

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO: SC20-1225
L.T. No: 3D18-1976 & 3D18-1975

MINTZ TRUPPMAN, P.A.,

Petitioner,

v.

COZEN O'CONNOR, PLC, et al.,

Respondents.

PETITIONER'S INITIAL BRIEF ON THE MERITS

TIMOTHY H. CRUTCHFIELD, ESQ.
COUNSEL FOR PETITIONER
Mintz Truppman, P.A.
1700 Sans Souci Boulevard
North Miami, Florida 33181
T: 305-893-5506
F: 305-893-5511
tim@mintztruppman.com

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

PREFACE.....1

STATEMENT OF THE CASE AND FACTS.....1

SUMMARY OF THE ARGUMENT.....7

ARGUMENT.....9

I. THE DISTRICT COURT ERRED AS A MATTER.....9
OF LAW BY ISSUING A WRIT OF PROHIBITION
BASED ON COLLATERAL ESTOPPEL

A. STANDARD OF REVIEW.....9

B. THE DISTRICT COURT ERRED BY USING.....9
PROHIBITION TO USURP THE CIRCUIT
COURT’S AUTHORITY TO RULE ON
COLLATERAL ESTOPPEL

1. THE DISTRICT COURT ERRED BY HOLDING.....10
THE CIRCUIT COURT DID NOT HAVE
JURISDICTION

a. The Action was Within the Jurisdiction.....10
Vested in the Circuit Court

b. A Collateral Estoppel Defense Does Not.....13
Divest the Circuit Court of its Jurisdiction
to Determine the Matter

2. THE DISTRICT COURT ERRED.....19
BY USING PROHIBITION TO REVOKE
PREVIOUSLY ENTERED ORDERS

3.	THE DISTRICT COURT ERRED.....	20
	BY USING PROHIBITION WHERE	
	A PLENARY APPEAL WOULD	
	PROVIDE AN ADEQUATE REMEDY	
C.	THE FACTS ESTABLISH THAT THE DISTRICT.....	22
	COURT ERRED BY HOLDING COLLATERAL	
	BARS THE ENTIRE ACTION	
II.	CONSIDERATION OF THE DEFENDANTS' PETITIONS.....	25
	FOR CERTIORARI	
	CONCLUSION.....	27
	CERTIFICATIONS.....	28

TABLE OF AUTHORITIES

Cases

<i>Allstate Ins. Co. v. Kaklamanos</i> , 843 So. 2d 885 (Fla. 2003).....	26
<i>Armstrong v. Harris</i> , 773 So. 2d 7 (Fla. 2000).....	9
<i>Baxas Howell Mobley, Inc. v. BP Oil Co.</i> , 630 So. 2d 207 (Fla. 3d DCA 1993)	22
<i>Boca Burger, Inc. v. Forum</i> , 912 So. 2d 561 (Fla. 2005).....	12
<i>Brevard County v Morehead</i> , 181 So. 3d 1229 (Fla. 5th DCA 2015)	9
<i>Carnival Corp. v. Middleton</i> , 941 So. 2d 421 (Fla. 3d DCA 2006)	5, 7, 20
<i>Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.</i> , 104 So. 3d 344 (Fla. 2012).....	17
<i>City of Oldsmar v State</i> , 790 So. 2d 1042.....	21
<i>Cozen O'Connor, PLC v. Mintz Truppman, P.A.</i> , 306 So. 3d 259 (Fla. 3d DCA 2020)	passim
<i>Cunningham v. Standard Guar. Ins. Co.</i> , 630 So. 2d 179 (Fla. 1994).....	14
<i>Curtis v. Albritton</i> , 132 So. 677 (Fla. 1931).....	18
<i>DeWitt v Duce</i> , 408 So. 2d 216 (Fla. 1981).....	21
<i>Dicks v. Colonial Fin. Corp.</i> , 85 So. 2d 874 (Fla. 1956).....	15
<i>E.I. DuPont de Nemours & Co., Inc. v. Melvin Piedmont Nursery</i> , 971 So. 2d 897 (Fla. 3d DCA 2007)	5, 7
<i>English v. McCrary</i> , 348 So. 2d 293 (Fla. 1977).....	passim
<i>Garnac Grain Co., Inc. v. Mejia</i> , 962 So. 2d 408 (Fla. 4th DCA 2007)	15
<i>Gen. Dynamics Corp. v. Paulucci</i> , 914 So. 2d 507 (Fla. 5th DCA 2005)	14
<i>Hurst v. State</i> , 88 So. 3d 149 (Fla. 2012).....	10

