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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2008-2009

1070663

Ex parte Citizens Property Insurance Corporation

PETITION FOR WRIT OF MANDAMUS

(In re: Ann B. Garnett

v.

Citizens Property Insurance Corporation et al.)

(Mobile Circuit Court, CV-06-3877)

MURDOCK, Justice.

Citizens Property Insurance Corporation ("Citizens") petitions for a writ of mandamus directing the Mobile Circuit

Court to vacate its order denying Citizens' motion to dismiss an action against it for lack of personal jurisdiction and to enter an order granting the motion to dismiss. We grant the petition.

Ann B. Garnett, a resident of Huntsville, owned a two-story beach home located in Navarre Beach, Florida. The home was insured against wind damage by Citizens, which is "a [Florida] government entity that is an integral part of the state, and that is not a private insurance company." Fla. Stat. Ann. § 627.351(6)(a)1 (2008). The Florida legislature established Citizens, a nonprofit corporation, "to provide affordable property insurance to applicants who are in good faith entitled to procure insurance through the voluntary market but are unable to do so."[1] Id. Citizens issues

[1]Citizens is the successor entity to both the Florida Windstorm Underwriting Association, which was "a non-profit residual insurer, created by the Florida Legislature, to provide insurance for wind damage to property owners who were unable to obtain it otherwise," Zimmerman v. State, Office of Ins. Regulation, 944 So. 2d 1163, 1164 (Fla. Dist. Ct. App. 2006), and the Florida Residential Property Casualty Joint Underwriting Association, which was established to address the lack of available homeowner's property and casualty insurance in the private-insurance market after Hurricane Andrew in 1992. Symposium, Responsibility for the Restoration of the Hurricane Insurance Industry: Business Proposal or State Solution?, 31 Nova L. Rev. 527, 530-31 (2007).

insurance only on property located in Florida and only through insurance agents licensed in Florida.

In the aftermath of a series of hurricanes that struck Florida in 2004, Citizens entered into agreements with numerous independent claims adjusters to evaluate wind-damage claims by Citizens' insureds. One such adjuster was Allied American Adjusting Company, LLC ("Allied), an Alabama limited liability company. Citizens' contract with Allied was entered into in Florida.

In September 2004, Garnett's beach home was destroyed by Hurricane Ivan. Thereafter, she filed a claim on her Citizens policy. Allied was the claim adjuster for Garnett's claim. Allied hired Joseph Morris, a resident of Mobile, as the "primary adjuster" to assist with Garnett's claim. Also, Allied retained Engineering Fire Investigations ("EFI"), a

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> "Citizens' rates are required by law to be higher than the rates of private insurers. As a result, Citizens has a rate structure that is not meant to compete with the private market. In fact, it is '[d]esigned to offer insurance only where the private market will not provide coverage' making it the 'provider of last resort.'"

31 Nova L. Rev. at 531 (quoting Kevin M. McCarty et al., Task Force on Long-term Solutions for Florida's Hurricane Insurance Market 40 n.8 (2006)(footnotes omitted)).

Tennessee corporation that specializes in environmental investigations, to assist with the investigation of Garnett's claim.

In May 2005, after Allied completed its review of Garnett's claim, Citizens denied the claim on the grounds that the damage to Garnett's beach home allegedly was caused by storm surge from Hurricane Ivan, not by wind.

In January 2006, Garnett sued Citizens, Allied, and EFI in the Madison Circuit Court; she subsequently amended her complaint to add Morris as a defendant. Garnett's complaint, as amended, contains claims of breach of contract, bad faith, "[u]nfair claim settlement practices," see Florida Stat. Ann. § 626.9541(1)(i) (2008), negligence, wantonness, misrepresentation, suppression,[2] and civil conspiracy,

[2]The gravamen of Garnett's action against Citizens is Citizens' decision not to pay for hurricane damage to Garnett's residence in Florida. The complaint does not allege misrepresentation or suppression in relation to Garnett's purchase of her insurance policy from Citizens. Instead, the allegations of misrepresentation and suppression in the complaint concern only facts "related to the investigation and adjustment of Ms. Garnett's claim," i.e., "that no evidence existed of wind damage to the home" and that storm surge was the cause of Garnett's loss. The complaint contains no allegation of reliance by Garnett on such representations. The pendency of the present case indicates that Garnett did not rely on any such representations and related denial of

specifically a conspiracy to conduct a biased investigation that would lead to the denial of Garnett's insurance claim.[3]

