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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 BRIEF ON JURISDICTION

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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JURISDICTIONAL STATEMENT

Based solely on its conclusion that the Plaintiff, Mintz Truppman, P.A. ("Mintz") is collaterally estopped from recovering one category of unique damages sought in some of the complaint's ten counts, the Third District granted prohibition and revoked the trial court's order denying motions to dismiss by directing the trial court to enter a new order dismissing the entire complaint with prejudice. [A. 16.]

The Third District's Opinion expressly and directly conflicts with decisions of this Court and with decisions of other district courts of appeal 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 *specially* 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)).

3) A motion to dismiss cannot be granted based upon the affirmative defense of collateral estoppel unless the grounds are established within the four corners

of the complaint. *Newberry Square Florida Laundromat, LLC v. Jim's Coin Laundry & Dry Cleaners, Inc.*, 296 So. 3d 584, 589 (Fla. 1st DCA 2020).

STATEMENT OF THE CASE AND FACTS[1]

Mintz Truppman, PA, ("Mintz") previously represented a client in federal court litigation in a first-party insurance claim against Lexington Insurance Company ("Lexington). [A. 5.] Cozen O'Connor, PLC and John Dickenson (together, "Cozen") represented Lexington in that litigation. [A. 5.] The parties reached a settlement which included Lexington's agreement to pay Mintz's fees, with the amount to be determined by the court. [A. 5.]

Mintz filed a motion seeking a determination of the amount of fees to be awarded. [A. 6.] 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. [A. 7] Two weeks later, Mintz filed the underlying suit in state court against Lexington and Cozen. [A. 8.]

Mintz's lawsuit against Lexington and Cozen was filed 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:

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[11] The facts are taken from the Opinion, which is attached in the Appendix. "A. #" refers to the page number of the Appendix.

> 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.

[A. 9.] Subsequently, the federal court entered its final judgment establishing the amount of fees to be paid for Mintz's services in that action. [A. 8.]

The operative complaint at issue in this proceeding is Mintz' Second Amended Complaint. The counts in that complaint are as follows: **declaratory relief** (Count I); breach of mediation contract (Counts II and 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). [A. 9.]

Lexington and Cozen filed "all-embracing" motions to dismiss the complaint. [A. 10.] The trial court entered orders denying each of the motions to dismiss. [A. 10.] Lexington and Cozen then filed petitions for certiorari and prohibition with the Third District. They argued "that certiorari lies because Lexington and Cozen's decision to include the Pre-Mediation Demand as an exhibit to Lexington's

Response – the act that forms the basis of all of Mintz's claims – is immunized by the litigation privilege." [A. 10.] They also argued that they were entitled to prohibition because "the gravamen of Mintz's state court action is to recover additional attorneys' fees for services in the federal action." [A. 11.]

In its Opinion granting Prohibition, the Third District states: "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." [A. 12.][2] Based on its view of "the gravamen" of the complaint, the court concluded collateral estoppel applied and revoked the trial courts prior orders by granting prohibition and directing the trial court to dismiss the entire complaint with prejudice.

SUMMARY OF ARGUMENT

Consistent with the Third District's 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 Opinion issued in this case expands the use of a writ of prohibition far beyond the

[2] Since this brief is limited to facts reflected in the Opinion, the complaint's relevant allegations and requests for relief are not set forth. However, the Opinion reveals there are counts for injunctive relief and declaratory relief, neither of which can seek damages, much less additional fees for the federal action. [A 9.]

scope allowed by this Court's decisions quoted above. Furthermore, by basing its ruling on what it decided was "the gravamen of the plaintiff's complaint" instead of on the claims actually pled and the all of the relief actually sought, the Opinion conflicts with decisions holding that a motion to dismiss is limited to consideration of the allegations within the four corners of a complaint.[3]

ARGUMENT

The Opinion further expands a conflict that already existed between the decisions of the Third District and this Court. As noted in the Opinion, legal precedent in the Third District provides that prohibition is appropriate when the court concludes a plaintiff is collaterally estopped from litigating an issue due to prior litigation in federal court. *Cozen O'Connor, PLC,* 2020 WL 3261153, *4 (citing *Carnival Corp. v. Middleton*, 941 So. 2d 421, 424 (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).) Although the Petitioner's arguments before the Third District were constrained by that court's legal precedent, the arguments before this Court are not. The Third District's holdings on this issue expressly and directly conflict with the decisions of this Court and other districts court of appeal. Granting jurisdiction

[3] "Gravamen" means: "the part of an accusation that weighs most heavily against the accused; the substantial part of a charge or complaint." https://www.dictionary.com/browse/gravamen (10/1/20). It does not mean every part.

will provide an opportunity to resolve this conflict and prevent further inappropriate expansion of the use of the writ of prohibition.

1) A writ of prohibition "cannot be used to revoke a previously entered order."