<i>Jacobs Wind Elec. Co., Inc. v. Dep't of Transp.</i> , 626 So. 2d 1333 (Fla. 1993).....	12
<i>Judkins v. Walton County</i> , 128 So. 3d 62 (Fla. 1st DCA 2013).....	14
<i>Kalo Brick & Tile Co.</i> , 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981)	12
<i>Malone v. Meres</i> , 91 Fla. 709, 109 So. 677 (1926).....	14
<i>Mandico v. Taos Const., Inc.</i> , 605 So. 2d 850 (Fla. 1992).....	<i>passim</i>
<i>Manzini v. Linton</i> , 77 So. 3d 647 (Fla. 2011).....	20
<i>Norwich v. Glob. Fin. Associates, LLC</i> , 882 So. 2d 535 (Fla. 4th DCA 2004)	15
<i>O'Connor v. Florida Dept. of Corr.</i> , 984 So. 2d 519 (Fla. 2008).....	10
<i>Philip Morris USA, Inc. V. Douglas</i> , 110 So. 3d 419 (Fla. 2013).....	21
<i>Pub. Serv. Com'n v. Fuller</i> , 551 So. 2d 1210 (Fla. 1989).....	12
<i>Savoie v. State</i> , 422 So. 2d 308 (Fla. 1982).....	26
<i>Smith v. Glisson</i> , 468 So. 2d 394 (Fla. 3d DCA 1985)	21
<i>State ex rel. Atlanta Paper Co. v. Herin</i> , 80 So. 2d 331 (Fla. 1955).....	18
<i>State ex rel. B. F. Goodrich Co. et al. v. Trammell</i> , et al., 140 Fla. 500, 192 So. 175 (1939)	11
<i>State ex rel. Chiles v. Pub. Employees Relations Com'n</i> , 630 So. 2d 1093 (Fla. 1994).....	10
<i>State ex rel. Eli Lilly & Co. v. Shields</i> , 83 So. 2d 271 (Fla. 1955).....	17, 18
<i>State ex rel. Harris v. McCauley</i> , 297 So.2d 825 (Fla. 1974).....	20
<i>State ex rel. R. C. Motor Lines, Inc. v. Boyd</i> , et al., 114 So.2d 169 (Fla. 1959).....	20
<i>State ex rel. Rheinauer v. Malone</i> , 40 Fla. 129, 23 So. 575 (1898).....	21
<i>State ex rel. Shailer v. Booher</i> , 241 So.2d 720 (Fla. 4th DCA, 1970)	20

<i>State v. Hocker</i> , 14 So. 586 (Fla. 1894).....	10
<i>State v. Jackson</i> , 306 So. 3d 936 (Fla. 2020).....	7, 10
<i>Topps v. State</i> , 865 So. 2d 1253 (Fla. 2004).....	15, 21
<i>Trepal v. State</i> , 754 So. 2d 702 (Fla. 2000).....	26
 Statutes	
U.S. Const. art. VI, cl. 2	12
§44.403(1), Fla. Stat.	2
§44.405, Fla. Stat.	3
§44.406, Fla. Stat.	12
 Rules	
Florida Rule of Appellate Procedure 9.120	17, 28
Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i).....	18
Florida Rule of Civil Procedure 1.110(d)	14
Florida Rule of Civil Procedure 1.120.....	23
Florida Rule of Civil Procedure 1.140(h)	15
 Other Authorities	
77 A.L.R. 245-.....	11

PREFACE

This Court has for review the Third District Court of Appeal's decision in *Cozen O'Connor, PLC v. Mintz Truppman, P.A.*, 306 So. 3d 259 (Fla. 3d DCA 2020), *reh'g denied* (July 17, 2020), *review granted*, SC20-1225, 2021 WL 1604010 (Fla. Apr. 26, 2021), based on express, direct conflict with *Mandico v. Taos Const., Inc.*, 605 So. 2d 850 (Fla. 1992), and *English v. McCrary*, 348 So. 2d 293 (Fla. 1977). Because the District Court misapplied the decisions of this Court, its decision should, respectfully, be quashed, and the case remanded for further proceedings.

STATEMENT OF THE CASE AND FACTS

Mintz Truppman, PA, ("Mintz") previously represented a client in federal court litigation in a first-party insurance claim against Lexington Insurance Company ("Lexington). [R.909.] Cozen O'Connor, PLC and John Dickenson (together, "Cozen") represented Lexington in that litigation. [R. 909.] The parties reached a settlement which included Lexington's agreement to pay Mintz's fees, with the amount to be determined by the court. [R. 909.]

Mintz filed a motion seeking a determination of the amount of fees to be awarded. [R.910.] On Lexington's behalf, Cozen filed a response that included disclosure of Mintz's mediation demand letter which, as Lexington

and Cozen now acknowledge, constituted a “mediation communication” as defined by [section 44.403\(1\), Florida Statutes](#). [R.911.] Two weeks later, Mintz filed the underlying suit in state court against Lexington and Cozen. [R. 912.] (Lexington and Cozen will be referred to jointly as “the Defendants.”)

Mintz’s lawsuit asserted a claim pursuant to the Florida Mediation Confidentiality and Privilege Act (“the Act”), sections 44.401-406, [Florida Statutes](#). [Section 44.406\(1\)](#) of the Act provides:

Any mediation participant who knowingly and willfully discloses a mediation communication in violation of [s. 44.405](#) shall, upon application of 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.

[R.913.] The complaint also asserted a bad faith claim against Lexington which was not based on the Defendants’ violation of the mediation privilege.

[R.290-293.] Subsequently, the federal court entered its final judgment establishing the amount of fees to be paid for Mintz’s services in that action.

[R. 912.]

