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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. SC20-1225

DCA CASE NOS.: 3D18-1976, 3D18-1975
L.T. CASE NO. 2016-028473-CA-21

MINTZ TRUPPMANN, P.A.

Petitioner,

vs.

COZEN O'CONNOR, PLC, JOHN DAVID DICKENSON, AND LEXINGTON INSURANCE CO.,

Respondents.
_____/

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RESPONDENTS' COZEN O'CONNOR AND JOHN DAVID DICKENSON'S ANSWER BRIEF ON THE MERITS

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Respondents, Cozen O'Connor, PLC, and John David Dickenson, (collectively "Cozen") hereby file their answer brief in response to the initial merits brief of Petitioner, Mintz Truppman, P.A. ("Mintz").

STATEMENT OF THE CASE[1]

Mintz sued Cozen and Lexington Insurance Co. ("Lexington") in the Circuit Court for the 11th Judicial Circuit (the "State Court Case"). All claims against Cozen were based on the violation of mediation confidentiality under Fla. Stat. § 44.406(1) that allegedly took place in a federal case (the "Federal Action") then pending and not concluded, in the U.S. District Court for the Southern District of Florida. After the Federal Action was concluded with a final unopposed judgment, Cozen moved to dismiss the State Court Case for among other reasons, lack of subject matter jurisdiction. The trial judge denied the motion and Cozen petitioned the District Court of Appeal, Third District for Writs of Prohibition and/or Certiorari claiming the trial judge was about to proceed in the case without subject matter jurisdiction. In an elaborated opinion (the "Opinion"), the District Court of Appeal (the "Third DCA") issued the writ of prohibition and dismissed as moot Cozen's Petition for Certiorari. (R. 908-20).

[1] Copies of documents referenced herein are included in the Record of the proceedings in the Third DCA. References to those documents will be through their page number as they appear in the Record, i.e. (R. ___).

In this Court, Mintz claims that prohibition should not have issued. Cozen, on the other hand, contends that prohibition does in fact lie in the circumstances of this case and if not, the court should direct that a writ of certiorari be issued quashing the trial court's order denying the motion to dismiss the case for want of subject matter jurisdiction.[2]

Cozen restates the facts because the statement of facts in Mintz's brief omits facts that are important for a full understanding of the jurisdictional issues.

FACTS

The Federal Court Proceedings

Daphne Query ("Query") sued Lexington Insurance Company ("Lexington") in Miami-Dade County Circuit Court seeking indemnification under a policy of insurance for property loss together with attorneys' fees and costs as provided by Fla. Stat. §626.9373. Query was represented by Mintz and Lexington was represented by Cozen. After removal to the U.S. District Court for the Southern District of Florida, Query and Lexington engaged in mediation which resulted in a partial settlement determining the amount of Query's property loss to be $125,000 and stipulating that Query's

[2] Cozen also contends that certiorari review in this case was improvidently granted for reasons discussed in Section 5 of the Argument.

statutory right to attorneys' fees and costs would be determined by the federal court pursuant to the procedure outlined in Rule 7.3 of the Local Rules for the Southern District of Florida. Upon receipt of the Mediation Report of the partial settlement (DE-41) (R. 30), the federal court entered an order of Dismissal (DE-42) (R. 31) retaining jurisdiction to enforce the settlement, which was immediately followed by Query's unopposed motion to modify or clarify the Order of Dismissal (DE-43) (R. 33). In her motion to modify or clarify, Query indicated the parties would soon file a Notice of Partial Settlement and Stipulation regarding Query's entitlement to attorneys' fees and costs. Query's motion asked the federal court to modify the original order of dismissal to expressly retain jurisdiction to determine the amount of attorneys' fees and costs. An Amended Final Order of Dismissal (DE-45) (R. 36) was then entered expressly retaining jurisdiction to enforce the terms of the settlement and to determine the amount of attorneys' fees and costs. Lexington and Query then jointly filed a Notice of Partial Settlement and Joint Stipulation Regarding Plaintiff's Entitlement to Attorneys' Fees and Costs (DE-46) (R. 38). The Stipulation made it clear that (1) Query was entitled to receive her reasonable attorneys' fees and costs "in the federal action," (2) that "the only issue remaining in the federal action is determining the reasonable amount of ["Query's"] reasonable attorneys' fees and costs in the

federal action as well as any other claim related thereto including but not limited to interest thereon" (emphasis supplied) and (3) fees and costs would be determined pursuant to the process laid out in Local Rule 7.3. The stipulation was specifically approved by the entry of an agreed order (DE-49) (R. 41).

Query and Lexington then engaged in the process outlined in Local Rule 7.3. When Query filed her verified motion for fees and costs (DE-70) (R. 44), she sought a Loadstar amount of over $400,000 and sought to have the Loadstar amount multiplied by two. Query justified the multiplier in part by repeatedly claiming she recovered 100% of her property loss (DE-70, at 3, 20, and 21) (R. 46, 63, and 64). By this, Query obviously intended to convey the message to the federal court that her settlement resulted in a payment of all she had demanded in the litigation, which was clearly not true.

Lexington filed a response (DE-74) (R. 71) and attached Query's Mediation Demand contending that Query had claimed more than $125,000 in property loss.[3] Query replied, but raised no objection to the filing of her Mediation Demand (DE-77) (R. 93). Instead, Query proceeded with the Rule

[3] The Mediation Demand consisted of letters attached as exhibits 19 and 20 to DE 74 (R. 71). The letters were not included in the district court record as they were not necessary to the petitions for prohibition and certiorari.

7.3 process to have her reasonable attorneys' fees and costs determined by the federal court as outlined in the stipulation approved by that Court. After several months of consideration, on February 7, 2017, Magistrate Judge Torres entered an Amended Report and Recommendation on Plaintiff's Motion for Award of Attorneys' Fees and Costs (DE-82) (R. 104) (the "R&R"). The R&R cautioned that the parties had 14 days to file written objections with the District Judge and the failure to timely file objections shall bar the parties from seeking a *de novo* determination by the District Judge and from attacking the findings in the R&R on appeal. Query filed no objection to the R&R, but the District Judge *sua sponte* conducted a *de novo* review of the R&R, approved and adopted the R&R as an order of the District Court, entered Final Judgment determining Query's reasonable attorneys' fees and costs to be $259,502.81 and entering Judgment for that amount, together with prejudgment interest of $9,465.14 (DE-84) (R. 133). The Final Judgment was fully satisfied by Lexington.

