

IN THE SUPREME COURT OF FLORIDA

REBECCA HANOS

Petitioner,

S. Ct. Case No.: SC14-1360

L. T. Case No.: 2D13-3872

v.

CITIZENS PROPERTY  
INSURANCE CORPORATION

Respondent/

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PETITIONER'S BRIEF ON JURISDICTION  
**REBECCA HANOS**

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ON REVIEW FROM THE DISTRICT COURT OF APPEAL,  
SECOND DISTRICT, STATE OF FLORIDA

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**George A. Vaka, Esq.**  
Florida Bar No.: 374016  
**Nancy A. Lauten, Esq.**  
Florida Bar No. 0593052  
Vaka Law Group  
777 S. Harbour Island Blvd., #300  
Tampa, FL 33602  
(813) 549-1799 – phone  
(813) 549-1790 – facsimile

**Kenneth C. Thomas, Jr., Esquire**  
Florida Bar No.: 0624640  
Marshall Thomas Burnett  
17231 Camelot Court  
Land O'Lakes, FL 34638  
(813) 229-1000 - Telephone  
(813) 229-3692 – Facsimile

Attorneys for Petitioner

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

This case involves a dispute between a homeowner and her insurance company over the repairs the insurance company made to her home following the discovery of sinkhole damage. Ms. Hanos sued Citizens Property Insurance Corporation's ("Citizens") for breach of contract in late 2011, after the repairs previously made to the property by Citizens failed. Shortly before the scheduled trial, Citizens filed a Notice of Automatic Stay pending neutral evaluation pursuant to §627.7074, Fla. Stat. (2011). The trial court ruled that Citizens had waived its right to neutral evaluation by extensively litigating the matter and denied the stay.<sup>1</sup>

On March 19, 2014, the Second District granted Citizens' Petition for Writ of Certiorari and Mandamus. The court quashed the lower court's order to the extent the order prohibited Citizens from invoking the neutral evaluation process. The court also granted mandamus and directed the trial court to "stay the underlying proceedings pending the completion of the neutral evaluation as required by section 627.7074(10)." The court cited Citizens Property Ins. Corp. v. Trapeo, 136 So. 3d 670 (Fla. 2<sup>nd</sup> DCA 2014), as the basis for its decision. The court denied the Petitioner's Motion for Rehearing and Certification on June 10, 2014, and her Motion for Rehearing En Banc on May 27, 2014. Petitioner's Notice

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<sup>1</sup> It is questionable whether the statute even applies to the current facts where the issue arose from the failure of the repairs performed by Citizens, not the existence of a sinkhole or the method of repair.

to Invoke the Discretionary Jurisdiction of this Court was timely filed on July 8, 2014.

### **SUMMARY OF THE ARGUMENT**

In this case, the Second District has ruled that a voluntary, nonbinding method of dispute resolution in sinkhole cases, neutral evaluation, is mandatory once invoked and that the circuit court has no authority over the process. The court further held that whether neutral evaluation has been, or even can be waived is a determination solely within the Department of Financial Services' authority and power; the circuit court lacks any ability to decide the matter. This Court has jurisdiction to hear this matter because the Second District's decision misapplies and, therefore, conflicts with decisional law from this Court regarding the separation of powers and the unlawful delegation of power.

### **JURISDICTIONAL STATEMENT**

This Court may exercise its discretionary jurisdiction when an appellate decision expressly and directly conflicts with the decision of another district court of appeal or this Court on the same question of law. Article V, §3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv); Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960) (describing jurisdictional bases for review). In addition to the jurisdictional bases described in Nielsen, conflict jurisdiction also exists when there has been a misapplication of the decisional law of this Court. Wallace v.

Dean, 3 So. 3d 1035, 1040 (Fla. 2009). The Second District's misapplication of the decisional law of this Court has resulted in a decision which impermissibly intrudes on the procedural practice of the Florida courts, and unlawfully delegates power to another branch of the government.

