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.
_____/

RESPONDENTS' COZEN O'CONNOR AND JOHN DAVID DICKENSON'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND THE FACTS

Respondents are Cozen O'Connor, PLC, John David Dickenson, (collectively "Cozen") and Lexington Insurance Company ("Lexington" and together with Cozen, the "Respondents"). Petitioner is the law firm of Mintz Truppmann, P.A. ("Mintz"). Mintz seeks review of an Opinion of the Third District Court of Appeal (the "Opinion") prohibiting the Circuit Court for the 11th Judicial Circuit from proceeding further in an action in which Mintz asked the Circuit Court to re-determine an issue of fact already determined by a prior federal court judgment.[1]

Mintz had sued Lexington in the circuit court seeking indemnity for property damage claimed by Mintz's client, Daphne Query ("Query").(5) After removal to the federal court, Lexington and Query settled the amount of the property loss through mediation for $125,000 and stipulated that Query was entitled to recover a reasonable sum for the services of her attorney, as called for by Fla. Stat. § 626.9373, which sum was to be determined by the federal court pursuant to Rule 7.3 of the Local Rules for the Southern District of Florida.(6) Query requested fees of $828,056 arguing she had to incur such fees to recover 100% of her property loss.(6) Cozen filed a copy of Query's mediation demand demonstrating she had sought much more than $125,000 to settle the case.(7) Mintz did not object to the filing of Query's

[1] The Opinion appears in Petitioner's Appendix at (4). Citations are to the page numbers of Petitioner's Appendix.

mediation demand in the federal court. (7) Instead, well before the federal court entered a final judgment awarding Query fees of $259,502.81 plus costs (the "Final Judgment"), Mintz filed suit, in its own name and as assignee of Query, in the Circuit Court,(8) eventually proceeding on a second amended complaint (the "SAC").(9) According to the Opinion:

> "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 gravamen of Mintz's state court lawsuit 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." (12)

Respondents sought dismissal of the SAC based among other things, on lack of subject matter jurisdiction.(.7) The motions were denied. Respondents then petitioned the Third District for writs of prohibition and certiorari to prevent re-litigation in the Circuit Court of the attorney fee issue and to prevent litigation of claims under Fla. Stat. Section 44.406(1) which Mintz had no standing to make.(7) The Third District granted prohibition, directing the Circuit Court to dismiss the SAC with prejudice.(16) Respondents' petitions for certiorari were denied as moot.(16) Mintz has petitioned this Court to review the Opinion, claiming the Opinion conflicts with decisions of this Court and other District Courts of Appeal.

SUMMARY OF THE ARGUMENT

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. 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 Opinion does not revoke an order already entered as prohibited by English v. McCrary, 348 So.2d 293 (Fla. 1977). It simply directed the Circuit Court to dismiss the case.

This is not a case where the correction of the trial court's ruling on jurisdiction was dependent on controverted facts as in Mandico v. Taos Const., Inc., 605 So.2d 850 (1992). There were no controverted facts relevant to the lack of subject matter jurisdiction. Jurisdiction to determine the statutory attorneys' fees claim was committed to the federal court by Fla. Stat. Section 626.9373 and the fee award was required to be entered in the Final Judgment in the federal case. The Opinion confirms that collateral estoppel was apparent from the face of the SAC. (15)

For these same reasons, the opinion does not conflict with Newberry Square Florida Laundromat, LLC v. Jim's Coin Laundry & Drycleaners, Inc., 296 So.3d 584 (Fla. 1st DCA 2020). The elements of collateral estoppel are clearly established by the SAC. (15)

ARGUMENT

a) The Opinion does not revoke an order already entered.

The first case cited for alleged conflict, English v. McCrary, involved an effort by a news reporter to attend a hearing on the divorce of a public figure. The trial judge excluded the reporter who then sought prohibition form the Fourth District. The Fourth District denied the writ and the denial was subsequently affirmed by the

Florida Supreme Court for a number of reasons. First, the trial judge had the jurisdiction to exclude persons from judicial proceedings and his alleged abuse of discretion when exercising that jurisdiction could not be attacked by prohibition. Secondly, the Court noted that prohibition cannot be used to undo a thing already done, but to prevent the doing of something, English v. McCrary, at 296, 97. The Court explained "[w]here proceedings sought to be prohibited have been completed and matters therein disposed of, prohibition may not be used for the sole purpose of establishing principles to govern future cases." English v. McCrary, at 297.

But here, the proceedings in the trial court were far from completed. The trial court had just denied motions to dismiss. No affirmative relief had been entered. The trial court was about to preside over the discovery and trial of a case on which all ten counts were devoted to re-determining the amount of attorneys' fees that had been awarded to Query in the federal court case. Only the federal court, which had jurisdiction over Query's claim against Lexington, had jurisdiction to award fees under Fla. Stat. § 626.9373. Once awarded, Query's claim for fees was merged into the Final Judgment and extinguished. Collateral estoppel prevented the Circuit Court from re-determining those fees, thus, there was no cognizable case or controversy between the parties concerning the amount of Query's attorneys' fees and therefore no subject matter jurisdiction to re-decide an issue already decided by a binding Final Judgment from the federal court.

Mintz's contrivance that the Opinion "revokes" the order already entered is both literally and figuratively wrong. The Opinion doesn't revoke any orders of the trial court. The Opinion and the writ of prohibition act prospectively to prevent the circuit court from proceeding further to do something it has no jurisdiction to do, to wit: re-deciding the amount of fees due Query under Fla. Stat. § 626.9373.

b) The Opinion prohibiting the trial court from proceeding further was not based on controverted facts.

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, English v. McCrary, 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 removed to 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.

In Lovett v. Lovett, 112 So.2d 768 (Fla. 1927), the Supreme Court identified at least four kinds of subject matter jurisdiction including what is sometimes called "case jurisdiction" which requires that the court's jurisdiction be 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). 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 litigants 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 litigants, to recover any remedy under Fla. Stat. § 44.406.

c) The grounds supporting collateral estoppel are established within the Second Amended Complaint

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.

Prohibition was issued because the trial court was about to re-determine the fees already determined by the federal court's Final Judgment. As an initial matter,

motions to dismiss for lack of subject matter jurisdiction are not confined to the allegations of the complaint and the trial court is to consider affidavits, and if necessary, testimony to determine a litigant's standing. But in this case, the Opinion of the Third District recites that the elements of collateral estoppel are established from the SAC.(15) Therefore, this Opinion only stands for the proposition that where it is plain from the allegations of the complaint that the plaintiff is asking the circuit court to re-determine the amount of attorneys' fees already awarded by a final federal court judgment, prohibition will lie to prohibit the circuit court from exceeding its jurisdiction. Petitioner fails to cite any case in direct conflict with that point of law. Instead, Mintz wants this court to plow through the record to see if the Third District misinterpreted the SAC. But conflict jurisdiction does not depend on what is in a complaint or any part of a record. The conflict must appear expressly and directly on the face of the opinion.[2]

CONCLUSION

Petitioner has failed to demonstrate an express and direct conflict and therefore there is no jurisdiction to grant discretionary review.

[2] Cozen hereby adopts the arguments made by Respondent Lexington in its jurisdictional brief.

Respectfully submitted,

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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 7th day of December, 2020 on all Counsel of Record identified on the attached Service List:

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

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.

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