Query never raised with the federal court any objection to the filing by Lexington and Cozen of Query's Mediation Demand. She did not move to seal the record of the Mediation Demand. She did not move to strike the Mediation Demand from the record. She did not seek relief from the stipulation that the federal court would decide the reasonable amount of

Query's attorneys' fees and costs. She did not seek a new judge who was not "contaminated" by knowledge of Query's Mediation Demand, nor did she seek from the federal court the recovery of sanctions, attorneys' fees, or any other remedy available to Query under Fla. Stat. §44.406 (2018). Instead, while Query's motion for fees and costs was under consideration by the federal court, and months before the Magistrate Judge had determined the amount of Query's fees, Mintz, on November 5, 2016, filed the case below in the Circuit Court for the 11th Judicial Circuit in and for Miami-Dade County, Florida, Case No. 16-028473 CA 21 (again, the "State Court Case") (R-285).

The Proceedings in the Circuit Court

The State Court Case sought to relitigate the reasonable amount of Query's attorneys' fees and costs that would eventually be fully and finally determined by the Final Judgment in the federal court action.[4] The Plaintiff in the State Court Case is Mintz Truppman, P.A. ("Mintz") which acted as co-counsel for Query in the Federal Action. Mintz sues in the State Court Action as the assignee of Query and the alleged real party-in-interest. In the State Court Case, Mintz sues Lexington, Cozen O'Connor, and John D. Dickenson (the latter two Defendants collectively "Cozen"), who defended Lexington in

[4] A copy of the Second Amended Complaint (the latest complaint) in the State Court Case is included in the Record (R. 135). It will be referred to as the "State Court Complaint."

the federal case. Mintz claims that by filing Query's Mediation Demand in the Federal Case, Lexington and Cozen violated the confidentiality provisions of the Florida Mediation Statute, Fla. Stat. §44.405. Mintz's State Court Complaint, which was filed months before the Magistrate Judge determined the amount of Query's fees, specifically alleges that, but for the filing by Lexington and Cozen of Query's Mediation Demand, in opposition to Query's motion to determine fees and costs, the federal court would have entered a higher award for Query's fees and costs.[5] In other words, an essential ingredient of Mintz's claim, that the attorneys fee award in the Federal Action was less than his demand, did not exist at the time Mintz filed the State Court Case. Furthermore, Mintz clearly sought to relitigate in the State Court Case the federal court's Final Judgment and to have the state court re-determine Query's entitlement to attorneys' fees and costs in direct contradiction to the stipulation filed in and approved by the federal court and in direct contradiction to the Final Judgment determining Query's recoverable fees and costs.

The State Court Case proceeded as far as Mintz's second amended complaint (again the "State Court Complaint"). The State Court Complaint

[5] See Mintz's State Court Complaint, at ¶¶ 40, 62, 78, 114, 123 and 132 (R. 146, 154, 158, 169, 171-72, and 174).

contains ten counts, nine of which are directed to one or both of the Cozen defendants. Every Count directed to a Cozen defendant invokes, relies and is dependent upon the same alleged violation of the mediation privilege under Fla. Stat. §44.405 and every such count realleges and relies on the following:

> "40. When the Insurance Company, Cozen and Dickenson filed its Response to Plaintiff's attorney's fee claim, with the confidential mediation communications attached, Mintz was deprived of the opportunity to have an unadulterated and unbiased fee evaluation conducted. The disclosure to the Federal Magistrate of these confidential mediation communications, deprived Mintz of that opportunity. The attorney's fee award entered was less than Mintz had claimed, thus resulting in damages from that lost opportunity."[6]

Furthermore, Mintz also seeks damages against one or both of the Cozen defendants in Counts 2, 3, 4, 9, and 10 on the theory that Query's mediation demand contained "proprietary information," and "work product" that belong to Mintz.[7] These damage claims are different from Query's claims for attorney's fees and will be discussed separately.[8]

Petitioner moved to dismiss the Second Amended Complaint for lack of subject matter jurisdiction. (R. 203). The trial court denied the motion to

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[6] See R. 146.
[7] See State Court Complaint at ¶¶ 62, 70, 78, 123 and 132 (R. 154, 156, 158, 171-72, and 174).
[8] See State Court Complaint (R. 152, 154, 157, 169, and 172).

dismiss (R. 214) and Cozen timely filed a Petition seeking writs of Prohibition and Certiorari. The Third DCA issued a writ of Prohibition requiring the trial court to dismiss the case with prejudice for lack of subject matter jurisdiction. Mintz then sought discretionary review in this Court.

SUMMARY OF THE ARGUMENT

Mintz seeks review of the writ of prohibition arguing that the Circuit Court had subject matter jurisdiction over the class of cases to which the case belongs, that the District Court of Appeal wrongfully prohibited the trial court from deciding the collateral estoppel issue, that collateral estoppel would not bar the entire action, that prohibition is the wrong remedy, and that the issues raised by Cozen should be resolved in a plenary appeal. The breadth of Mintz's arguments require a discussion of Mintz's claims and the several reasons why the Circuit Court lacked subject matter jurisdiction and why prohibition was the appropriate remedy.

Mintz wanted two bites of the apple with respect to Query's attorneys fee claim. Mintz intentionally did not raise the mediation privilege issue with the district court, and months before the fee issue was decided, Mintz filed the State Court Case claiming that the fee award in the Federal Action, which had not yet been determined, was less than he asked for because of the mediation privilege violation. Mintz referred to the fictional delta between

Query's demand and the award entered in the Federal Action as "Lost Opportunity Damages." Mintz then let the Federal Action proceed to judgment without objection or appeal. The State Court record showed that Query's fee issue was determined in the Federal Action and that the State Court Case had been filed before Mintz's cause of action, as he pled it, had been complete; i.e., the Lost Opportunity Damage in the Federal Action did not exist. Thus, subject matter jurisdiction over Query's attorneys fee claim was lacking for two reasons. (1) the fee claim was barred by collateral estoppel, merged into the judgment leaving no case or controversy as to it; and (2) the Lost Opportunity Damage did not exist at the time the State Court Complaint was filed so at the time of the filing, there was no case or controversy to support subject matter jurisdiction.