## **ARGUMENTS**

**I. The Second District's decision that the Automatic Stay Provision of the Neutral Evaluation Statute, §627.7074(10), Fla. Stat. (2011), is mandatory and prohibits a court from proceeding when a party invokes Neutral Evaluation at any time during the litigation, including trial or on the eve of trial, misapplies the decisional law of this Court, and impermissibly intrudes on the procedural practice of Florida Courts.**

This case is one of several in which the Second District Court of Appeal interpreted §627.7074, Fla. Stat. (2011), the neutral evaluation statute. The court first issued Citizens Property Ins. Corp. v. Trapeo, 136 So. 3d 670 (Fla. 2<sup>nd</sup> DCA 2914), which became the basis for the decision in this case. The Second District ruled that the trial court's determination that neutral evaluation could be waived conflicted with the express language of the statute. The court held the language of the neutral evaluation statute was compulsory; there was no waiver provision or timeframe for requesting neutral evaluation. The court also held that the statutory language was clear that neutral evaluation could be requested at any time, including on the eve of trial. Trapeo, 136 So. 3d at 677-78.



The Second District also ruled that the trial court had acted in excess of its jurisdiction in determining whether a waiver had occurred because the “circuit court does not have authority over the neutral evaluation process.” Trapeo, 136 So. 3d at 678. The court found it “clear” that the legislature intended “the procedure for neutral evaluation of sinkhole claims be administered through” the Department of Financial Services (“Department”). The court stated:

Whether a party can or has waived neutral evaluation is a determination within the Department’s authority and power as reasonably implied from the statute’s express language. As a result, the circuit court is not in a position to determine whether neutral evaluation can or has been waived. This is true despite the fact that nothing in the applicable statute addresses waiver.

Id. The court determined that “staying the court proceedings is a ministerial act with no room for discretion.” Trapeo, 136 So. 3d at 679. With all due respect, the Second District’s interpretation of §627.7074, Fla. Stat. (2011), misapplies the established law of this Court and renders the statute unconstitutional.

### **Violation of the Separation of Powers**

This Court should exercise its discretionary jurisdiction to review this case because, as applied by the Second District, the neutral evaluation statute violates the Florida Constitution.<sup>2</sup> As this Court has explained on multiple occasions, the cornerstone of American democracy “known as separation of powers recognizes

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<sup>2</sup> This Court should also review the Second District’s denial of Ms. Hanos’ motion for attorneys’ fees.

three separate branches of government—the executive, the legislative, and the judicial—each with its own powers and responsibilities.” Bush v. Schiavo, 885 So. 2d 321, 329 (Fla. 2004). See also League of Women Voters of Florida v. Florida House of Representatives, 132 So. 3d 135, 144 (Fla. 2013). This constitutional doctrine has been expressly codified in Article II, Section 3 of the Florida Constitution, “which not only divides state government into three branches but also expressly prohibits one branch from exercising the powers of the other two branches.” Bush v. Schiavo, 885 So. 2d at 329. This Court has traditionally “applied a strict separation of powers doctrine,” and has explained that the doctrine “encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power.” Id. (internal citations omitted). Since its earliest days, this Court has drawn a sharp distinction between power that is legislative and that which is judicial in nature:

The very essence of [an exercise of the legislative power] is a rule for future cases. It must be of general and uniform application. If an act of the legislature, in terms, judicially determines a question of right, or of property, as the basis upon which the act is founded, so far the proceeding must be regarded as judicial; or where the act determines matters of fact, or of right, dependent on matters of fact, it is the exercise of judicial powers.

Ponder v. Graham, 4 Fla. 237 (1851) (internal citations omitted).

When a substantive statute such as §627.7074, Fla. Stat. (2011), has procedural elements, the court must “decide whether those elements *impermissibly* intrude upon the procedural practice of the courts.” State v. Raymond, 906 So. 2d 1045, 1049 (Fla. 2005) (emphasis by the court). If the procedural elements of a statute are found to intrude impermissibly upon the procedural practice of the courts, the legislative provisions have to give way to the court rules and procedures. Id. The ruling of the Second District reached the exact opposite conclusion, holding that the procedural practice of the courts must yield to procedural elements of a statute. The Second District has now empowered insurance companies, such as Citizens, to disrupt the judicial proceedings and invoke neutral evaluation “any time” in sinkhole cases, including well into the litigation, on the eve of trial, during trial, even while the jury is deliberating if the trial is not proceeding as planned.

Whether a party can invoke neutral evaluation and a short stay during the early stages of the proceedings (or even before suit), is far different from what the Second District has ruled in this case. Construing §627.7074(10), Fla. Stat. (2011), to mean that the trial court has absolutely no discretion and that neutral evaluation can be invoked at “any time”, regardless of the disruption to the court proceedings, renders the statute unconstitutional. As construed, the statute clearly violates the trial court’s power to control the proceedings before it. It also violates this Court’s

exclusive authority to “adopt rules for practice and procedure in the courts of this State.” See TGI Friday’s, Inc. v. Dvorak, 663 So. 2d 606, 611 (Fla. 1995). This Court views judicial authority strictly and refuses to allow any encroachments upon it. The Second District’s interpretation of §627.7074(10), Fla. Stat. (2011), directly conflicts with that view.