The operative complaint at issue in this proceeding is Mintz's Second Amended Complaint. In addition to asserting a bad faith claim against Lexington based on matters other than the violation of the mediation privilege and claims against the Defendants arising for their pre-suit violations of the mediation privilege, this complaint asserts Lexington violated the mediation privilege once again on January 17, 2017, by filing a confidential mediation communication as an exhibit to its motion to dismiss Mintz's initial complaint. [R.147] The counts in the operative complaint are as follows: **declaratory relief** (Count I); breach of mediation contract based on disclosure of confidential information during federal litigation (Count II); breach of mediation contract based on disclosure of confidential information on January 17, 2017 (Count III); conspiracy to violate the Act (Count IV); violation of section 44.405 of the Act (Count V); **injunctive relief** (Count VI); bad faith/unfair claims practices (Count VII); and, fraud in the inducement (Counts VIII, IX and X). [R. 437-403.]

Count III is based entirely on the allegation that Lexington breached the mediation privilege on January 17, 2017. [R.443-45] Count VI seeks injunctive relief based in part on the assertion that:

The Defendants have shown that they have no intention of complying with the statutorily mandated confidentiality of mediation communications set for in [the Act] by intentionally violating [Fla. Stat. § 44.405](#) on two different occasions, October

21, 2016 and January 17, 2017, nor doing anything to remedy their ongoing violations of Florida's mediation confidentiality.

[R.450.]

Lexington and Cozen filed motions to dismiss the complaint. [R. 914.] Collateral estoppel was not among the grounds asserted for dismissal in these motions.¹ [R. 203-13, 492-512, 539-60.] The trial court entered orders denying each of the motions to dismiss. [R. 914.] Lexington and Cozen then filed petitions for certiorari and prohibition with the Third District Court of Appeal.

The District Court issued a decision stating it agreed with the Defendants' position that the circuit court lacked subject matter jurisdiction. [R.915.] After concluding collateral estoppel bars the entire action, the court held:

Mintz is **collaterally estopped** from pursuing its lawsuit in state court, because this suit's claims – damages for additional fees for representing Query in her property damage claim against Lexington – have already been adjudicated by the federal court. Prohibition therefore lies because, **under the unique facts and circumstances of this case**, the circuit court lacks jurisdiction to adjudicate the claims asserted in Mintz's second amended complaint. We grant Lexington and Cozen's petitions seeking prohibition, direct the trial court to dismiss, with prejudice, Mintz's second amended complaint, and dismiss as moot the petitions to the extent they seek certiorari relief.

¹ Collateral estoppel also was not raised in the affirmative defenses that the Defendants filed to the previous version of the complaint. [R.409-12, 421-23.]

[919-20 (emphasis added).] The District Court thus granted prohibition based on its conclusion regarding how the doctrine of collateral estoppel should be applied to “the unique facts and circumstances of this case.”

The District Court cited and followed its own precedent where it had granted prohibition based on collateral estoppel in *Carnival Corp. v. Middleton*, 941 So. 2d 421 (Fla. 3d DCA 2006), and *E.I. DuPont de Nemours & Co., Inc. v. Melvin Piedmont Nursery*, 971 So. 2d 897, 898 (Fla. 3d DCA 2007).

Mintz filed a notice to invoke this Court’s conflict jurisdiction. As explained in Mintz’s Jurisdictional Brief, the Third District’s decision in this case (and its decisions *Carnival Corp.* and *Melvin Piedmont Nursery*) conflict with decisions of this Court holding:

- 1) A writ of prohibition “cannot be used to revoke an order already entered.” *English v. McCrary*, 348 So. 2d 293, 297 (Fla. 1977)
- 2) “Prohibition lies to prevent an inferior tribunal from acting in excess of jurisdiction **but not to prevent an erroneous exercise of jurisdiction**. In this state, circuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which *clearly* and *speciallly* appears so to be.” *Mandico v. Taos Const., Inc.*, 605 So. 2d 850, 854 (Fla.

1992) (bold emphasis added) (quoting *English v. McCrary*, 348 So. 2d 293, 297 (Fla. 1977)).

After the Defendants filed their jurisdictional briefs, this Court entered an order accepting jurisdiction.

SUMMARY OF ARGUMENT

Consistent with its prior decisions in *Carnival Corporation v. Middleton*, 941 So. 2d 421 (Fla. 3d DCA 2006), and *E.I. DuPont de Nemours & Co., Inc. v. Melvin Piedmont Nursery*, 971 So. 2d 897, 899 (Fla. 3d DCA 2007), the District Court issued a decision in this case that expands its use the writ of prohibition far beyond the scope allowed by this Court's decisions.

The District Court's repeated reliance on collateral estoppel as grounds for prohibition conflicts with this Court's controlling precedent. Prohibition is an extraordinary writ "meant to be very narrow in scope, to be employed with great caution and utilized only in emergencies." *English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977). **"Prohibition may only be granted when it is shown that a lower court is without jurisdiction or attempting to act in excess of jurisdiction."** *State v. Jackson*, 306 So. 3d 936, 945 (Fla. 2020) (emphasis in original) (quoting *McCrary*, 348 So. 2d at 296-97).

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 v. Taos Const., Inc.*, 605 So. 2d 850, 854 (Fla. 1992). The District court erred by granting prohibition where this action is within the jurisdiction vested in the circuit court. The circuit court's jurisdiction over the action gives it the authority to

rule on the issue of collateral estoppel. Since prohibition cannot be used “to prevent an erroneous exercise of jurisdiction,” *McCrary*, 348 So.2d at 297, the District Court could not use prohibition to prevent the circuit court from exercising its jurisdiction to rule on the issue of collateral estoppel.