As to Mintz's claim in his own right for divulging his alleged proprietary method for constructing his mediation demand, Mintz was not a "party" to the mediation, and because he was not a party, he had no standing to seek relief under Fla. Stat. § 44.406. Lack of standing eliminates a case or controversy cognizable by the State Court and defeats subject matter jurisdiction.

In this Court, Mintz admits that "collateral estoppel can bar Mintz from recovering the lost opportunity damages," but goes on to argue collateral estoppel should not bar Mintz from recovering any other damages that arise

from the disclosure of the mediation communication. That argument goes nowhere because the Second Amended Complaint is devoid of any other damages sustained by Query, and Mintz had no standing to bring any claims of his own under § 44.406 which was the only substantive basis for every claim Mintz asserted against Cozen. The District Court properly viewed the nine counts of the Second Amended Complaint directed against Cozen as seeking additional fees for representing Query. No other harm was mentioned other than Mintz's own claim under § 44.406 for which he lacked standing.

The writ of prohibition directed only a dismissal for lack of subject matter jurisdiction. Such an order is not a judgment on the merits and would not have precluded Mintz or Query from pursuing other claims Mintz pretends to have but does not identify.

The Second Amended Complaint demonstrates on its face that the State Court had no subject matter jurisdiction. Prohibition may be reserved for only those cases where a court is threatening to act in excess of its jurisdiction, but this is just such a case. The doctrines of collateral estoppel and res judicata exist to prevent the wasteful re-litigation of issues and claims already decided, inconsistent judgments, and proceedings that amount to a collateral attack on the judgment of another court. If prohibition does not lie

to prohibit a trial judge from proceeding with a case where the complaint itself shows the claim was barred by collateral estoppel, res judicata and lack of standing, then the defendant could be exposed to a never ending series of new cases for the same wrong and have to wait until the case ends in the trial court to appeal and reverse the judgment only to be faced again with the same claim and no interlocutory process to prevent relitigation. None of the prohibition cases cited by Respondent support such a draconian limitation on the use of prohibition.

ARGUMENT

By proceeding to relitigate issues barred by collateral estoppel or res judicata, or by undertaking to act on a complaint from a person with no standing, the trial court exceeded its jurisdiction. Prohibition will lie to prevent a court from proceeding when the lack of subject matter jurisdiction is apparent and the court declines to dismiss on procedural grounds. These issues will be dealt with seriatim.

1. Query's Statutory Claim for Fees and Costs Was Finally Determined by the Federal Court and Cannot Be Relitigated in the Court Below

The starting point for analysis is the claim that was decided and the facts necessarily relied upon to establish the claim. The Florida Statute which gave Query the right to recover reasonable attorneys' fees against her

insurer, Fla. Stat. §626.9373 (2018) plainly requires that the award of fees is to be made by the trial court that entered the judgment on the insured's underlying claims against her insurer. In fact, if awarded, attorneys' fees must be included in the judgment or decree rendered in the case, Fla. Stat. §626.9373(2) (2018).

Furthermore, Florida law unequivocally states that the insured's right to recover fees from her insurer belongs to the insured and not to her attorney. Forthurber v. First Liberty, Ins. Corp., 229 So.3d 896 (Fla. 5th DCA 2017); Fortune, Ins. Co. v. Gollie, 576 So.2d 796 (Fla. 5th DCA 1991). Similarly, Fla. Stat. §44.406(1), which creates the right to seek remedies for the violation of mediation confidentiality limits standing to the parties to the case being mediated and not their attorneys. Thus, Mintz's State Court Case is one in which he asserts the rights of Query by virtue of being in privity of contract with her relative to attorneys' fees, and therefore the doctrine of collateral estoppel prevents Mintz from relitigating the reasonable amount of Query's fees in the same way collateral estoppel would apply to Query.

> The doctrine of collateral estoppel applies where the threshold requirements are met: (1) the issue at stake is identical to the one involved in the prior litigation; (2) the issue was actually litigated in the prior suit; (3) the

> determination of the issue in the prior litigation was critical and necessary to the determination; and (4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding.

Carnival v. Middleton, 941 So.2d 421, 424 (Fla. 3rd DCA 2006), citing, Baxas Howell Mobley, Inc. v. P.B. Oil Co., 630 So.2d 207 (Fla. 3rd DCA 1993). Collateral estoppel prevents Query and anyone claiming by, through or under Query from relitigating the federal court's determination as to the amount of Query's recoverable attorneys' fees.

Cozen, who participated as Lexington's lawyer in the federal case, can defensively assert collateral estoppel against Query and Mintz. The Third DCA has held that a lawyer who successfully defends his client for fraud in an earlier case is considered in privity with his client and when the lawyer is sued in a later case for the same fraud based on the same document, the lawyer can rely on defensive collateral estoppel to bar the fraud claim against him in the second case. ICC Chemical Corp. v. Freeman, 640 So.2d 92 (Fla. 3rd DCA 1994); See, Bates v. Cook, Inc., 615 F.Supp. 662, 672 (M.D. Fla. 1984). ("[w]here non-parties are in privity with a party, participate in a prior action or are virtually represented by the party, they may be bound by the

decision in the prior action."). See also, Cray v. NATIONSSECURITIES, 1999 WL 223501 at WL pg. 2 (S.D. Fla. 1999) ("Defensive collateral estoppel is an attempt to prevent a plaintiff from relitigating an issue which the plaintiff has previously litigated unsuccessfully against another defendant"); Parklane Hosiery v. Shore, 439 U.S. 322, 329 (1979) ("Defensive collateral estoppel precludes a plaintiff re relitigating the same issue by merely switching adversaries").