In addition, this Court has consistently ruled that a party may waive any right to which “he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution.” DK Arena, Inc. v. EB Acquisitions I, LLC, 112 So. 3d 85, 97 (Fla. 2013); Tucker v. State, 559 So. 2d 218, 219 (Fla. 1990) (even fundamental constitutional rights such as the right to a jury trial can be waived when a defendant so chooses). The Second District, in direct conflict with those decisions, has now decreed, without any explanation or justification, that a **voluntary**, alternative method of dispute resolution in sinkhole cases cannot be waived, and further, that mandamus is available to enforce the automatic stay. Mandamus is only available when a court has no discretion, which further emphasizes the extent to which the Second District’s construction of the statute intrudes on the power of the court to control the proceedings before it.

**II. The Second District’s decision that pursuant to §627.7074, Fla. Stat. (2011), a Circuit Court is not authorized to determine whether Neutral Evaluation has been waived; rather, any decision on waiver is a determination within the Department of Financial Service’s Authority, misapplies the decisional law of this Court, and results in an Unconstitutional Delegation of Power.**

The Second District also ruled that a circuit court is not authorized to determine whether neutral evaluation can or has been waived by the party's actions during the course of the litigation over which the court has jurisdiction. Instead, the court has ruled that the waiver determination is exclusively within the Department of Financial Service's authority and power. The decision of the Second District (Judicial Branch), has condoned a statutory (Legislative Branch) delegation of authority to the Department of Financial Services (Executive Branch), the authority to make a determination about waiver of a right which, up until this point, has been exclusively a judicial function. This Court has long held that legislation that purports to re-allocate the power among the branches is void. Chiles v. Children A, B, C, D, E, F, and F, 589 So. 2d 260, 268 (Fla. 1991); Pepper v. Pepper, 66 So. 2d 280, 284 (Fla. 1953). The Second District's decision misapplies, and thus, conflicts with that decisional law.

Interpreting section 627.7074, Fla. Stat. (2011), as the Second District did in this case, as allocating to the Department the power to decide whether neutral evaluation has been waived, also results in an impermissible delegation of authority to the Department without adequate, or for that matter, any standards.<sup>3</sup> This Court has consistently ruled that excessive delegations of power by the

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<sup>3</sup> The neutral evaluation statute and chapter 624, Fla. Stat., which details the duties and authority of the Department of Financial Services, do not even address the matter.

legislature to another branch of government violate Article II, Section 3 because they necessarily cede to another branch the “discretion as to what the law shall be.” Conner v. Joe Hatton, Inc., 216 So. 2d 209, 211 (Fla. 1968). In order to guard against unlawful legislative delegations, courts must scrutinize such delegations to assure they are guided by “some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.” Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978); Phillips Petroleum Co. v. Anderson, 74 So. 2d 544, 547-48 (Fla. 1954); State ex rel. Ware v. City of Miami, 107 So. 2d 387, 389 (Fla. 1958).

The Second District’s interpretation of §627.7074, Fla. Stat. (2011), misapplies and conflicts with those decisions because the statute provides none of the required “definite limitations” on the exercise of power this Court has unfailingly required as a prerequisite for a valid delegation. Bailey v. Van Pelt, 82 So. 789, 793 (Fla. 1919). The statute also provides no guidance to courts seeking to review the actions taken by the Department pursuant to the delegation, if the decision is even reviewable at all. This Court strikes down legislative delegations for just that reason, finding that “[w]hen legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.” Askew, 372 So. 2d 918-19;

Florida State Bd. of Architecture v. Wasserman, 377 So. 2d 653, 656 (Fla. 1979).

The Second District's ruling misapplies that decisional law.

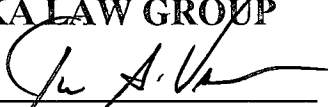
The Second District has issued a decision which invites a great deal of mischief and abuse in sinkhole cases by allowing neutral evaluation to be invoked at **any** time, while at the same time abolishing the power of the trial judge to control the proceedings in the courtroom and its docket. Under the ruling, the parties are free to manipulate and interfere with the orderly administration of justice while leaving the trial judge impotent to exercise the authority constitutionally delegated to the judiciary. There is no rational explanation or logic for such an extreme result. This Court should exercise its discretion and accept jurisdiction over this matter, quash the decision of the Second District, and rule, as a matter of law, that neutral evaluation and the accompanying stay can be waived by affirmative action like any other right, and that the circuit court is empowered to make that determination.