Furthermore, prohibition “cannot be used to revoke an order already entered.” *English v. McCrary*, 348 So. 2d 293, 297 (Fla. 1977). The circuit court already entered its order denying dismissal. The District Court improperly revoked that order by granting prohibition “to direct the trial court to dismiss, with prejudice, Mintz's second amended complaint.” *Cozen O'Connor*, 306 So. 3d at 265.

“Prohibition will be invoked only in emergency cases to forestall an impending present injury where person seeking writ has no other appropriate and adequate legal remedy.” *English v. McCrary*, 348 So. 2d 293, 297 (Fla. 1977). The District Court also erred where there are other appropriate and adequate remedies for reviewing a circuit court’s ruling on collateral estoppel.

ARGUMENT

I. THE DISTRICT COURT ERRED BY USING PROHIBITION TO USURP THE CIRCUIT COURT'S AUTHORITY TO RULE ON COLLATERAL ESTOPPEL

A. STANDARD OF REVIEW

The District Court's order granting a writ of prohibition expressly and directly conflicts with opinions of this Court on the same question of law. Appeals involving a pure question of law are reviewed *de novo*. [Armstrong v. Harris](#), 773 So. 2d 7, 11 (Fla. 2000). This includes appeals from orders granting writs of prohibition. *E.g.*, [Brevard County v Morehead](#), 181 So. 3d 1229, 1232 (Fla. 5th DCA 2015).

B. THE DISTRICT COURT ERRED BY HOLDING IT CAN USE PROHIBITION TO REQUIRE THE CIRCUIT COURT TO DISMISS A CASE BASED ON COLLATERAL ESTOPPEL

The writ of prohibition is an extraordinary writ “that it is meant to be very narrow in scope, to be employed with great caution and utilized only in emergencies.” [English v. McCrary](#), 348 So. 2d 293, 296 (Fla. 1977). See also, [Mandico v. Taos Const., Inc.](#), 605 So. 2d 850, 853 (Fla. 1992). “Prohibition may only be granted when it is shown that a lower court is without jurisdiction or attempting to act in excess of jurisdiction.”

State v. Jackson, 306 So. 3d 936, 945 (Fla. 2020) (emphasis in original) (quoting *English v. McCrary*, 348 So. 2d 293, 296-97 (Fla. 1977)). “

1. THE DISTRICT COURT ERRED BY HOLDING THE CIRCUIT COURT DID NOT HAVE JURISDICTION

a. *The Action was Within the Jurisdiction Vested in the Circuit Court*

A writ of prohibition addresses only one thing: whether a court has the authority to act. It is well-established that “[p]rohibition may only be granted when it is shown that a lower court is without jurisdiction or attempting to act in excess of jurisdiction.” *McCrary*, 348 So.2d 293. This Court has reaffirmed and enforced this requirement numerous times. See, e.g. *Jackson*, 306 So. 3d at 945; *Hurst v. State*, 88 So. 3d 149 (Fla. 2012); *O’Connor v. Florida Dept. of Corr.*, 984 So. 2d 519 (Fla. 2008); *State ex rel. Chiles v. Pub. Employees Relations Com’n*, 630 So. 2d 1093, 1094 (Fla. 1994). Stated another way, “Prohibition lies where the inferior court either has no jurisdiction to entertain the cause, or, while doing so, it goes beyond its legitimate powers.” *State v. Hocker*, 14 So. 586, 588 (Fla. 1894).

While prohibition is used to prevent a court from acting outside its jurisdiction, it cannot be used to prevent the inferior court from exercising its jurisdiction erroneously. *Mandico*, 605 So. 2d at 854 (“Prohibition lies to

prevent an inferior tribunal from acting in excess of jurisdiction but not to prevent an erroneous exercise of jurisdiction.”) (quoting *McCrary*, 348 So.2d at 293). This is in accord with prohibition’s historical purpose which was to keep the “great variety of courts” “within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm.” *McCrary*, 348 So. 2d at 296 (quoting 77 A.L.R. 245-247 (quoting Bacon's Abridgment)).

In *McCrary*, this Court addressed how a circuit court’s jurisdiction is viewed in the context of determining whether prohibition can be used. Florida’s 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.” 348 So. 2d at 297. “[As] a general rule it might be said that nothing is outside the jurisdiction of a superior court of general jurisdiction except that which is clearly vested in other courts or tribunals, or is clearly outside of and beyond the jurisdiction vested in such circuit courts by the Constitution and the statutes enacted pursuant thereto.” *Id.*, (quoting *State ex rel. B. F. Goodrich Co. et al. v. Trammell et al.*, 140 Fla. 500, 192 So. 175 (1939)).

This case does not involve an attempt to conduct proceedings where another entity has “exclusive jurisdiction of the subject matter of [the] cause.”

E.g., *Pub. Serv. Com'n v. Fuller*, 551 So. 2d 1210, 1210-11 (Fla. 1989). Nor does this case involve an attempt by a state court to assert jurisdiction where Congress clearly intended to preempt a field of law. E.g., *Jacobs Wind Elec. Co., Inc. v. Dep't of Transp.*, 626 So. 2d 1333, 1335 (Fla. 1993) (citing U.S. Const. art. VI, cl. 2; *Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981)). See also, *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 568 (Fla. 2005). Rather, the instant case involves claims that either are the bread and butter of the circuit court or are within its purview by state statute.²

Addressing the civil remedies provided by the Mediation Confidentiality and Privilege Act, the Opinion notes: “Lexington and Cozen concede that, pursuant to the Act's express terms, a Florida circuit court would *generally* have subject matter jurisdiction to adjudicate such a claim. As [section 44.406\(1\)](#) provides, a mediation participant, upon application of a party to a court of competent jurisdiction, is subject to any of several remedies, including damages and attorney's fees.” *Cozen O'Connor*, 306 So. 3d at 263.