Also, Query, through Mintz, expressly stipulated that the federal court would determine the reasonable amount of Query's fees and costs "as well as any other claims related thereto. . . ." (DE-46, at ¶3) (R. 38). That stipulation was approved by an order of the federal court (DE-49 at ¶2) (R. 41). Mintz's various claims in the State Court Case that Mintz would have received a greater fee award for Query, but for the alleged violation of mediation confidentiality in the federal court, clearly show that the mediation confidentiality claims under §44.405 are "directly related" to the amount of Query's fees. When a State Court seeks to redetermine issues already decided by a federal court, prohibition should issue to preclude the redetermination of issues decided by the federal court. Carnival v. Middleton, 941 So.2d 421 (Fla. 3d DCA 2006). In Carnival, a passenger initially sued Carnival for personal injury in state court. The claim was

dismissed without prejudice based on the forum selection clause in the ticket contract. The passenger then sued in federal court and was dismissed with prejudice based on a one year statute of limitations contained in the same ticket contract. When the passenger returned to state court, the trial court accepted jurisdiction to consider (1) the adequacy and conspicuousness of the limitation of actions clause and (2) whether the clause denied the passenger's constitutional right to a jury trial. Carnival sought interlocutory appeal and the District Court treated the appeal as a petition for a writ of prohibition. The 3rd DCA found that the federal court determined the adequacy and conspicuousness of the time limitation for claims and therefore collateral estoppel barred relitigation of that issue in the state court. Because the passenger was collaterally estopped from relitigating that issue in state court, the 3rd DCA found "the lower court was without jurisdiction to entertain issues already disposed of in federal court." Carnival, at 424 (emphasis added). Carnival clearly demonstrates that collateral estoppel bars Mintz, who claims through Query from relitigating in the State Court Case the amount of Query's fees which is the only damage claim Query is alleged to have.

Furthermore Carnival suggests that res judicata would also bar Mintz's claims in the State Court Case. Carnival held "a final decree bars a

subsequent suit between the same parties based on the same cause of action and is conclusive as to all matters germane thereto that were or could have been reviewed 'not necessarily actually adjudicated, in the prior proceeding." Carnival, at 424, quoting from Gordon v. Gordon, 59 So.2d 40 (Fla. 1952). Like the parties in Carnival, Query and Lexington explicitly stipulated what claims the federal court would decide.

They stipulated that Query's statutory claim for attorneys' fee and costs "as well as any other claims related thereto" will be decided in the federal court. The specific issue of attorneys' fees and costs was decided by the federal court and now Mintz claims in state court that the federal court received evidence in the form of Query's Mediation statement that contaminated the fee award. That claim could and should have been raised in the federal court. Fla. Stat. §44.406(1) gives any party to a case being mediated the right to apply to a court of competent jurisdiction for a number of remedies , including damages and equitable relief, in the event of a knowing and willful disclosure of a mediation communication. The federal court was certainly a court of competent jurisdiction. It had jurisdiction over the parties, supervisory and disciplinary jurisdiction over the lawyers, jurisdiction over the case being mediated, and also by stipulation of the parties, the consent to determine Query's reasonable attorneys' fees "as well

as any other claims related thereto." A claim that Lexington and Cozen disclosed improper evidence in opposition to Query's motion to determine her fees is certainly one related to the determination of her fees. Query clearly had "a full and fair opportunity" to raise her mediation privilege claim in federal court.

When any civil action is tried in any court, the plaintiff must timely object to any improper evidence offered by the defendant. The plaintiff cannot fail to object to the improper evidence, and then after receiving an unsatisfactory judgment, file suit in another court claiming the judgment in the first case would have been more favorable, but for the admission of improper evidence. Nothing in the Mediation Confidentiality and Privilege Act, Fla. Stat. §44.401, et. Seq. (2018) excuses a litigant from timely objecting to the disclosure of confidential and privileged communication in the very proceeding in which the alleged improper disclosure is being made. To be sure, §44.406 lists remedies, beyond the exclusion of evidence, that a Party can apply for, but nothing in the statute excuses the plaintiff from making a timely objection. Otherwise, the Court will and must proceed to judgment on the evidence admitted without objection. That is exactly what happened in the federal court and nothing in the relevant legislation allows for a collateral attack on a judgment duly rendered.

In Gordon v. Gordon, 59 So.2d 40 (Fla. 1952), the Florida Supreme Court pointed out the primary distinction between res judicata and collateral estoppel to be that collateral estoppel only bars relitigation of the same issue while, if res judicata applies, it bars claims that were or could have been raised. Gordon pointed out that for res judicata to apply the causes of action must be the same. Florida law does not look to labels such as breach of contract, negligence, etc. Instead, "[i]f a case arises out of the same nucleus of operative fact, or is based on the same factual predicate, as a former action, the two cases are really the same 'claim' . . . for purposes of res judicata." Madura v. Countrywide Home Loans, Inc., 344 F3ed.Appx. 509, 517 (11th Cir. 2009) citing Gordon v. Gordon, supra.

The claims in the State Court against Cozen that relate to the amount of Query's fees are all predicated on Query's right to a proper determination of her reasonable attorneys' fees and costs free from any contamination caused by any improper evidence. That is exactly what Query stipulated would be presented to and decided in the federal court, except that she subsequently elected not to object to the alleged impropriety of disclosing her mediation demand.

Consequently, both collateral estoppel and res judicata bar Mintz's claims made as the assignee of Query.

2. Mintz Lacks Standing to Make Any Claims in His Own Right Under the Mediation Confidentiality and Privilege Act

In addition to seeking a new determination of Query's reasonable attorneys' fees and costs, the State Court Complaint also seeks other damages allegedly incurred by Mintz (as distinguished from Query) as a result of the supposed violation of §44.405. This raises the obvious question of whether Mintz, as the lawyer for Query and a participant in the mediation, has a private right of action under the Mediation Confidentiality and Privilege Act (the "MCPA").

Section 44.406 entitled "Confidentiality; civil remedies" is the only provision in the MCPA that creates any civil remedies. It reads in pertinent part:

> (1) Any mediation participant who knowingly and willfully discloses a mediation communication in violation of §44.405 shall, upon application by any party to a court of competent jurisdiction, be subject to remedies including:
> (a) Equitable relief.
> (b) Compensatory damages.
> (c) Attorney's fees, mediator's fees, and costs incurred in the mediation proceeding.
> (d) Reasonable attorney's fees and costs incurred in the application for remedies under this section. (Emphasis added.)

