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 REPLY BRIEF

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

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INTRODUCTION

Including the decision below, the Third District has granted writs of prohibition in three cases based on its conclusion that the actions were barred by the affirmative defenses of collateral estoppel or res judicata. *Cozen O'Connor, PLC v. Mintz Truppman, P.A.*, 306 So. 3d 259 (Fla. 3d DCA 2020); *E.I. DuPont de Nemours & Co., Inc. v. Melvin Piedmont Nursery*, 971 So. 2d 897 (Fla. 3d DCA 2007); *Carnival Corp. v. Middleton*, 941 So. 2d 421 (Fla. 3d DCA 2006). The issue before this Court is whether these decisions conflict with the very narrow scope that this Court has established for prohibition's use. See, *e.g., English v. McCrary,* 348 So.2d 293 (Fla. 1977); *Mandico v. Taos Construction,* 605 So.2d 850 (Fla. 1992).

Although the Defendants also filed petitions for writs of certiorari, the Third District dismissed those petitions as moot based upon its decision to provide relief by issuing a writ of prohibition. Since the Third District did not rule on the merits of the petitions for certiorari relief, this Court does not have jurisdiction to address whether certiorari relief should be granted. See *Initial Brief,* pp25-26. Since Cozen's brief is silent on the matter, it appears Cozen agrees. However, Lexington's asks that this Court rule on the issue of whether a writ of certiorari should be issued. (Cozen does not join or adopt Lexington's brief.)

The Defendants' arguments regarding the Third District granting their petitions for prohibition overlap. In fact, Lexington states that it adopts and incorporates Cozen's brief in its entirety. *Lexington Brief,* p. 1. Accordingly, this Reply Brief will present a unified response to the Defendants on issues relating to the Third District granting prohibition, and Mintz will respond to Lexington's position regarding certiorari relief on this point at the end of this brief.

ARGUMENT

I. THE VERY NARROW SCOPE OF PROHIBITION SHOULD NOT BE EXPANDED TO INCLUDE REVIEW OF TRIAL COURT ORDERS ON THE AFFIRMATIVE DEFENSES OF COLLATERAL ESTOPPEL, RES JUDICATA AND STANDING

The Defendants argue the Third District's opinions in this case and in *Middleton* and *Melvin Piedmont* do not conflict with this Court's decisions limiting the availability of prohibition based on their assertion that prohibition can be used whenever a party has not satisfied jurisdictional requirements for a particular case.

Their argument focuses on a case that does not even mention the word prohibition – *Lovett v. Lovett*, 112 So. 768 (Fla. 1927). See *Cozen Brief, 23, 24, 29,*33. *Lovett* provides a general explanation of how the term "subject matter" can have different application when discussing issues relating to

jurisdiction. *Lovett,* at 775-76. However, it does not alter the type of jurisdiction that this Court has held can be addressed by prohibition – specifically whether the lower tribunal has the jurisdictional power to hear and determine the class or type of case at issue.

At this Court explained:

> 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 ….

Mandico v. Taos Const., Inc., 605 So. 2d 850, 854 (Fla. 1992) (emphasis added) (quoting *English v. McCrary*, 348 So.2d 293).

The type of jurisdiction addressed in this Court's decisions regarding the limited availability of prohibition is thus consistent with the strict meaning of the term this Court provided in *Cunningham v. Standard Guar. Ins. Co.,* 630 So.2d 179 (Fla. 1994), which relied in part on this Court's analysis in *Lovett.*

> In *Lovett,* this Court explained that subject-matter jurisdiction concerns **the power of the trial court to deal with a class of cases to which a particular case belongs**. Stated differently:

> "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.**" *Hunt v. Hunt,* 72 N.Y. 217.

Cunningham, 630 So. 2d at 181 (Fla. 1994) (quoting *Malone v. Meres,* 91 Fla. 709, 725, 109 So. 677, 683 (1926)).