² The Mediation Confidentiality and Privilege Act provides civil remedies are available for violation of the act upon application “to a court of competent jurisdiction.” [§44.406, Fla. Stat.](#)

As established by this Court's extensive precedent on the issue, prohibition was improper as a matter of law since this case falls within the circuit court's jurisdiction. Nonetheless, based on its conclusion regarding the application of collateral estoppel to the facts of this case, the District Court granted prohibition and held "we agree with Lexington and Cozen that the lower court lacks the subject matter jurisdiction." [Cozen O'Connor, 306 So. 3d at 263.](#)

b. A Collateral Estoppel Defense Does Not Divest the Circuit Court of its Jurisdiction to Determine the Matter

The District Court's Opinion states: "We grant prohibition because, under the unique circumstances presented here, the circuit court lacks the subject matter jurisdiction to adjudicate Mintz's claims." [Cozen O'Connor, PLC v. Mintz Truppman, P.A., 306 So. 3d 259, 260 \(Fla. 3d DCA 2020\)](#). The court concluded that collateral estoppel bars Mintz's claims, and then held: "Prohibition therefore lies because, **under the unique facts and circumstances of this case**, the circuit court lacks jurisdiction to adjudicate the claims asserted in Mintz's second amended complaint." [Cozen O'Connor, PLC v. Mintz Truman, P.A., 306 So. 3d 259, 265 \(Fla. 3d DCA 2020\)](#) (emphasis added).

However, the doctrine of collateral estoppel has nothing to do with the circuit court's subject matter jurisdiction, and subject matter jurisdiction is not affected by the unique facts and circumstances of this case.

"[S]ubject-matter jurisdiction concerns the power of the trial court to deal with a class of cases to which a particular case belongs." *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994).

"Jurisdiction," in the strict meaning of the term, as applied to judicial officers and tribunals, means no more than the power lawfully existing to hear and determine a cause. It is the power lawfully conferred to deal with the general subject involved in the action. It does not depend upon the ultimate existence of a good cause of action in the plaintiff, in the particular case before the court. "It is the power to adjudge concerning the general question involved, and **is not dependent upon the state of facts which may appear in a particular case.**"

Id. at 181 (emphasis added) (quoting *Malone v. Meres*, 91 Fla. 709, 725, 109 So. 677, 683 (1926)) (citation omitted). Nonetheless, the District Court treated its conclusion that that collateral estoppel applied based on "the unique facts and circumstances of this case," as a ruling on the circuit court's subject matter jurisdiction.

Collateral estoppel and res judicata are affirmative defenses under the scope of *Florida Rule of Civil Procedure 1.110(d)*. Accordingly, they can be waived if not pled. *Judkins v. Walton County*, 128 So. 3d 62, 65 (Fla. 1st DCA 2013); *Gen. Dynamics Corp. v. Paulucci*, 914 So. 2d 507, 509–10 (Fla.

5th DCA 2005); *Garnac Grain Co., Inc. v. Mejia*, 962 So. 2d 408, 410–11 (Fla. 4th DCA 2007); *Norwich v. Glob. Fin. Associates, LLC*, 882 So. 2d 535, 536–37 (Fla. 4th DCA 2004); See also *Dicks v. Colonial Fin. Corp.*, 85 So. 2d 874, 876 (Fla. 1956) (“Estoppel is an affirmative defense which must be specially pleaded and is waived if not pleaded.”) Unlike collateral estoppel, subject matter jurisdiction is the one defense that cannot be waived by a party’s failure to raise the defense with the trial court. [Fla.R.Civ.Pro. 1.140\(h\)](#).

Collateral estoppel, like res judicata, is a type of procedural bar.

The term “procedural bar” is a very broad term essentially meaning that the case, claim, or issue **is precluded in some manner from being considered on the merits**. The notion that a claim or an issue can be procedurally barred or “precluded” by a prior adjudication is commonly expressed in the concepts of res judicata and collateral estoppel.

Topps v. State, 865 So. 2d 1253, 1254 (Fla. 2004) (emphasis added). If it is raised as an affirmative defense, the circuit court has the jurisdiction to rule on whether it precludes an issue from being considered on the merits in some manner. A superior court cannot use prohibition to divest the circuit court of its jurisdiction to rule on the issue.

“Prohibition may not be used to divest a lower tribunal of jurisdiction to hear and determine the question of its own jurisdiction; nor may it be used to test the correctness of a lower tribunal's ruling on jurisdiction where the existence of jurisdiction depends on controverted facts that the inferior

tribunal has jurisdiction to determine.” *Mandico.*, 605 So. 2d at 854 (citations omitted) (quoting *McCrary*, 348 So.2d at 297-98). “A clear distinction is drawn between assumption of **jurisdiction to which the court has no legal claim** and erroneous exercise of jurisdiction with which it is invested.” *McCrary*, 348 So. 2d at (emphasis added).

