

IN THE SUPREME COURT OF FLORIDA

FRANCISCO CRUZ and  
NIKURA CHIRINO,

CASE NO.: SC 12151  
SECOND DCA CASE NO.: 2D11-1826

Petitioners,

v.

COOPERATIVA DE SEGUROS  
MÚLTIPLES DE PUERTO RICO, INC.,

Respondent.

**PETITIONERS' BRIEF ON DISCRETIONARY JURISDICTION**

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## **STATEMENT OF THE CASE AND FACTS**

The Petitioners were the Plaintiffs-insureds in a breach of contract action seeking the recovery of damages for losses caused by sinkhole activity covered under a homeowner's policy of insurance issued by the Respondent.

On January 31, 2011, pursuant to § 627.7074, Florida Statutes (hereinafter "§ 627.7074"), Respondent invoked the alternative dispute resolution procedure for disputed sinkhole claims, known as "neutral evaluation," by forwarding a request to the Florida Department of Financial Services (hereinafter "the department"). Respondent's request for neutral evaluation pursuant to § 627.7074 was sent via facsimile, and thus, presumably received by the Department on January 31, 2011.

On February 1, 2011, pursuant to § 627.7074(11), Respondent moved to stay or abate the proceeding until completion of the neutral evaluation. The stay motion was set for hearing before the lower court on March 7, 2011. Following the hearing, the lower court stayed the matter and expressly ordered all parties to comply with the provisions of § 627.7074.

On March 7, 2011, Petitioners filed a motion for reconsideration of the lower's courts stay order, contending that the mandatory stay provision of § 627.7074(11) is facially unconstitutional as a violation of separation of powers and the Florida Supreme Court's exclusive rule-making authority. Concurrently, Petitioners filed a notice of constitutional issue and forwarded the notice to the

attorney general and state attorney, as required by Rule 1.071, Florida Rules of Civil Procedure. On March 16, 2011, the lower court denied Petitioners' motion for reconsideration, expressly finding the mandatory stay provision of the statute is not an unconstitutional violation of separation of powers.

On March 17, 2011, Petitioners moved for an order lifting the stay of proceedings, asserting that a stay was no longer statutorily permitted under the express provisions of §627.7074(7), Florida Statutes, which mandatorily required that the neutral evaluation conference be held within 45 days of the date the department received the request for neutral evaluation. On April 4, 2011, the lower court held a hearing on the motion to lift the stay. During that hearing, the lower court further allowed the proceedings to be delayed, not only by denying the Petitioners' motion to lift the stay, but also by entering an order requiring an indefinite stay of the proceedings, until such a time as the neutral evaluation was completed.

Thereafter, on April 12, 2011, Petitioners brought a Writ of Certiorari and Alternative Writ of Mandamus before the Second District Court of Appeal. Petitioners brought the Writ of Certiorari asking the Second DCA to quash the lower court's order regarding the indefinite stay since it was contrary to the provisions of §627.7074(7) and Article I, § 21 of the Florida Constitution. On December 30, 2011, the Second District Court of Appeal denied the Writ of

Certiorari opining that the Petitioners had failed to establish how they had suffered irreparable harm.

In their alternative Writ of Mandamus, Petitioners asked the Second DCA for a determination that the lower court erred in granting the indefinite stay since the mandatory stay provision of § 627.7074(11) is an unconstitutional violation of separation of powers under Article II, § 3 of the Florida Constitution, and an infringement upon the Florida Supreme Court's exclusive-rule making authority under Article V, § 2 of the Florida Constitution. The Second District Court of Appeals denied Petitioners' Writ of Mandamus expressly declaring that § 627.7074(11) *is* constitutional since it is significantly intertwined with substantive provisions of the statute.

### **SUMMARY OF THE ARGUMENT**

This Court has discretionary jurisdiction to review a decision of a district court of appeal where, like here, that decision expressly declares valid a state statute. Fla. R. App. P. 9.030(a)(2)(A)(i). The Second District Court of Appeal's decision in this case expressly declared that the stay provision provided in section 627.7074(11), Florida Statutes (2010), is constitutional, and does not impermissibly usurp the Florida Supreme Court's rulemaking authority. Thus, this Court has discretion to review the Second District Court of Appeal's decision.