As noted in *Cunningham, Lovett* recognizes this strict meaning of jurisdiction applied to judicial officers and tribunals. Nonetheless, the Defendants attempt to obfuscate the meaning that clearly applies in the context of prohibition by focusing on *Lovett's* general explanation of how the term "subject matter" can have different applications when discussing issues relating to jurisdiction. See *Cozen Brief, 23, 24, 29,*33. *Lovett* does not support Defendants' position.

Rather, in *Lovett,* this Court observed:

> There is some confusion in the use of this term 'subject-matter' in some of the cases dealing with the question of jurisdiction. **Sometimes it is applied with reference to the power of the court to deal with the class of cases to which the particular case belongs**, and sometimes it is applied to the res within the court's control or under its jurisdiction, or to the rights—that is, the questions of personal or property rights, the controversy—before the court in the particular case.

Id. at 775. While discussing the strict meaning of the term discussed above, *Lovett states*:

> Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power.

Lovett v. Lovett, 112 So. 768, 775 (Fla. 1927) (quoting *Foltz v. St. Louis, etc., R. Co.*, 60 F. 316, 8 C. C. A. 635).

However, *Lovett* goes on to note: "But before this potential jurisdiction of the subject-matter—this power to hear and determine—can be exercised, it must be lawfully *invoked* and called into action; the parties and the subject-matter of the particular case must be brought before the court in such a way that it acquires the jurisdiction and the power to act." *Id.* It then explores requirements parties must satisfy to invoke a court's jurisdiction (*e.g.* "process must be served on the opposite party"). *Id.*

While *Lovett* distinguishes the application of the term "subject matter" when addressing the issue of jurisdiction in the context of the "power of the court to deal with the class of cases to which the particular case belongs" from the application of the term "subject matter" when addressing whether parties have properly invoked that jurisdiction for a particular case, it also "muddied the waters" by saying:

> So that, when it is said that a court has jurisdiction of the subject-matter of any given cause, if these words are to be given their full meaning, **they imply, generally speaking**: (1) That the court has jurisdictional power to adjudicate the class of cases to which such case belongs; and (2) that its jurisdiction has been *invoked* in the particular case by lawfully bringing before it the necessary parties to the controversy; (3) the controversy itself by pleading of some sort sufficient to that end; and (4) when the cause is one in rem, the court must have judicial power or control over the res, the thing which is the subject of the controversy. **This, in a general way, is what we mean when we say that a court has 'jurisdiction of the subject-matter and the parties' to a cause**.

Lovett, 112 So. at 776 (Fla. 1927).[1]

Without citing supporting language from any of this Court's decisions that established the appropriate limitations on the availability of prohibition, Defendants rest their argument on the assumption that the broad description of what may be referred to as "jurisdiction of the subject-matter and the parties to a cause" somehow expands the applicability of prohibition to consideration of whether a specific action is barred by the affirmative defenses of collateral estoppel, res judicata, or standing. Defendants' arguments are in conflict with this Court's precedent.

Cozens' brief only mentions *English v. McCrary* once. In *McCrary,* this Court observed:

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[1] See Judge Scott Stephens, *Florida's Third Species of Jurisdiction*, Fla. B.J., March 2008, at 11, for an analysis relating to confusion over the use of the word "jurisdiction" in Florida.

> The circuit courts of the State of Florida are courts of general jurisdiction similar to the Court of King's Bench in England clothed with most generous powers under the Constitution, which are beyond the competency of the legislature to curtail. They are superior courts of general jurisdiction, subject of course to the appellate and supervisory powers vested in the Supreme Court by the Constitution, and 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.

McCrary, 348 So.2d at 297. Although the Defendants acknowledge that "the court below has jurisdiction of the class of case to which this case belongs," *Cozen Brief,* p. 24, they nonetheless assert *McCrary* "clearly identifies an exception to the broad grant of jurisdiction of the circuit courts, that being, 'that which is clearly vested in other courts or tribunals.'" *Cozen Brief,* p. 32. See also *Lexington Brief,* p. 10. The Defendants overlook the fact that this only applies when the other court or tribunal has exclusive jurisdiction over the type of case involved. The circuit courts of Florida clearly are not divested of jurisdiction when there is concurrent jurisdiction over a class of cases: "It is black letter law ... that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause

of action." *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 479, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981).[2]

In *Mandico,* this Court held that prohibition cannot even be used when a defendant has immunity under the workers compensation statute. *Mandico,* 605 So.2d 850. The Defendants' attempt, but fail, to distinguish that holding as follows:

> The Supreme Court held that based on the facts assumed in the certified question, that 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.