This Court addressed this distinction in *Mandico*. The suit at issue in that case was a personal injury action in which the defendant asserted immunity under the workers’ compensations law. Although this Court held that the immunity applied and that the trial court erred by not dismissing the action, it also held that a writ of prohibition could not be issued because the lower court had the jurisdiction to determine the issue.

This Court explained:

A person has a right to file a personal injury action in circuit court, and the court has jurisdiction to entertain the suit. The assertion that the plaintiff’s exclusive remedy is under the workers’ compensation law **is an affirmative defense**, and its validity can only be determined in the course of litigation. The court has jurisdiction to decide the question even if it is wrong. Moreover, the decision will often turn upon the facts, and the court from which the writ of prohibition is sought is in no position to ascertain the facts. At the same time, it is incongruous to say that while the circuit court has jurisdiction to make findings of fact, depending upon the nature of the findings, it may thereupon lose jurisdiction. Thus, we hold that henceforth **prohibition may not be employed to raise the defense of workers’ compensation immunity.**

Mandico, 605 So. 2d at 854 (emphasis added). Accordingly, this Court quashed the District Court’s decision to the extent it granted prohibition.³

This Court reached a similar result when Citizens Property Insurance Corporation sought review of a non-final order denying its motion to dismiss a bad faith claim based upon sovereign immunity. *Citizens Prop. Ins. Corp. v. San Perdido Ass’n, Inc.*, 104 So. 3d 344, 345 (Fla. 2012). Relying in part on the reason in *Mandico*, this Court held: “it is improper to bring this action through a petition for a writ of prohibition based on the State’s limited waiver of sovereign immunity.” *Citizens Prop. Ins. Corp. v. San Perdido Ass’n, Inc.*, 104 So. 3d 344, 351 (Fla. 2012).

This Court has repeatedly held that “prohibition will not lie to review the correctness of an order of a trial court overruling a challenge to its jurisdiction over the person of a defendant where that court has jurisdiction over the subject matter of the suit.” *State ex rel. Eli Lilly & Co. v. Shields*, 83 So. 2d

³ Although this Court recognized that prohibition could not be used to review orders determining whether a party is entitled to workers’ compensation immunity as a matter of law, it recognized the benefits of having immediate appellate review for such orders. It thus used the *Mandico* decision to amend [Florida Rule of Appellate Procedure 9.120\(1\)\(3\)](#) and add such orders to the list of non-final orders that can be addressed by interlocutory appeal. *Mandico v. Taos Const., Inc.*, 605 So. 2d 850, 855 (Fla. 1992). Because the amendment became effective immediately upon the opinion’s release, this Court was able to consider the defendant’s immunity as an appeal under [Rule 9.120](#) and remand the case with directions that the suit be dismissed. *Id.*

271, 272 (Fla. 1955) (citing *State ex rel. Atlanta Paper Co. v. Herin*, 80 So. 2d 331 (Fla. 1955)). As this Court explained:

It is said there is an important distinction between a want of jurisdiction as to the subject-matter of the suit and the want of jurisdiction as to the locality of parties to the suit, but the general rule is that, where the court has jurisdiction of the subject-matter, it must decide the sufficiency of the process and service by which it acquires jurisdiction of the person, and error in this must be reviewed by writ of error or appeal.

Jurisdiction of the subject-matter means the power of the court to adjudicate the class of cases to which the particular case belongs.

Curtis v. Albritton, 132 So. 677, 680 (Fla. 1931) (citations omitted). In *Shield*, this Court went a step further and held:

To dispel any further doubt in the matter, we specifically hold not only that prohibition will not lie to review an adverse ruling of the trial court upon challenge to the court's jurisdiction over the person of the defendant but also that a defendant who has properly raised such question is not prejudiced by participation in the trial and defending the matter on the merits and may have the correctness of such ruling reviewed upon appeal after adverse final judgment in the cause should one so be rendered.

State ex rel. Eli Lilly & Co. v. Shields, 83 So. 2d 271, 272 (Fla. 1955).⁴

Just as prohibition cannot be used to prevent a circuit court from exercising its jurisdiction to determine issues such as personal jurisdiction and workers' compensation immunity, it cannot be used to prevent a circuit

⁴ Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i) now provides that non-final orders determining the jurisdiction of the person can be reviewed by appeal.

court from exercising its jurisdiction to determine whether the defense of collateral estoppel bars the action. The District Court erred by using prohibition to divest the circuit court of its jurisdiction over the case, including the circuit court's jurisdictional authority to rule on whether the defense of collateral estoppel bars in some manner the litigation of any issues in this action.

The magnitude of the error is much more than a conflict regarding some nuanced application of the writ of prohibition. If the District Court's decision were to stand, a defendant could circumvent the circuit court's ability to rule on a collateral estoppel defense by filing a petition for prohibition seeking to divest the circuit court of its jurisdiction to determine the issue by asking the district court to make the determination. This is precisely what occurred in this case. Acceptance of such a ruling would fundamentally change the extremely narrow scope and operation of prohibition.