Subsection (1) of Section 44.406 makes it clear that any "mediation participant" can be "subject to" the remedies provided, but only "any party" can make an application to a court of competent jurisdiction for the remedies provided. Since mediation participants and party are both defined terms under the MCPA, it is clear from the structure of subsection (1) that the legislature intended that only a party could apply for remedies under §44.406, while any mediation participant could be made subject to those remedies. If the legislature had intended that all mediation participants be both subject to the remedies provided in subsection (1) as well as permitted to apply for those remedies, there would have been no need to mention the word "party" anywhere in subsection (1).

Section 44.403(2) defines a mediation participant to include "a mediation party or a person who attends a mediation. . ." Under Section 44.403(3) "mediation party" or "party"

"means a person participating directly, or through a designated representative, in a mediation and a person who:

a) Is a named party;
b) Is a real party-in-interest; or
c) Will be a real party-in-interest if an action relating to the subject matter of the mediation were brought in a civil court of law."

Mintz was never the named party in the federal action. Nor could Mintz have been the real party-in-interest at the time of the mediation or at any time

during the pendency of the federal case. The mediation was conducted to resolve Query's property loss claim against Lexington including her statutory right to reasonable attorneys' fees and costs. The pleadings up to that point showed Query as the only plaintiff. The motions and all other papers filed after the mediation continued to show Query as the only plaintiff, and the final judgment was awarded only to Query. Fed.R.Civ.P. 17 mandates that all civil actions (except some not here relevant) must be prosecuted in the name of the real party-in-interest.

Since Mintz was not a party to the federal case or a real party-in-interest, he has no standing under §44.406 to apply for remedies for any supposed damages he may have for violation of §44.405. Consequently, as will be discussed infra, the lower court lacked jurisdiction to hear and decide Mintz's claims made in his own name under §44.406.

Mintz argues to this Court that collateral estoppel would not bar the "entire action" because he had counts for declaratory relief and injunctive relief. But declaration of rights and injunctions are remedies, not substantive claims. The State Court Complaint alleged no substantive claim against Cozen other than wrongful disclosure of the mediation statement and it alleges no harm other than the impact on Query's fee award, which is barred

by collateral estoppel, and the harm from disclosure of Mintz's so-called proprietary information, which claim is barred by lack of standing.

3. The Court's Jurisdiction Is Not Properly Invoked by a Party Whose Claim Is Barred by Collateral Estoppel, Res Judicata or the Lack of Standing

The subject matter jurisdiction of the circuit court has been described in many different ways by the Florida Supreme Court and the five District Courts of Appeal. In Streicher v. U.S. Bank Nat'l Assn., 2016 WL 1028359 (S.D. Fla. 2016), the court considered and concluded that standing goes to the jurisdiction of the court. The opinion identifies a number of apparently conflicting decisions on subject matter jurisdiction, and then conducts an analysis of the Florida Supreme Court decision in Lovett v. Lovett, 112 So.2d 768 (Fla. 1927). Lovett contains a comprehensive analysis of subject matter jurisdiction. Based on that analysis, the court in Streicher, was able to harmonize many of the subject matter jurisdiction cases that at first reading seem in conflict. For example, in Krivanek v. Take Back Tampa Political Committee, 625 So.2d 840 (Fla. 1993), the Florida Supreme Court stated lack of standing is a waivable affirmative defense. Five and a half weeks later, in Rogers & Ford Const. Corp. v. Carlandia Corp., 626 So.2d 1350, 1352 (Fla. 1993), the Florida Supreme Court stated:

> "The determination of standing to sue concerns a court's exercise of jurisdiction to hear and decide the cause pled by a participant party."

In Streicher, this apparent conflict is harmonized by the pronouncements in Lovett. In Lovett, at 775, 76, the Florida Supreme Court explains that there are at least four different kinds of subject matter jurisdiction. First, subject matter jurisdiction means does the court have the jurisdictional power to adjudicate the class of case to which such case belongs. That jurisdiction is never waivable. A second species of subject matter jurisdiction, sometimes called "case jurisdiction" requires that the court's jurisdiction has been properly invoked, by having before it the necessary parties with standing. "[o]nly persons who have standing can participate in a judicial proceeding." Byron v. Gallagher, 609 So.2d 24, 26 (Fla. 1992). That jurisdiction may or may not be waivable. A third species of subject matter jurisdiction is the requirement of a pleading or other proper document to invoke jurisdiction. And in the case of actions in rem, there is no subject matter jurisdiction unless the court has judicial power over the res, a fourth category of subject matter jurisdiction. These pronouncements in Lovett are still the law in Florida today.

Although the court below has jurisdiction of the class of case to which this case belongs (an action at law for damages in excess of $15,000), the

court's jurisdiction has not been properly invoked by a proper party to bring the claim (case jurisdiction). As to Mintz's claims to relitigate the amount of Query's reasonable attorneys' fees and costs, that claim was finally determined by the federal court and is merged into the Final Judgment. Thus, neither Mintz nor Query are parties who can bring that claim before any court. In the absence of a party who can bring a claim, the court's subject matter jurisdiction is not properly invoked. As the 3rd DCA recognized in Carnival v. Middleton, 941 So.2d 421 (2006), the trial court was "without jurisdiction to entertain issues already disposed of in federal court." Middleton, at 424. See also, E.I. DuPont Neumours & Co. v. Melvin Piedmont Nursery, 971 So.2d 897 (Fla. 3rd DCA 2007) (Writ of Prohibition issued to the Circuit Court based on collateral estoppel effect of prior federal judgment.)

Likewise, as to Mintz's claims made in his own right under Fla. Stat. §44.406(1), he has no standing to bring those claims. Since Mintz is not a proper party to bring those claims before the trial court, the trial court's subject matter jurisdiction is not properly invoked.

> "What is relevant here is that the Florida Supreme Court has said that "the doctrine of standing certainly exists in Florida." Kuhnlein, 646 So. 2d at 720, and that it "concerns a court's exercise of jurisdiction." Rogers & Ford, 626 So.2d at 1352. Even if standing does not affect *subject-matter* jurisdiction under Florida law, at the very

> least standing is part of what some courts call "case jurisdiction" and what the *Lovett* court referred to as jurisdiction over the subject matter of the cause.
>
> . . .
>
> Thus, regardless of whether standing is part of subject-matter jurisdiction or case jurisdiction, standing is jurisdictional within the meaning of Rule 1.420

Streicher, supra, "Standing is a threshold determination necessary for the maintenance of all actions, including class actions." Ferreiro v. Phila. Indemn. Ins. Co., 928 So.2d 374, 378 (Fla. 3rd DCA 2006). Standing has been equated with jurisdiction of the subject matter of litigation. . . ." Askew v. Hold the Bulkhead – Save Our Bays, Inc., 269 So.2d 696, 698 (Fla. 2nd DCA 1972). See also, Silver Star Citizen Committee v. City Council of Orlando, 194 So.2d 681 (Fla. 4th DCA 1967) (when the record shows no right of the petitioner to bring suit, the circuit court is left with no jurisdiction over the subject matter).