Citizens filed a motion to dismiss Garnett's action on the grounds that the Madison Circuit Court lacked personal jurisdiction over Citizens and on grounds of forum non conveniens. See Ala. Code 1975, § 6-5-430 ("[T]he courts of this state shall apply the doctrine of forum non conveniens in determining whether to accept or decline to take jurisdiction of an action based upon such claim originating outside this state[.]"). In May 2006, the Madison Circuit Court conducted a hearing on Citizens' motion. In November 2006, the Madison Circuit Court entered an order, sua sponte, transferring on

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coverage. See generally Hunt Petroleum Corp. v. State, 901 So. 2d 1 (Ala. 2004); Restatement (Second) of Torts § 537 (1977) ("The recipient of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it if, but only if, ... he relies on the misrepresentation in acting or refraining from action ...."). Thus, such misrepresentations, even if made by Citizens in correspondence received by Garnett in Alabama, provide no basis for specific-contacts personal jurisdiction over Citizens in Alabama as argued by Chief Justice Cobb in her dissent.

[3]Although Citizens enjoys limited immunity under Florida law, the parties have not discussed the extent to which that immunity might be pertinent to some of Garnett's claims. See Fla. Stat. Ann. § 627.351(6)(r) (2008). See also Nevada v. Hall, 440 U.S. 410 (1979).

forum non conveniens grounds the action to the Mobile Circuit Court.

In February 2007, the Mobile Circuit Court conducted a hearing on Citizens' motion to dismiss, after which it ordered limited discovery concerning Citizens' insureds who reside in Alabama. In part, the results of the ordered discovery reflect that Citizens has approximately 1.3 million active insurance policies and that, of the insurance policies Citizens issued between 2002 and 2007 (either as an original policy or as a renewal policy), 2,363 contain an Alabama mailing address for notices and correspondence.

According to an affidavit from Ray Walton, director of claims for Citizens, Garnett initially obtained her policy through a Florida insurance broker located in Fort Lauderdale, Florida. Citizens mailed the notices for Garnett's policy to the address Garnett provided on her application for insurance, i.e., her Alabama address. We also note that Walton averred that Citizens maintains no place of business or office in Alabama, it does not conduct business in Alabama, it has no property in Alabama, it has no telephone listing in Alabama,

it has no employees or authorized agents in Alabama, and it has derived no income from business conducted in Alabama.

On January 4, 2008, the Mobile Circuit Court entered an order denying Citizens' motion to dismiss. On January 24, 2008, Garnett, Allied, EFI, and Morris filed a joint motion to dismiss, with prejudice, Garnett's claims against them; the trial court entered an order dismissing the claims. Thus, Citizens is the only remaining defendant in Garnett's action.

Citizens petitions this Court for a writ of mandamus directing the Mobile Circuit Court to vacate its January 4, 2008, order and to enter an order of dismissal of Garnett's claims against it on the grounds of lack of personal jurisdiction or forum non conveniens.[4] Because we conclude that Citizens' petition is due to be granted on the ground that the trial court lacks personal jurisdiction over Citizens, we pretermit any discussion of the issue whether

[4]Citizens also filed a motion with the trial court requesting that it stay further proceedings, including further discovery, pending this Court's decision on Citizens' petition for writ of mandamus. The trial court denied the motion. Citizens then filed a motion with this Court requesting that we order the trial court to stay further proceedings pending our decision on Citizens' petition. We granted the motion.

Citizens' motion to dismiss should have been granted on the ground of forum non conveniens.

It is well settled that

> "[m]andamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court."

Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995). A petition for a writ of mandamus can be used to challenge the denial of a motion to dismiss for lack of personal jurisdiction. Ex parte McInnis, 820 So. 2d 795, 798 (Ala. 2001).

The issue of personal jurisdiction "'stands or falls on the unique facts of [each] case.'" Ex parte I.M.C., Inc., 485 So. 2d 724, 725 (Ala. 1986) (quoting and adopting the trial court's order). "An appellate court considers de novo a trial court's judgment on a party's motion to dismiss for lack of personal jurisdiction." Elliott v. Van Kleef, 830 So. 2d 726, 729 (Ala. 2002).[5] "In considering a Rule 12(b)(2), Ala. R.

[5]The trial court made no findings of fact based on oral testimony that might implicate the ore tenus rule.

Civ. P., motion to dismiss for want of personal jurisdiction, a court must consider as true the allegations of the plaintiff's complaint not controverted by the defendant's affidavits ...." Ex parte McInnis, 820 So. 2d at 798. If, however,

> "the defendant makes a prima facie evidentiary showing that the Court has no personal jurisdiction, 'the plaintiff is then required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and he may not merely reiterate the factual allegations in the complaint.'"