### **CONCLUSION**

This Court has discretionary jurisdiction to review the decision entered below. The Court should exercise its jurisdiction to consider the merits of the Petitioner's argument, and ultimately quash the decision entered below.

Respectfully submitted,

**VAKA LAW GROUP**

  
George A. Vaka, Esquire  
Nancy A. Lauten, Esquire

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via electronic mail to the following individuals on this 18<sup>th</sup> day of July, 2014:

**Kara Berard Rockenbach, Esquire**, Methe & Rockenbach, P.A., 1555 Palm Beach Lakes Blvd., Suite 1200, West Palm Beach, FL 33401 ([kbrock@flacivillaw.com](mailto:kbrock@flacivillaw.com)); ([tbermudez@flacivillaw.com](mailto:tbermudez@flacivillaw.com))

**Aram P. Megerian, Esquire**, Cole, Scott & Kissane, P.A., 4301 West Boy Scout Blvd. Suite 400, Tampa, FL 33607 ([aram.megerian@csklegal.com](mailto:aram.megerian@csklegal.com)).

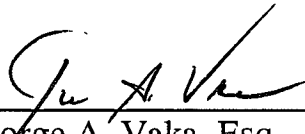
**VAKA LAW GROUP**

  
George A. Vaka, Esquire  
Florida Bar No.: 374016  
Nancy A. Lauten, Esquire  
Florida Bar No.: 0593052  
777 S. Harbour Island Blvd., Ste. 300  
Tampa, Florida 33602  
813.549-1799 Telephone  
813.549-1790 Facsimile  
[gvaka@vakalaw.com](mailto:gvaka@vakalaw.com)  
[nlauten@vakalaw.com](mailto:nlauten@vakalaw.com)



**CERTIFICATE OF COMPLIANCE**

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

  
\_\_\_\_\_  
George A. Vaka, Esq.  
Nancy A. Lauten, Esq.

# APPENDIX

2014 WL 1051974

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN  
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District Court of Appeal of Florida,  
Second District.

CITIZENS PROPERTY INSURANCE  
CORPORATION, a Florida  
government entity, Petitioner,  
v.  
Rebecca HANOS, Respondent.

No. 2D13-3872. | March 19, 2014.

Petition for Writ of Certiorari to the Circuit Court for Pasco  
County; Stanley R. Mills, Judge.

#### Attorneys and Law Firms

Kara Berard Rockenbach of Methe & Rockenbach, P.A.,  
West Palm Beach, and Aram P. Megerian of Cole, Scott &  
Kissane, P.A., Tampa, for Petitioner.

George Vaka and Nancy A. Lauten of Vaka Law Group,  
Tampa, for Respondent.

#### Opinion

DAVIS, Chief Judge.

\*1 Citizens Property Insurance Corporation seeks certiorari review of the trial court's order denying its request for an automatic stay pursuant to section 627.7074(10), Florida Statutes, in the breach of contract action brought against Citizens by Rebecca Hanos.

That underlying action stems from a dispute between the parties over repairs made to Hanos' home after sinkhole damage was discovered. Prior to trial, Citizens invoked the neutral evaluation process outlined in section 627.7074 and filed a notice of automatic stay pursuant to subsection (10) of the statute. The trial court then entered an order denying Citizens' "request" for a stay.

To the extent that order prohibits Citizens from invoking the neutral evaluation process, we grant the petition and quash the order. *See Citizens Prop. Ins. Corp. v. Trapeo*, --- So.3d --- (Fla. 2d DCA 2014); *Citizens Prop. Ins. Corp. v. Finley*, --- So.3d --- (Fla. 2d DCA 2014). Furthermore, we treat the remaining portion of Citizens' petition before this court—the portion that challenges the trial court's refusal to enter the automatic stay—as a petition for writ of mandamus and grant the petition. The trial court is directed to stay the underlying proceedings pending the completion of the neutral evaluation as required by section 627.7074(10).

Certiorari petition granted; order quashed; mandamus petition granted with directions.

NORTHCUTT and MORRIS, JJ., Concur.

#### Parallel Citations

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