In the case below, the court was presented with a motion to dismiss for lack of subject matter jurisdiction by Cozen.[9] On the record of the hearing on the motion, Lexington adopted and joined in the motion. The motion was denied by order dated August 30, 2018.[10]

[9] R. at 203.
[10] R. 214.

By denying the motion to dismiss for lack of jurisdiction, the court departed from the essential requirements of the law and confirmed its intention to proceed with the case despite its lack of "case jurisdiction." The primary purposes of collateral estoppel is to prevent the relitigation of claims. The primary purposed of standing is to prevent persons with no interest in an issue from initiating and invoking a court's jurisdiction. A plenary appeal can never adequately supply a remedy for litigating a claim in which the court's jurisdiction was not properly invoked. The remedy of collateral estoppel can never achieve its purposes of avoiding relitigation of a matter already decided if the defendant must wait until the relitigation is concluded to stop the court's exercise of jurisdiction that does not exist. Requiring a party to relitigate in the state court issues already decided by a federal court constitutes irreparable harm. In Re SDDS, Inc., 97 F.3d 1030 (8th Cir. 1976), citing, Daewoo Elecs. v Western Auto Supply Co., 975 F.2d 474 (8th Cir. 1992). In Florida, the risk of inconsistent judgments is a sufficient ground to enjoin a later filed suit, under the rule of "priority," even where the earlier suit has not yet reached a final judgment. Inphynet Contracting Services, Inc. v. Matthews, 196 So.3d 449 (Fla. 4th DCA 2016). The rationale and purpose of the priority rule is "the avoidance of wasting judicial resources and duplicative and unnecessary proceedings and the risk of inconsistent

judgments . . . ." Inphynet, supra, at 464, citing Robeson v. Melton, 52 So.3d 676 (Fla. 4th DCA 2009). The Inphynet case found that the pendency of a later filed case raising the same or similar issues creates the risk of inconsistent judgments which establish "the potential for irreparable harm that justifies certiorari review of the order denying a stay of the entire proceeding. Inphynet, supra at 463. If the mere pendency of a prior suit, that has not yet reached a judgment, creates a risk that a later filed suit will result in an inconsistent judgment, it is certain that a later filed suit in the state court that collaterally attacks a prior judgment already entered on the exact issue decided by the federal court surely must also present a sufficient risk of irreparable harm that justifies interlocutory review by certiorari.

Furthermore, in this case, the parties had a court approved stipulation that the federal court would determine the amount of Query's reasonable attorneys' fees. Waiting for a plenary appeal to enforce the collateral estoppel effect of the federal judgment denies Lexington and Cozen the benefit of the stipulation and no remedy exists to compensate Lexington and Cozen for the needless and vexatious duplicative litigation.

4. Prohibition Is the Right Remedy Once Collateral Estoppel, Res Judicata or Lack of Standing Appear in the Record Without Factual Dispute, and the Court Denies a Motion to Dismiss for Lack of Subject Matter Jurisdiction

Mintz devotes much of its merits argument to the idea that his action falls within the class of cases over which the Circuit Court has jurisdiction under Fla. Const., Article V. But Mintz ignores the species of subject matter jurisdiction known as case jurisdiction that was recognized in this Court's decision in Lovett v. Lovett, 112 So.2d 768, at 775-76 (Fla. 1927). As explained in Section 3, supra, collateral estoppel, res judicata, and lack of standing all defeat case jurisdiction. The trial court was not denied the right to decide the collateral estoppel issue. The claim preclusion and standing defenses appeared on the face of the complaint and were argued to the court. The trial judge believed he had jurisdiction and denied the motion to dismiss for lack of subject matter jurisdiction.

Petitioner relies on Mandico v. Taos Const., Inc., 605 So.2d 850, 854 (Fla. 1992) for the proposition that "circuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which clearly and specially appears so to be." Mandico involved a general contractor's claim of immunity under Section 440.11(1) of the Worker's Compensation Law. The Fourth District certified the questions of immunity, and whether prohibition would lie to prevent the trial court from

proceeding with the case if immunity was present. The Supreme Court held that based on the facts assumed in the certified question, there would be immunity, but that prohibition would not lie to enforce that immunity because in most cases the existence of the immunity would depend upon controverted facts. Recognizing the dilemma this would create for contractor's seeking the immunity to which they were entitled, the Supreme Court, in that very opinion, amended Fla. R.App. P. 1.930(a)(3)(C) to add a subsection (vi) allowing interlocutory appeal of orders determining a party is not entitled to Worker's Compensation immunity.

This is not a case where jurisdiction depends on controverted facts. In this case, the Opinion of the Third District expressly recites that all ten counts of the operative complaint seek to re-determine the amount of attorney's fees Query was entitled to under Fla. Stat. § 626.9373. Thus, the Opinion is confined to a situation where the trial court seeks to re-decide a fact question that by statute was required to be decided by the federal court having jurisdiction of the insurance claim. There is no jurisdictional basis for a Florida circuit court to revise a factual determination made in a Final Judgment issued by a U.S. District Court. Collateral estoppel was intended to prevent re-litigation of factual issues and the forum shopping practiced by Petitioner in this case. Rather than objecting in the federal court to the filing

of his Mediation Demand, moving to seal or strike the Mediation Demand, or seeking a re-determination of fees by a judge not contaminated by knowledge of the Mediation Demand, Mintz sought a second bite at the apple in a different court, presumably one in which Mintz believed it could achieve a higher award. Mintz does not cite any case that demonstrates prohibition is unavailable to prevent a court from re-litigating an issue already decided in a final unappealable judgment of a U.S. District Court.