Ex parte Covington Pike Dodge, Inc., 904 So. 2d 226, 229-30 (Ala. 2004) (quoting Mercantile Capital, LP v. Federal Transtel, Inc., 193 F. Supp. 2d 1243, 1247 (N.D. Ala. 2002)).

Where, as here, a case involves service of process on a foreign defendant pursuant to Alabama's long-arm rule,

> "[a]n appropriate basis exists for service of process outside of this state ... when the person or entity has such contacts with this state that the prosecution of the action against the person or entity in this state is not inconsistent with the constitution of this state or the Constitution of the United States ...."

Rule 4.2(b), Ala. R. Civ. P. This Court has stated that Rule 4.2 "extends the personal jurisdiction of Alabama courts to the limit of due process under the United States and Alabama

Constitutions." Hiller Invs., Inc. v. Insultech Group, Inc., 957 So. 2d 1111, 1115 (Ala. 2006).

As to the "limits of due process" under the United States Constitution, in International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), the Supreme Court stated:

> "[I]n order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); see also Sudduth v. Howard 646 So. 2d 664, 667 (Ala. 1994). The Supreme Court continued in International Shoe:

> "Whether due process is satisfied must depend ... upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.
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> "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances,

hardly be said to be undue."

326 U.S. at 319-20 (citations omitted; emphasis added).

Personal jurisdiction can rest either on the theory of specific jurisdiction, when "a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum," Helicopteros Nacionalas de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984), or on the theory of general jurisdiction, "when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, [but] ... there are sufficient [continuous and systematic] contacts between the State and the foreign corporation." Id. at 414-16; see also Ex parte Covington Pike Dodge, Inc., supra. This Court has stated, however, that regardless of whether the issue of jurisdiction is considered under specific-jurisdiction analysis or under general-jurisdiction analysis, "[t]he critical question with regard to the nonresident defendant's contacts [with the forum state] is whether the contacts are such that the nonresident defendant '"should reasonably anticipate being haled into court"' in the forum state." Elliott, 830 So. 2d at 730 (quoting Burger King Corp.

v. Rudzewicz, 471 U.S. 462, 473 (1985), quoting in turn World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980)(emphasis added)). As the Supreme Court has explained, it is only "[w]hen a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' Hanson v. Denckla, 357 U.S. [235] at 253 [(1958)], [that] it has clear notice that it is subject to suit there." World-Wide Volkswagen, 444 U.S. at 297 (emphasis added). "This purposeful-availment requirement assures that a defendant will not be haled into a jurisdiction as a result of '"the unilateral activity of another person or a third person."'" Elliot, 830 So. 2d at 731 (quoting Burger King, 471 U.S. at 475, quoting in turn Helicopteros Nacionalas de Colombia, S.A., 466 U.S. at 417).

Based on the materials submitted to the trial court concerning Citizens' contacts with Alabama, we conclude that its contacts are not sufficient to satisfy the requirements for personal jurisdiction described above. As already noted, Citizens is a nonprofit "[Florida] government entity that is an integral part of th[at] State." Further, it insures only property located in Florida, and it does so only because it

has been mandated to do so by the Florida legislature. It issues insurance policies only through Florida-licensed insurance brokers; the policy at issue was issued through a Florida insurance broker located in Fort Lauderdale. There is no evidence indicating that Citizens advertises in Alabama or that it otherwise solicits business in Alabama. Insofar as its policyholders are concerned, the most that can be said of Citizens, based on the record before us, is that it uses the United States mail to forward notices from its Florida office to addresses in Alabama designated by a fraction of a percent of those policyholders. Even this act is performed only as a result of the unilateral designation by those policyholders of such an address, typically because the policyholder has chosen to maintain a principal residence in Alabama.[6] See Hanson,

[6]If, after procuring a policy from Citizens, an Alabama resident were to move to Oregon, and the insurer acquiesced in the insured's request to begin forwarding notices to the insured's new address in Oregon, could we say that the insurer was doing business in Oregon so as to reasonably be expected to be haled into court in that state? To avoid being haled into court in another state, should a Florida insurance company in the sole business of selling casualty insurance on Florida real property through Florida-based agents be required to insist that prospective policyholders go through the motion of renting a post-office box somewhere in the state of Florida for the purpose of receiving notices from that company? We suggest that the answer to both queries is "No."