## ARGUMENT

In the case at bar, the Second District Court of Appeal expressly declared the validity of 627.7074(11), Florida Statutes (2010)<sup>1</sup> in their Opinion, denying Petitioner's Writ of Certiorari for review of a non-final order denying their motion to lift a stay of proceedings in their lawsuit against their insurer, and also denying Petitioners' alternative Writ of Mandamus.

In the Second District Court of Appeal, Petitioners contended that the neutral evaluation process, particularly the mandatory stay provision set forth in section 627.7074(11)(2010), is unconstitutional. The section provides, in pertinent part, as follows:

**627.7074 Alternative procedure for resolution of disputed sinkhole insurance claims.—**

(11) Any court proceeding related to the subject matter of the neutral evaluation shall be stayed pending completion of the neutral evaluation.

In their Petition for Writ of Mandamus, Petitioners primarily asserted that the aforementioned statutory provision is unconstitutional because the mandatory stay is a violation of the separation of powers under Article II, § 3 of the Florida Constitution, because the Florida Legislature abrogated the Florida Supreme Court's exclusive rule-making authority under Article V, § 2(a) of the Florida

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<sup>1</sup> The 2010 version of Florida Statutes 627.7074 has since been amended, but still includes a substantially similar unconstitutional stay provision as the one addressed by Second District Court of Appeal in its opinion.

Constitution. (“The supreme court shall adopt rules for the practice and procedure in all court. . .”). A statute which purports to create or modify a procedural rule of the court is constitutionally infirm as a violation of separation of powers. *See, e.g., State v. Raymond*, 906 So.2d 1045, 1048 (Fla. 2005). Florida Statutes 627.7074(11) is a legislatively created procedural rule, because it specifically mandates that a court proceeding be stayed pending completion of the neutral evaluation. “The granting of a stay, because it is a step in the enforcement of a final judgment, is concerned with ‘the means and methods to apply and enforce’ substantive rights and falls within the definition of procedural law. . .” Thus, by creating a statutory scheme which imposes a stay, the Legislature has clearly established a scheme which constitutes a procedural rule for the courts to follow in resolving sinkhole claims. However, solely based upon *Peninsular Properties Braden River, LLC v. City of Bradenton*, the Second DCA held that the stay provision is sufficiently intertwined with substantive provisions so that it is not an unconstitutional violation of separation of powers. 965 So.2d 160 (Fla. 2d DCA 2007). In issuing this opinion, the Second District Court of Appeal unmistakably declared the state statute valid. However, in making that ruling the court misstated the law in this area, and misapplied the *Peninsular Properties Braden River, LLC* decision. In fact, *Peninsular Properties* is chiefly distinguishable from the case at bar because the procedural provision at issue there simply tolled the time for

judicial review of a binding dispute resolution process, as opposed to the stay provision at issue in this case, which halts a proceeding, after it has been initiated, in favor of a non-binding mediation process. Because the neutral evaluation process is not binding, it cannot affect the underlying proceedings that are being stayed; consequently, the Court's holding in *Peninsular Properties* does not support a finding that the stay provision at issue is sufficiently intertwined with the substantive provisions of §627.7074 to render the stay provision constitutional. Therefore, the Second District Court of Appeal's reliance on *Peninsular Properties* was misplaced, and the stay provision is unconstitutional. Thus, this Court should review the constitutionality of Florida Statutes §627.7074.

### **CONCLUSION**

For the foregoing reasons, this Court has jurisdiction to review the Second District Court of Appeal's decision which expressly, and improperly, declared Florida Statute § 627.7074(11)(2010) constitutional.

### **CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by regular U.S. mail to Aimee M. Nocero, Esq., Neilson and Associates,

P.A., 1332 W. Colonial Drive, P.O. Box 547638, Orlando, FL 32854-7638, this \_\_\_\_  
\_\_\_\_ day of March 2012.

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Lower Tribunal Case No.: 2D11-4316

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**APPENDIX TO**  
**PETITIONERS' BRIEF ON JURISDICTION**

1. Decision of the Second District Court of Appeal, December 30, 2011