Furthermore, the nature of a defendant's immunity under Fla. Stat. § 440.11(1983), that was at issue in Mandico is very different in character from the lack of case jurisdiction caused by the collateral estoppel, res judicata and lack of standing that appeared on the face of the State Court Complaint. The language of § 440.11 does not mention immunity from suit. It speaks instead of immunity from liability. That suggests strongly that the legislature recognized that suits might be brought against employers by employees covered by a workman's compensation policy, but that the employer's liability would be limited to the exclusive remedy provided by the act. In the Mandico case, the court receded from its holding in Winn-Lovett Tampa v. Murphree, 73 So.2d 287 (Fla. 1994), that a trial court was without jurisdiction of a minor's suit because his remedy was limited by Chapter 440. In Mandico, the court held that the circuit court has subject matter jurisdiction

over a person's personal injury claim and whether the exclusive remedy limitation under Chapter 440 should apply is to be determined in the litigation process. But that situation is very different from the situation in this case. Here, the complaint on its face shows that Mintz was asking the State Court to redetermine Query's attorneys' fees that were already adjudicated in the Federal Action, and that Mintz was bringing claims in his own right under § 40.406 that he had no standing to bring. There is nearly one hundred years of jurisprudence in this state to the effect that a court lacks case jurisdiction to collaterally attack a prior judgment or to proceed on behalf of a plaintiff who lacks standing.

Furthermore, English v. McCrary, 348 So. 2d 293 (Fla. 1977) relied upon by Petitioners, clearly identifies an exception to the broad grant of jurisdiction to the circuit courts, that being,

> "that which is clearly vested in other courts or tribunals, or which is clearly outside of and beyond the jurisdiction vested in such circuit courts by the Constitution and statutes enacted thereto."

English v. McCrary, at 297, citing Chapman v. Reddick, 41 Fla. 120 (1899) and Curtis v. Albritton, 132 So. 677 (1931). The statute which created the right to attorneys' fees requires that those fees be assessed by the trial court in which the insured's action against the insurer was filed, and that the

fees be included in the judgment. Fla. Stat. § 626.9373. To be sure, if Query's insurance claim had not been removed to federal court, the circuit court could have resolved the insurance claim and the statutory claim for fees. But once the insurance claim was decided by the federal court, by statute, only the federal court could decide the right to statutory fees. Once those fees were awarded in the unappealed Final Judgment, collateral estoppel precludes any court, state or federal, from re-determining the amount of those fees.

Furthermore, in Lovett v. Lovett, 112 So.2d 768 (Fla. 1927), the Supreme Court held that parties with standing are a necessary element to invoke a court's case jurisdiction. "[O]nly persons who have standing can participate in a judicial proceeding." Byron v. Gallagher, 609 So.2d 24, 26 (Fla. 1992). Once Query's claim for attorneys' fees was merged into her Final Judgment, Query, and Mintz claiming through Query, lost any standing to bring a case to re-litigate Query's attorneys' fees. Mintz may believe it was damaged in its own right by publication of the mediation demand, but Fla. Stat. § 44.406 only grants standing to sue for violations of the Mediation Privilege to the parties and not their attorneys. Thus, the Circuit Court did not have before it persons with standing to invoke the court's jurisdiction to re-litigate Query's fees or award any damages whatsoever to Mintz. Mintz

cites no Florida case holding that a circuit court has jurisdiction to re-litigate the amount of fees awarded in a final judgment issued by a federal court. Likewise, Mintz cites no case granting standing to counsel, as opposed to parties, to recover any remedy under Fla. Stat. § 44.406. Likewise, there is no indication that the legislature intended to create a shroud of secrecy around how lawyers construct their settlement or mediation demands. That would open the flood gates to lawyers suing each other for copying or using allegedly proprietary techniques.

Petitioner asserts conflict with Newberry Square Florida Laundromat, LLC v. Joe's Coin Laundry and Drycleaners, Inc., 296 So.3d 584 (Fla. 1st DCA 2020) which stands for the unremarkable proposition that on a motion to dismiss for failure to state a claim, the court is confined to the four corners of the complaint and leave to amend shall be freely granted. These points have nothing to do with the instant case and certainly do not conflict with the Opinion of the Third District.

State v. Jackson, 306 So.3d 936 (Fla. 2020), holds only that prohibition cannot be used affirmatively to reinstate a vacated death sentence. Phillip Morris USA, Inc. v. Douglas, 110 So.3d 419 (Fla. 2013), does not establish that collateral estoppel issues can be adequately addressed on a plenary appeal such that interlocutory review is not warranted. That issue was not

involved or even discussed in that case. Hurst v. State, 88 So.3d 149 (Table), Fla. 2012) simply repeats the rule that prohibition may only be granted when it is shown that a lower court is without jurisdiction or attempting to act in excess of jurisdiction. Public Service Commission v. Fuller, 551 So.2d 1210 (Fla. 1989) strongly supports the District court's decision in the instant case. Fuller holds that an operating agreement between two utilities is merged into an order of the public service commission that approved the agreement, and therefore prohibition would lie to prohibit a circuit judge from proceeding with litigation between the utilities over the agreement because the Public Service Commission has exclusive jurisdiction to interpret the agreement as it was merged into the commission order approving it. Fuller illustrates that even where the circuit court has jurisdiction over the class of case (a breach of contract action), if case jurisdiction belonged to the Public Service Commission, prohibition would lie to prevent the circuit court from proceeding further.

Mintz cites Topps v. State, 865 So. 2d. 1253 (Fla. 2004) for two propositions: (1) a superior court cannot use prohibition to divest the circuit court of its jurisdiction; and (2) denials of extraordinary writs do not constitute a determination on the merits for purposes of collateral estoppel. Topps certainly does not address the first point. There was no suggestion in Topps

that prohibition divests a court of jurisdiction, nor is there any argument to that effect in this case. Prohibition cannot take away jurisdiction a court has, it only prevents a court from exercising jurisdiction it does not have due to the operation of what Topps refers to as "procedural bars" such as res judicata and collateral estoppel. Nor did Topps hold that denials of extraordinary writs do not constitute determinations on the merits. Instead, Topps decides prospectively that all unelaborated orders denying relief required in petitions for extraordinary writs will not be deemed on the merits unless the order indicates otherwise such as by indicating the decision is on the merits or with prejudice. Topps has nothing to do with this case. The District Court order did not deny, it granted, prohibition and the order was not unelaborated.