2. THE DISTRICT COURT ERRED BY USING PROHIBITION TO REVOKE PREVIOUSLY ENTERED ORDERS

This Court has held repeatedly that prohibition's "purpose is to prevent the doing of something, not to compel the undoing of something already done. **It cannot be used to revoke an order already entered.**" *English v.*

McCrary, 348 So. 2d 293, 297 (Fla. 1977) (emphasis added) (citing *State ex rel. Harris v. McCauley*, 297 So.2d 825 (Fla. 1974), *State ex rel. R. C. Motor Lines, Inc. v. Boyd et al.*, 114 So.2d 169 (Fla. 1959), *State ex rel. Shailer v. Booher*, 241 So.2d 720 (Fla. 4th DCA, 1970)) (emphasis added). See also *Manzini v. Linton*, 77 So. 3d 647 (Fla. 2011) (“the writ of prohibition may not be used to compel the undoing of something already done or revoke an order already entered”).

Nonetheless, The District Court’s Opinion grants a writ of prohibition for the purpose of revoking the trial court’s orders denying the Defendant’s motions to dismiss and directing the trial court to enter a new order dismissing the entire case with prejudice.⁵ [R. 920.]

3. THE DISTRICT COURT ERRED BY USING PROHIBITION WHERE A PLENARY APPEAL WOULD PROVIDE AN ADEQUATE REMEDY

“Prohibition will be invoked only in emergency cases to forestall an impending present injury where person seeking writ has no other appropriate and adequate legal remedy.” *English v. McCrary*, 348 So. 2d 293, 297 (Fla. 1977).

“But it does not lie for errors or grievances which may be redressed, in the ordinary course of judicial proceedings, by

⁵ Likewise, the Third District applied prohibition to revoke a prior order in *Carnival* where it revoked the trial court’s “non-final order reinstating a negligence cause of action against Carnival.” *Carnival*, 941 So.2d at 423.

appeal or writ of error. It is a fundamental principle, **and one which will be strictly enforced**, that this writ is never allowed to usurp the functions of a writ of error or certiorari, and can never be employed as a process for the correction of errors of inferior tribunals.”

English v. McCrary, 348 So. 2d 293, 298 (Fla. 1977) (quoting *State ex rel. Rheinauer v. Malone*, 40 Fla. 129, 23 So. 575, 576 (1898)).

Erroneous rulings on affirmative defenses such as collateral estoppel can be adequately addressed in a plenary appeal. See, e.g., *Smith v. Glisson*, 468 So. 2d 394, 395 (Fla. 3d DCA 1985); See also *Philip Morris USA, Inc. V. Douglas*, 110 So. 3d 419, 433 (Fla. 2013) (defining how collateral estoppel applied to smoking liability cases after judgment of liability in class action); *Topps v State*, 865 So. 2d 1253, 1255 (Fla. 2004) (holding that denials of extraordinary writs did not constitute determinations on the merits for purposes of collateral estoppel); *City of Oldsmar v State*, 790 So. 2d 1042, fn. 4 (finding that collateral estoppel did not apply when there was not a final judgment in a still pending case.); *DeWitt v Duce*, 408 So. 2d 216, 221 (Fla. 1981) (collateral estoppel barred tort action for interference with inheritance when dispute could have been raised in probate proceeding).

The District Court erred by granting prohibition where there was no emergency and where a plenary appeal provides an adequate remedy if the

Defendants do not prevail on their collateral estoppel defense in the trial court.

C. THE FACTS ESTABLISH THAT THE DISTRICT COURT ERRED BY HOLDING COLLATERAL BARS THE ENTIRE ACTION

As the Third District correctly recognized: The elements of collateral estoppel are: “1) the **issue at stake is identical** to the one involved in the prior litigation; 2) the issue has been **actually litigated** in the prior suit; 3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in that action; 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.” [Cozen O'Connor, 306 So. 3d at 264](#) (quoting [Baxas Howell Mobley, Inc. v. BP Oil Co., 630 So. 2d 207, 209 \(Fla. 3d DCA 1993\)](#))).

The court’s holding that collateral estoppel applies was based on the following conclusion: “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.” [Cozen O’Connor, PLC v. Mintz Truppman, P.A., 306 So. 3d 259, 263 \(Fla. 3d DCA 2020\)](#). While the issue was not properly before the Third District for its

consideration, Mintz does not claim error based on the court's ruling that Mintz is barred from claiming addition fees would have been awarded in the federal action if the Defendants had not breached mediation confidentiality. However, the Third District clearly erred in holding that this ruling barred the entire action.

When items of special damage are claimed, they must be specifically pled in the complaint. [Fla.R.Civ.Pro. 1.120\(g\)](#). In addition to seeking other damages, Mintz's Second Amended Complaint identifies a category of special damages that can be described as lost opportunity damages. This category of special damage is pled specifically only in the three fraud counts (counts 8-10). These counts include the following allegation: "As a direct and proximate result of Mintz's detrimental reliance on the Insurance Company's misrepresentations (through its counsel), Mintz has suffered, and continues to suffer damages from the dissemination of the confidential mediation communications by the Insurance Company (through its counsel), ***including but not limited to the lost opportunity to have had Mintz's attorney's fee claim in the underlying action litigated and decided without improper evidence and*** to not have Mintz's confidential mediation communications and work product and proprietary settlement information published in the federal and state court public files." [R. 169, 172, 174 (emphasis added).]