357 U.S. at 253 ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (emphasis added)); see also 16 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 228:22 (3d ed. 2000)("[T]he court must consider whether the insurer's contacts with a state were the result of a deliberate and purposeful act on the part of the insurer, or whether the contacts were compelled by the unilateral actions of the insured, or were created by circumstances over which the insurer had no control.").[7] Also, Citizens' contract with Allied was entered

[7]In support of her argument that Alabama courts have personal jurisdiction over Citizens, Garnett relies, in part, on McGee v. International Life Insurance Co., 355 U.S. 220 (1957). McGee was decided in 1957, before the United States Supreme Court's decision in Worldwide Volkswagen. Moreover, it is distinguishable. In McGee, a Texas-based insurance company chose to insure the life of an individual residing in the forum state in which the underlying judgment was obtained, namely California. In contrast, the object of the insurance in the present case was real property located, not in Alabama

into in Florida and concerned the performance of services in Florida; the only connection with Alabama in that regard is that Allied is an Alabama limited liability company. In addition, Citizens' actions toward Garnett in response to Allied's coverage recommendation were based on an investigation and decision-making process that apparently occurred in Florida.

Based on the foregoing, we cannot conclude that Garnett has established that Citizens purposefully availed itself of the privilege of conducting business activities within the State of Alabama such that Citizens "reasonably should anticipate being haled into court" in this State. We hold that Citizens did not subject itself to the personal jurisdiction of Alabama courts in the present case, and its petition is due to be granted.

PETITION GRANTED; WRIT ISSUED.

Woodall, Stuart, Smith, Bolin, Parker, and Shaw, JJ., concur.

Cobb, C.J., and Lyons, J., dissent.

-- the forum state where the plaintiff seeks to obtain a judgment -- but in the state of Florida.

COBB, Chief Justice (dissenting).

I concur with Justice Lyons's assessment that, because of Citizens' general contacts with this State, personal jurisdiction does exist under a general-contacts analysis.

I write to add that personal jurisdiction would also exist under a specific-contacts analysis. That is, regardless of whether it had sufficient general contacts with the State to be subject to personal jurisdiction, Citizens' specific contacts with Garnett are sufficient to give rise to personal jurisdiction over Garnett's action.

At the time it entered into an insurance contract with Garnett, Citizens knew that it was undertaking a duty not only to pay money upon the occurrence of certain contingencies related to Garnett's Florida real property, but also to act in good faith and to deal fairly with Garnett. Citizens also knew, at the time it entered into the contract, that the violation of this duty of good faith and fair dealing, and any related tortious conduct, would give rise to damages in tort personal to Garnett, who was an Alabama resident. See Chavers v. National Sec. Fire & Cas. Co., 405 So. 2d 1 (Ala. 1981).

In fact, Garnett asserts tort claims in this case seeking damages not for damage to the insured property in Florida, but for personal harm arising from alleged bad-faith investigation of her claim and denial of coverage, misrepresentation, suppression, and conspiracy on the part of Citizens.

In particular, the record reflects that the letter from Citizens denying coverage, which is alleged to have been sent in bad faith and to have contained misrepresentations or to have been a vehicle for fraud and suppression, was sent to the insured, Garnett, in Alabama. Thus, the parties' evidentiary submissions establish that the allegations of bad faith, fraudulent misrepresentation, and suppression arise from Citizens' own deliberate and purposeful dealings and communications with Garnett in Alabama--not from any unilateral act on Garnett's part.[8] In addition, Garnett

[8]I express no opinion as to whether the evidence supports Garnett's bad-faith, fraud, and suppression claims, or as to whether the fraud and suppression claims as currently stated are sufficient under Rule 9(b), Ala. R. Civ. P. I disagree with the reasoning underlying the majority's statement that "[t]he pendency of the present case indicates that Garnett did not rely on any [allegedly fraudulent] representations and related denial of coverage." ___ So. 2d at ___ n.2. The filing of a fraud action does not negate the possibility that

alleges that Citizens conspired through communications with its Alabama-based adjuster to conduct a flawed investigation of Garnett's claim that would result in the denial of coverage.

This is not a case where, as the majority hypothesizes in footnote 6 of its opinion, an insured has procured a contract in one state and then unilaterally moves its primary residence to another. In fact, this case is not even akin to a products-liability case in which a person purchases a defective product in one state and then unilaterally moves the product to the state of the purchaser's residence. The alleged tortious conduct here occurred not when the insurance contract at issue was created (perhaps in Florida),[9] but when

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reliance existed before the discovery of the alleged fraud. Furthermore, given the current stage of the litigation and the fact that the parties did not present evidence to this Court on the issue of reliance, I believe it is premature to opine on whether Garnett relied on any of Citizens' allegedly fraudulent representations.