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 Third District'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. [A. 16.] 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. These decisions from the Third conflict with the decisions of this Court and jurisdiction should be accepted so that the conflict can be resolved.

2) "Prohibition lies to prevent an inferior tribunal from acting in excess of jurisdiction but not to prevent an erroneous exercise of jurisdiction."

This Court repeatedly has held:

> "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 *specially* appears so to be." Therefore, 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 v. Taos Const., Inc., 605 So. 2d 850, 854 (Fla. 1992) (quoting *English v. McCrary,* 348 So. 2d 293, 297 (Fla. 1977)) (emphasis added; citation omitted).

Applying this Court's holdings in *Mandico* and *English,* the Second District held:

> This court has no authority through a writ of prohibition to review a trial court's denial of a defendant's motion to dismiss based on the defendant's affirmative defense of statute of limitations. Prohibition is an extraordinary writ that is extremely narrow in scope and operation. It exists to prevent "an inferior tribunal from acting in excess of jurisdiction but not to prevent an erroneous exercise of jurisdiction." *English v. McCrary,* 348 So.2d 293, 297 (Fla.1977). When a trial court makes an erroneous ruling on a statute of limitations defense, that error, like any other error concerning an affirmative defense, can be corrected on appeal from a final order.

Panagakos v. Laufer, 779 So. 2d 296, 297 (Fla. 2d DCA 1999). See also *Allan & Conrad, Inc. v. Univ. of Cent. Florida*, 961 So. 2d 1083, 1086 (Fla. 5th DCA 2007)

("prohibition is not available to review a trial court's order that rejects an affirmative defense.")

The Third District's Opinion recognizes that the trial court had subject matter jurisdiction over the class of claims created by the Act. [A12.] Therefore, the trial court undeniably had jurisdiction to rule on the motions to dismiss. By holding that a writ of prohibition should be granted based upon the Third District's disagreement with the trial court's ruling on motions to dismiss, the Opinion directly conflicts with this Court's holdings on the issue.

Although the Opinion acknowledges the trial court's jurisdiction over claims filed pursuant to the Act, it holds: "We grant prohibition because, under the unique circumstances presented here, the circuit court lacks the subject matter jurisdiction to adjudicate Mintz's claims." [A. 5.] The only circumstance addressed in the Opinion is the court's conclusion that Mintz is collaterally estopped from claiming damages based on the theory that it would have been awarded additional fees in the federal action if the Defendants had not breached the mediation privilege (a conclusion irrelevant as a matter of law to the claims for equitable relief).

"[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). *Id.* "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." *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994) (quoting *Malone v. Meres,* 91 Fla. 709, 725, 109 So. 677, 683 (1926)).

The Third District's Opinion conflicts with caselaw holding that a writ of prohibition cannot be entered where the underlying court has jurisdiction over the class of case involved, even if the appellate court believes the trial court's ruling results in an erroneous exercise of jurisdiction.

3) "**A motion to dismiss cannot be granted based upon the affirmative defense of collateral estoppel unless the grounds are established within the four corners of the complaint.**"

"A motion to dismiss cannot be granted based upon the affirmative defense of collateral estoppel unless the grounds are established within the four corners of the complaint." *Newberry Square Florida Laundromat, LLC v. Jim's Coin Laundry & Dry Cleaners, Inc.*, 296 So. 3d 584, 589 (Fla. 1st DCA 2020). Even if it was appropriate for the Third District to consider issuing a writ of prohibition to revoke the trial court's orders denying the motions to dismiss, it would have to consider the claims and request for relief actually pled, not just "the gravamen" or the parts of the complaint it considered most substantial. The danger of a court ruling on a motion to dismiss based upon "the gravamen" of the complaint is demonstrated by this case.

Lexington and Cozen concede they disclosed a privileged mediation communication. [A. 7.] However, they assert litigation immunity shields them from

suit under the Act and from the remedies established by the Act. [A. 10.] The Act expressly includes equitable relief as a remedy. §44.44.406(1), Fla. Stat. The complaint included counts for declaratory and injunctive relief. These counts cannot seek damages, so they cannot be affected by Mintz being collaterally estopped from obtaining more money for fees in the federal litigation. However, the count for declaratory relief could resolve the important dispute as to whether the litigation privilege essentially nullifies the Act in the context of litigation, and the count for injunctive relief could result in an injunction preventing further violations. By basing its ruling only on a category of damages that it viewed as "the gravamen" or most substantial part of the complaint, the Third District failed to consider each of the claims and requests for relief actually pled.

CONCLUSION

It is respectfully requested that this Court accept jurisdiction to resolve the conflicts stated above and to prevent further expansion of the improper use of the writ of prohibition.

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.

By: /s/ Timothy H. Crutchfield
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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@reyeslawfirmpa.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 6th day of October, 2020.

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