Collateral estoppel only bars the “identical issue” “actually litigated.” The issue actually litigated in the federal action was the amount of Mintz’s reasonable attorney’s fees for services provided in that litigation. Mintz does not dispute litigating damages based on the “lost opportunity to have had Mintz’s attorney’s fee claim in the underlying action litigated and decided without improper evidence” can be considered litigation of the identical issue actually litigated. However, that does not prevent Mintz from litigating other issues that were not even raised, much less litigated, in the federal action.

The three fraud counts expressly noted they were seeking “damages from the dissemination of the confidential mediation communications ... including but not limited to” the lost opportunity damages. While collateral estoppel can bar Mintz from recovering the lost opportunity damages, it cannot prevent it from recovering any other damages that arose from the dissemination of confidential mediation communications.

None of the remaining seven counts include the plea for lost opportunity damages. In fact, two of the counts do not seek any damages. Count 1 only seeks declaratory relief and count 6 only seeks injunctive relief. Accepting that there can be no litigation over the issue of whether Mintz should have been awarded more fees for the federal litigation does not negate or alter Mintz’s request for declaratory relief. Likewise, it has no

relevance to Mintz's request for injunctive relief which was raised as a result of Lexington violating the mediation privilege again after this action was filed.

Count 3 asserts a claim based on Lexington's breach of mediation confidentiality that occurred **in this action** when Lexington filed a confidential mediation communication as an exhibit to its January 17, 2017, motion to dismiss.

The bad faith count against Lexington is based upon matters other than the violation of the mediation privilege, and it does not seek any lost opportunity damages. The remaining counts seek damages, but none of them seek damages based on the amount of Mintz's fees for the federal action.

Even if the District Court was able to use prohibition to determine whether, based on the facts and circumstances of this case, collateral estoppel divests the circuit court of jurisdiction, it erred in this case because collateral estoppel would only bar litigation regarding a single category of damages sought in three counts, not the entire action.

II. CONSIDERATION OF THE DEFENDANTS' PETITIONS FOR CERTIORARI

This Court accepted jurisdiction to resolve the conflict between the decisions of this court and the Third District's decisions in this matter,

Carnival Cruises, and *Melvin Piedmont Nursery*. Once this Court accepts jurisdiction over a cause over a conflict, it has the discretion to “consider other issues properly raised and argued before this Court.” *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982). However, since the 1980 amendment of the Florida Constitution, this Court has not had the jurisdictional authority to issue writs of certiorari. Accordingly, this Court has stated that it does not have jurisdiction “to entertain petitions for common law certiorari.” *Trepal v. State*, 754 So. 2d 702, 706 (Fla. 2000). While Mintz would like to address why certiorari cannot be granted, it must recognize that the issue cannot be properly raised and argued at this time.⁶

⁶ Two of the key issues are: 1) the petitions seek untimely certiorari review of the trial court’s ruling regarding litigation privilege since the petitions were filed 405 days after the trial court first ruled on the issue [R. 3, 217, 386.]; and 2) certiorari cannot be granted since the issues raised (standing under the Mediation Confidentiality and Privilege Act and whether the litigation privilege can negate remedies provided by that Act) present issues of first impression. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003) (“A district court should exercise its discretion to grant certiorari review **only** when there has been a violation of **a clearly established principle of law** resulting in a miscarriage of justice.”) (bold emphasis added)).

CONCLUSION

This is the third time the Third District issued a writ of prohibition based on its conclusion that collateral estoppel applied to the facts of a case. Each time, the District Court exceeded its authority in granting a writ of prohibition, repeatedly resulting in an improper diminution of circuit court jurisdiction. The District Court's decision and the resulting mandate should be quashed, and this matter should be remanded for further proceedings.

CERTIFICATE OF COMPLIANCE

Pursuant to [Rule 9.210\(a\), Fla. R. App. P.](#), undersigned counsel hereby certifies that this brief is submitted in Arial 14-point font.

By: /s/ Timothy H. Crutchfield
Timothy H. Crutchfield
Florida Bar No. 621617

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served on Charles C. Kline, Esq., Jason R. Domark, Esq. Reid Kline, Esq., Cozen O'Connor, Southeast Financial Center, Suite 3000, 200 South Biscayne Blvd., Miami, Florida 33131-2352, ckline@cozen.com, jdomark@cozen.com, rkline@cozen.com; Thomas Scott, Esq., Cole, Scott & Kissane, 9150 South Dadeland Blvd., Suite 1400, Miami, Florida 33156, Thomas.scott@csklegal.com, renee.nail@csklegal.com; Israel Reyes, Esq., The Reyes Law Firm, P.A., One Columbus Center, 1 Alhambra Plaza, Suite 1130, Coral Gables, Florida 33134, ireyes@reyeslawfirmmpa.com; and Craig Greene, Esq., Kramer, Green, Zuckerman, Greene & Buchsbaum, P.A., 4000 Hollywood Blvd., Ste. 485-South, Hollywood, Florida 3320, cgreene@kramergreen.com by e-mail this 9th day of August, 2021.

MINTZ TRUPPMAN, P.A.
Attorneys for Plaintiffs
1700 Sans Souci Boulevard
North Miami, FL 33181
Telephone: (305) 893-5506
tim@mintztruppman.com
2nd: charles@mintztruppman.com

By: /s/ Timothy H. Crutchfield
Timothy H. Crutchfield
Florida Bar No. 621617