedly lost due to the delay in repairing the apartment complex based on Citizens' procrastination in adjusting and paying the Manor House claims. On the fraud claim, Manor House alleged that Citizens' representations of the nature and extent of its coverage obligations were intentionally false and misleading and that it engaged in misleading claims handling practices by aggregating various general construction costs to a single building so as to exceed the policy limits applicable to that building, demanding immaterial documents regarding Manor House's insurable interest and corporate ownership, and attempting to mislead the appraisal panel by concealing information related to the estimate of damages announced by Citizens' field adjustor.

The trial court granted Citizens' motion for partial summary judgment regarding Manor House's claim that it should not have to pay its own appraiser's fees and half the cost of the umpire's fees. We agree with the trial court's analysis: the insurance policy specifically called for each party to pay its own appraiser and to share the umpire's fees. Accordingly, we affirm as to that issue with no need for further discussion.

The trial court also 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. While that is an accurate reading of the insurance policy, 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." *Capitol Envtl. Servs., Inc. v.*

*Earth Tech, Inc.*, 25 So. 3d 593, 596 (Fla. 1st DCA 2009). Thus, 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.” *Life Inv’rs Ins. Co. of Am. v. Johnson*, 422 So. 2d 32, 34 (Fla. 4th DCA 1982). In *T.D.S. Inc. v. Shelby Mutual Insurance Co.*, the Eleventh Circuit noted that Florida courts “allow recovery of [consequential] damages if they were in the contemplation of the parties at the time of the creation of the insurance contract.” 760 F.2d 1520, 1532 n.11 (11th Cir. 1985). Similarly, in *Rondolino v. Northwestern Mutual Life Insurance Co.*, the court held that “[i]f a party can prove loss of profits [from breach of an insurance contract] with reasonable certainty, then damages will be awarded.” 788 F. Supp. 553, 555 (M.D. Fla. 1992). While *T.D.S.* and *Rondolino* are federal cases, we find them to be well-reasoned and to be consistent with this Court’s opinion in *Travelers Insurance Co. v. Wells*, which held that in a claim for breach of an insurance contract, “[c]onsequential or resulting collateral damage may . . . be recovered if it can be sufficiently proved.” 633 So. 2d 457, 461 (Fla. 5th DCA 1993).

In granting summary judgment, 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. It is undisputed that Citizens, a creature of statute, is immune from bad faith claims. See § 627.351(6)(s)1, Fla. Stat. (2017). However, the consequential damages Manor House seeks are based squarely on breach of contract claims requiring no allegation or proof that Citizens acted in bad faith.<sup>2</sup> Thus, Citizens is not statutorily immune from this aspect of Manor House's claim.

Finally, the trial court granted Citizens' motion for judgment on the pleadings regarding the fraud claim pursued by Manor House. The trial court agreed with Citizens that the fraud claim was barred by the independent tort doctrine. In other words, the trial court found that the allegations of Manor House's fraud claim were not distinguishable from its breach of contract claim. "A breach of contract, alone, cannot constitute a cause of action in tort. . . . It is only when the breach of contract is attended by some additional conduct which amounts to an independent tort that such a breach can constitute [a separate action in tort]." *Tiara Condo. Ass'n v. Marsh & McLennan Cos.*, 110 So. 3d 399, 408–09 (Fla. 2013) (Pariente, J., concurring) (quoting *Elec. Sec. Sys. Corp. v. S. Bell Tel. & Tel. Co.*, 482 So. 2d 518, 519 (Fla. 3d DCA 1986)); see also *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238, 1239 (Fla. 1996) (noting that the independent tort doctrine "requires proof of facts separate and distinct from the breach of contract"). We note that certain allegations in the fraud count essentially alleged a fraudulent breach of contract, which would not amount to an independent tort, and we affirm the trial court's judgment on the pleadings of the fraud count on this ground. But we also note that Manor

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<sup>2</sup> While it originally pled a count for breach of the covenant of good faith and fair dealing, Manor House did not contest Citizens' motion for judgment on the pleadings on that count based on its immunity from first-party bad faith claims.

House's fraud complaint contained additional allegations that attempted to assert bad faith liability, including unfair claims handling practices, which would generally amount to an independent tort precluding entry of a judgment on the pleadings. However, as discussed above, Citizens is immune from an action for first-party bad faith. See *Citizens Prop. Ins. Corp. v. Perdido Sun Condo. Ass'n*, 164 So. 3d 663, 666 (Fla. 2015) (“[T]he Legislature never listed statutory first-party bad faith claims as one of the exceptions to Citizens’ immunity.”). Therefore, to the extent that the trial court’s judgment on the pleadings on the fraud count foreclosed bad-faith claims for failure to allege an independent tort, we affirm based on the “tipsy coachman”<sup>3</sup> doctrine, as we find that the trial court reached the right result even if for the wrong reasons.

Accordingly, we affirm in part and reverse in part, and remand the case for further proceedings consistent with this opinion

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

ORFINGER and EISNAUGLE, JJ., concur.

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<sup>3</sup> *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002).

**5DCA CERTIFICATION**

I hereby certify that the foregoing is a true and correct copy of the instrument(s) filed in this office.

Witness my hand and official seal this August 14, 2019.

Joanne P. Simmons, Clerk of the Fifth District Court of Appeal.



By: /s/ Kathy Palmere



KERRY I. EVANDER  
CHIEF JUDGE

RICHARD B. ORFINGER  
JAY P. COHEN  
WENDY W. BERGER  
F. RAND WALLIS  
BRIAN D. LAMBERT  
JAMES A. EDWARDS  
ERIC J. EISNAUGLE  
JOHN M. HARRIS  
JAMIE R. GROSSHANS  
MEREDITH L. SASSO  
JUDGES

JOANNE P. SIMMONS  
CLERK

CHARLES R. CRAWFORD  
MARSHAL

DISTRICT COURT OF APPEAL  
FIFTH DISTRICT  
300 SOUTH BEACH STREET  
DAYTONA BEACH, FLORIDA 32114  
(386) 947-1500 COURT  
(386) 255-8600 CLERK

August 14, 2019

Hon. John A. Tomasino, Clerk  
Supreme Court of Florida  
500 South Duval Street  
Tallahassee, Florida 32399-1927

Re: Manor House, Ocean View, Merritt  
vs  
Citizens Property Insurance

Appeal No. 5D17-2841  
Trial Court No: 05-2007-CA-007058-X  
Trial Court Judge: HON CHARLES J. ROBERTS

Dear Hon. Tomasino:

Attached is a certified copy of the Notice Invoking the Discretionary Jurisdiction of the Supreme Court pursuant to Rule 9.120, Florida Rules of Appellate Procedure, along with a copy of this Court's opinion or decision relevant to this case.

- The filing fee prescribed by Section 25.241(3), Florida Statutes, was received by this court and will be forwarded.
- The filing fee prescribed by Section 25.241(3), Florida Statutes, was not received by this Court.
- Petitioner/Appellant has been previously determined insolvent by this Circuit Court or our court.

No filing fee is required because:

- Summary Appeal (Rule 9.141)
- Unemployment Appeals Commission
- Habeas Corpus
- Juvenile case
- Other - Petition

Sincerely,  
JOANNE P. SIMMONS, CLERK  
By: /s/ Kathy Palmere  
Deputy Clerk

Attachments

cc: Alexander L. Brockmeyer, Mark A. Boyle, Molly C. Brockmeyer, Christopher N. Mammel, Kara B. Rockenbach, Juan P. Caceres, David A. Noel, Rachel J. Glasser, John Tomasino