Mintz cites The City of Olsmar v. State, 790 So.2d 1042 (Fla. 2001), for the proposition that collateral estoppel does not apply when there is no final judgment in a still pending case. But here, there was a final judgment in the Federal Action. It was not pending. It was closed and the time to appeal had expired.

Mintz's citation to State ex rel Chiles v. Public Employee's Relations Commission, 630 So.2d 1093 (Fla. 1994), is equally unavailing. The only reference to prohibition in that case is that the writ can only be issued to a

court. The writ in this case was issued to a court. Mintz's citation to Harris v. McCauley, 297 So.2d 825 (Fla. 1974), is also in opposite. Harris points out that the circuit court has the inherent power to appoint acting prosecutors so prohibition does not lie because the court was acting within its jurisdiction. State ex rel R.E. Motor Lines, Inc. v. Boyd, 114 So.2d 169 (Fla. 1959), is simply another example of a case holding that prohibition cannot be used to undo the issuance by the public service commission of a certificate granted to a transportation company. This case does not involve revoking certificates. The writ was issued to a court not the public service commission and it seeks only to prevent the court from exceeding its "case jurisdiction." Finally, State ex rel Foral City Phosphate Co. v. Hocker, 33 Fla. 283, 14 So. 586 (Fla. 1894), stands only for the proposition that prohibition does not lie to challenge in personam jurisdiction or venue because they do not go to the courts subject matter jurisdiction.

5. The Writ of Certiorari was Improvidently issued –There is no Express Conflict

Respectfully, certiorari review based on conflict jurisdiction is limited to conflict that is expressed in words within the four corners of the Opinion to be reviewed. Since the April 1, 1980 amendment of Fla. Const., art V, Section 3(b)(3), certiorari review based on conflict jurisdiction has been

limited to a decision of the district courts of appeal that "expressly and directly" conflicts with a decision of another district court of appeal or of the Supreme Court "on the same question of law. . . . ." Expressly has been interpreted by this Court to mean "to represent in words" and "to give expression to." Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). Both before and after April 1, 1980, there are decisions of the Supreme Court which recognize that the conflict necessary to support discretionary certiorari review must be expressed within the four corners of the opinion to be reviewed and that material in the record or statements in dissenting or concurring opinions do not create a conflict because such material and statements are not "expressed" as the opinion of the court. See, e.g. Tedder v. State, 12 So.3d 197 (Fla. 2009); Burns v. State, 676 So.2d 1366 (Fla. 1996); Kennedy v. Kennedy, 641 So.2d 408 (Fla. 1994); Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Seaboard Air Line Railroad Company v. Branham, 104 So.2d 356 (Fla. 1958); see also, Florida Greyhound Owners & Breeders Assn. v. West Flagler Associates, Ltd., 347 So.2d 408 (Fla. 1977), *concurring Opinion.* There is nothing in the Opinion of the Third District that expressly and directly conflicts with any point of law contained in any of the decisions cited by Petitioner.

The Third DCA Opinion acknowledges that Lexington and Cozen raised three arguments in support of lack of subject matter jurisdiction:

(1) Litigation Immunity

(2) Lack of Standing

(3) Exclusive Jurisdiction in the Federal Action to Adjudicate Query's Fee Claim

But the Opinion only discusses the third argument.

As to that argument, the Opinion recites:

> "When we look beyond Mintz's characterization of its lawsuit and focus on the nature and substance of Mintz's claims, it is clear that Mintz essentially is seeking, in each of the ten counts of its second amended complaint, additional fees for Mintz's representation of Query in the federal action –fees that Mintz sought in the motion, but did not obtain in the federal court's Final Judgment. Irrespective of the labels Mintz places on the ten counts in its second amended complaint, we view the gravemen of Mintz's state court suit as seeking to close the gap between Query's $828,056 fee demand filed in federal court and the considerably lower award adjudicated in the federal court's Final

Judgment. In sum, Mintz seeks to relitigate in state court a fee claim that the federal court determined with finality."[11]

Mintz does not cite to any case that directly and expressly holds that prohibition cannot be used to prevent the relitigation described in the Opinion. Instead, Mintz takes issue with the Court of Appeal's characterization of the ten counts in his complaint. But this Court does not look to the record on appeal to find a conflict. Respectfully, it must confine itself to the words expressed between the four corners of the Opinion.

If the court accepts Mintz's invitation to review the record on appeal to find conflict, it will see that Mintz did claim that he suffered damages because his allegedly proprietary formula for filing a mediation demand was now filed in the Federal Action. But the Court will also see that Cozen, both in its petition and its reply brief, pointed out that Mintz had no standing under § 40.406 to seek any remedies for a violation of § 40.405, whether they be damages, injunctive or declaratory relief. This Court can of course sustain the Third DCA's decision based on the standing arguments which were supported by the record, but respectfully, this Court should not find conflict jurisdiction based on anything other than what was expressed in the Opinion.

[11] Opinion, at 9-10 (R. 916-17).

It may be that the District Court considered and rejected Mintz's claim in his own right as so patently ridiculous or so clearly procedurally barred by lack of standing that further discussion was not necessary or the Court could have construed the nature and substance of Mintz's own claims just as they articulated in the Opinion. But, what is crystal clear is that the words in the Opinion do not expressly and directly conflict with any decision of the Supreme Court or the decision of any other District Court of Appeal.

CONCLUSION

WHEREFORE, Cozen respectfully suggests that the Order granting review by certiorari was improvidently issued and should be withdrawn. Alternatively, Cozen requests the decision under review be affirmed, or that the case be remanded with instructions to issue a writ of certiorari quashing the trial court's order denying Cozen's motion to dismiss for lack of subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210(a), Fla. R. App. P., undersigned counsel hereby certifies that this brief is submitted in Times New Roman 14-point font. We certify the brief contains 9,265 words excluding the Table of Authorities and Table of Contents and otherwise complies with the Rules pertaining merits briefs.

By: /s/ Charles C. Kline
Charles C. Kline

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Court's e-Filing Portal and in accordance with the Florida Rules of Civil Procedure on this 8th day of November, 2021 on all Counsel of Record identified on the attached Service List:

By: /s/ Charles C. Kline
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