[9]The record indicates that Garnett's insurance contract with Citizens was renewed on several occasions before Hurricane Ivan damaged Garnett's home, but Citizens did not present sufficient evidence from which to determine whether Florida is the locus of the renewal contracts. See Consolidated Underwriters Ins. Co. v. Landers, 285 Ala. 677, 235 So. 2d 818 (1970) (recognizing that a renewal provision in an insurance policy constituted a continuing offer to insure

the insurer investigated and then denied the insured's claim. At that time, the insurer reasonably ought to have anticipated that the direct consequences of its actions would have been felt by the insured in Alabama. See Duke v. Young 496 So. 2d 37, 39 (Ala. 1986) (holding that a person subjects himself to personal jurisdiction in a particular state if he reasonably ought to anticipate that someone residing in that state would be the recipient of the direct consequences of his actions).

The majority also poses the following hypothetical in footnote 6: "To avoid being haled into court in another state, should a Florida insurance company in the sole business of selling casualty insurance on Florida real property through Florida-based agents be required to insist that prospective policyholders go through the motion of renting a post-office box somewhere in the state of Florida for the purpose of receiving notices from that company?" I agree that the answer

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and that payment of the renewal premium in advance constituted acceptance of that offer and created a binding contract of insurance). Even if I were to assume that the locus of the insurance contract at issue is Florida, that assumption would not change my analysis as to whether personal jurisdiction exists, because Citizens reasonably ought to have anticipated that tortious activity related to the investigation and denial of the claim would cause injury to Garnett in Alabama.

to that question is "no." Several simple solutions, however, exist for the insurance company in such a situation. For example, if the insurer truly is not doing insurance business outside the state of Florida so that it would be subject to the insurance regulations of other states, I see no reason why the insurer would not be able to insist upon a Florida venue provision in the insurance contract. Further, Citizens is a creature of Florida statutory law. Assuming Citizens is not subjecting itself to regulation in other states by the extent of its insurance business there, I see no reason why the Florida legislature could not have provided that, as a condition of obtaining insurance from Citizens, each insured must agree to pursue any legal action against Citizens in Florida.

In conclusion, "[t]he fundamental question is, did the defendant act in such a manner that he reasonably ought to anticipate the direct consequences of his actions to be felt by another person residing in another state?" Duke v. Young 496 So. 2d at 39. Assuming the uncontradicted allegations in the complaint to be true and considering the evidentiary submissions of the parties as they pertain to allegations that

are in dispute, see Ex parte Safeway Ins. Co. of Alabama, Inc., 990 So. 2d 344, 349-50 (Ala. 2008), I believe that, in this case, the answer to that question would have to be "yes" -- even if one looks solely at the specific contacts between Citizens and Garnett that give rise to this action. Therefore, I believe that personal jurisdiction exists, even under a specific-contacts analysis.

I respectfully dissent.

LYONS, Justice (dissenting).

The effect of the use of the mail on an insurer's doing business is explained in 1 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 3:13 (3d ed. 1995):

> "The traditional concept seems to be that a foreign insurer's mere mailing of insurance applications and policies to residents of a state is not a sufficient basis of that state assuming jurisdiction over the insurer. Under this view the effecting of an isolated contract of insurance through the use of the mails, or the mailing of a policy from one state to the insured in another state does not amount to doing business in the latter state, and the same is true with regard to policies of renewal. Likewise, the issuance of a policy by a foreign insurance company to a resident of a state and the collection of premiums thereon by mail does not constitute 'doing business' in the state."

(Emphasis added; footnotes omitted.)

Over 2,300 of the insurance policies Citizens issued (either as original policies or as renewal policies) between 2002 and 2007 contain an Alabama mailing address for notices and correspondence. Garnett received premium and policy-renewal notices from Citizens at her Alabama address. Citizens could have simply declined to issue policies to an applicant who could not furnish a Florida mailing address but who, instead, requested that Citizens use an address in an

adjoining state for transacting business. Under these facts, where we do not deal with an isolated contract but one among many such contracts issued to policyholders in an adjoining state, I do not consider subjecting Citizens to the jurisdiction of an Alabama court to be offensive to notions of justice and fair play.

Cobb, C.J., concurs.