Cozen Brief, pp. 29-30 (emphasis in original). This Court's ruling in *Mandico* was not based upon any conclusion that "in most cases the existence of the immunity would depend on controverted facts." While this Court observed that the availability of immunity "will often turn upon the facts," it held definitively that prohibition can never be used to raise the immunity. *Mandico,* 605 So.2d 854. Prohibition thus cannot be used even if the face of a plaintiff's complaint establishes that the immunity applies and bars the action.[3]

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[2] If proceedings before a court with concurrent jurisdiction give rise to a an affirmative defense of collateral estoppel or res judicata, the circuit judge still has jurisdiction to rule on the affirmative defense in the same manner the circuit judge would have jurisdiction to rule on a defense arising from proceedings before another circuit judge in the courtroom across the hall.

[3] *Mandico* also recognizes: The assertion that the plaintiff's exclusive remedy is under the workers' compensation law is an affirmative defense, and its validity can

The Defendants then try to distinguish *Mandico* by asserting that the "nature" of immunity under the workers compensation statute is different from the protection provided under the doctrines of collateral estoppel, res judicata and standing. *Cozen Brief,* p. 31. However, they are all affirmative defenses that the circuit court has jurisdiction to address and determine.[4] They also attempt to distinguish *Mandico* by wrongly asserting that the defenses asserted in this case are established on the face of the complaint. They overlook the fact that the availability of prohibition is based on the type of case, not the facts of a specific case. Just as the affirmative defense of immunity under the workers' compensation statute is never grounds for prohibition–even when the defense is established on the face of a complaint– the affirmative defenses raised in this case can never be grounds for a court to issue a writ of prohibition. The facts of a particular case are irrelevant.

This Court's holdings in *McCrary* and *Mandico* are not limited to the facts presented in those cases, and Lexington's attempt to reconcile the clear conflict between the Third District's decisions and these holdings based upon

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only be determined in the course of litigation. The court has jurisdiction to decide the question even if it is wrong.*Id.*

[4] This Court recently reaffirmed that "lack of standing is an affirmative defense." *Seaside Town Council, Inc. v. Seaside Cmty. Dev. Corp.*, 47 Fla. L. Weekly D72 (Fla. 1st DCA Dec. 29, 2021)

Lexington noting factual distinctions between the cases therefore fails. *Lexington Brief,* pp. 12-17. None of these factual distinctions have any relevance to the issue before this Court.

As noted in Mintz's prior brief, this Court's decision in *Citizens Prop. Ins. Corp v. San Perdido Association,*104 So.3d 344 (Fla. 2012), further established the very narrow scope of prohibition where it held that Citizens' assertion of sovereign immunity could not be grounds for prohibition. Neither Defendant even addressed the holding in *San Perdido.*[5]

The Defendants' assertion that prohibition can be used when a claim is barred by an affirmative defense of collateral estoppel, res judicata, or

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[5] This Court has recognized one exception to the requirement that prohibition only be used to address a court's jurisdiction to act.

> [N]otwithstanding that prohibition is generally available only to prevent courts from acting when there is no jurisdiction to act (rather than to prevent an erroneous exercise of jurisdiction), prohibition is also clearly recognized as the proper avenue for immediate review of whether a motion to disqualify a trial judge has been correctly denied."

Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc., 104 So. 3d 344, 350 (Fla. 2012) (quoting *Sutton v. State,* 975 So.2d 1073, 1076 (Fla.2008.) There clearly needs to be a vehicle allowing prompt review of such orders since a biased trial judge could cause irreversible harm. (For example, a biased judge could use an unwarranted threat of sanctions to force a party to dismiss a valid claim.) However, it is suggested that a more appropriate vehicle for review would be provided by amending Florida Rule of Appellate Procedure 9.130 to allow the appeal of nonfinal orders denying a motion to disqualify a trial judge.

standing finds no support in the decisions of this Court. In fact, other than the Third District's decisions in this case, *Middleton, and Melvin Piedmont,* the Defendants have not cited any case holding that prohibition can be used to address the affirmative defenses of collateral estoppel or standing. (Those cases do not hold prohibition can be used to address the affirmative defense of standing.) None of these decisions provided any explanation of why the Third District determined prohibition was an appropriate remedy.

In *Middleton,* the defendant appealed a non-final order reinstating a lawsuit. Without explanation, the Third District treated the appeal as a petition for prohibition. *Middleton,* 941 So.2d at 422. It then granted the petition for prohibition and revoked the trial court's order on the grounds that the action was barred by the affirmative defenses of res judicata and collateral estoppel. *Id.* at 424-25. The opinion did not cite any authority relating to prohibition, much less provide an analysis or explanation indicating why the court believed prohibition could be an appropriate remedy.

When the Third District granted the petition for prohibition in *Melvin Peidmont,* it simply cited *Middleton* as the only justification for issuing a writ of prohibition. When it held that the trial court erred by denying the Defendant's motions to dismiss in the instant case, citations to the court's prior decision in *Middleton* and *Melvin Piedmont* were the only supporting

authority for issuing a writ of prohibition. Once again, no other explanation or analysis was provided.

The Third District's decisions holding that prohibition can be used to address the affirmative defenses of collateral estoppel and res judicata clearly conflict with this Court's governing decisions establishing the very limited scope and availability of the extraordinary writ of prohibition. If this conflict is not addressed, it is almost certain that the error in the decision below, in *Middleton* and in *Melvin Peidmont* will continue to be repeated, and that this Court's precedential holdings limiting the use of prohibition will be further eroded. It is therefore requested that this Court reverse the decision below and disapprove the use of prohibition in *Middleton* and *Melvin Piedmont.*

II. LEXINGTON'S REQUEST THAT THIS COURT RULE ON ITS PETITION FOR CERTIORARI FAILS TO RECOGNIZE THE LIMITS OF THIS COURT'S JURISDICTION.

While recognizing that this Court has held it does not have jurisdiction to entertain petitions for common law certiorari, Lexington nonetheless contends this Court has jurisdiction to rule on the merits of its petition for certiorari based on the following: "once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate

process, **as though the case had originally come to this Court on appeal.'"** *Lexington Brief,* p. 31 (emphasis added) (quoting *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982)). Lexington's position ignores the full consequences of this statement. If this Court were to treat the petition for certiorari as if it "had originally come to this Court," it would dismiss the petition. See, *e.g., Trepal v. State,* 754 So.2d 702, 706 (Fla. 2000).

Lexington's second argument fares no better. Lexington states:

> Furthermore, this Court, in the course of exercising its discretionary jurisdiction to review decisions based on conflict, has reviewed decisions by the district courts of appeal relating to certiorari. *See, e.g., Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1088 (Fla. 2010).

Lexington Brief, p. 31. This statement is correct, but it also fails to support Lexington's conclusion. As demonstrated in *Custer Medical,* this Court reviews appellate decisions to determine whether the intermediate appellate courts have properly ruled on petitions for certiorari. Reviewing district courts' decisions that address the merits of petitions for certiorari is not the same as this Court being the initial court to entertain and rule on the merits of petition for certiorari.

While Mint's initial brief did not burden this Court with all the arguments against granting certiorari relief, it did raise two very simple arguments establishing Lexington and Cozen are not be entitled to certiorari relief.

Remarkably, Lexington fails to mention, much less rebut, either of the arguments raised in Mintz's Initial Brief.

Lexington presents the following arguments in support of its request that this Court grant its petition for certiorari: 1) "The circuit court departed from the essential requirements of law by failing to apply the litigation privilege,"[6] 2) "The Circuit Court departed from the essential requirements of the law by allowing the underlying action to proceed despite Mintz's lack of standing,"[7] and 3) "The circuit court departed from the essential requirements of law by failing to dismiss Mintz's causes of action based upon the doctrine of collateral estoppel."[8] As stated in Mintz's prior brief, though, collateral estoppel only applies to only one category of special damages that is only requested in three of the complaint's ten counts. General damages are still available for those claims and the remaining counts are unaffected by collateral estoppel.

Lexington's two remaining arguments are defeated at the outset for the reasons raised in Mintz's Initial Brief (and completely ignored in Lexington's brief). First, "the petitions seek untimely certiorari review of the trial court's rulings regarding litigation privilege since the petitions were filed 405 days

[6] Lexington Brief, pp. 32-38.
[7] Lexington Brief, pp. 38-43.
[8] Lexington Brief, pp. 43-44.

after the trial court first ruled on the issue."" *Initial Brief, p. 26.* A petition for certiorari must be filed within 30 days of the rendition of the order being reviewed. Fla. R. App. P. 9.100. "The time limit to file a petition for writ of certiorari cannot be extended by obtaining a second order in the trial court to the same effect as the first." *Arce v. Maher Guiley And Maher, P.A.*, 936 So. 2d 682, 683 (Fla. 5th DCA 2006).

On April 24, 2017, the Defendants filed motions to dismiss asserting the entire action should be dismissed because it was barred by the litigation privilege. [R. 348, 368.] On August 25, 2017, the trial court rejected that argument by entering an order denying the motions to dismiss as to the four counts based on violation of the Florida Mediation Confidentiality and Privilege Act. [R. 386.]

The Defendants later renewed their litigation privilege argument in their motions to dismiss the Second Amended Complaint**.** [R. 496, 547.] The trial court rejected this argument a second time when it denied those motions to dismiss on August 30, 2018. [R.247.] The Defendants filed their petitions for certiorari on October 1, 2018, – 405 days after the trial court's first order denying their request for dismissal on the grounds of the litigation privilege. [R.3, 217, 386.]

Florida Rule of Appellate Procedure 9.100(c)(1) requires that a certiorari petition must be filed within 30 days of rendition of the order sought to be reviewed. This requirement is jurisdictional and failure to meet it will result in dismissal of the petition. *Wibbens v. State, Dept. of Highway Safety & Motor Vehicles, Bureau of Driver Improvement*, 956 So. 2d 503, 504 (Fla. 1st DCA 2007) (citing *Hofer v. Gil De Rubio,* 409 So.2d 527 (Fla. 5th DCA 1982)).

Since Lexington and Cozen did not seek review until 405 days after the trial court's initial order rejecting their litigation privilege argument, their request for relief was untimely and the District Court did not even have jurisdiction to address the issue.

Even if Cozen and Lexington had sought timely review of the trial court's initial order rejecting their litigation privilege argument, the second argument raised in Mintz's brief also establishes that certiorari would be inappropriate. "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." *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003) (bold emphasis added). The question of whether Mintz has standing to assert claims under the act and the issue of whether the litigation privilege bars claims under the Act are both

issues of first impression. It would be inappropriate to grant certiorari under these circumstances.[9]

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 diminishing circuit court jurisdiction in conflict with this Court's prior decisions. The District Court's decision and the resulting mandate should be quashed, and this matter should be remanded for further proceedings.

[9] Since this Court does not have jurisdiction to entertain the petitions for certiorari, Mintz's Initial Brief focused on these two arguments which clearly establish certiorari relief cannot be granted, and did not engage in the irrelevant arguments presented by Lexington as to litigation privilege and standing. However, the merits of those arguments are addressed in more detail in the Response Mintz filed to the petitions in the District Court. [R.837.]

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210(a), Fla. R. App. P., undersigned counsel hereby certifies that this brief is submitted in Ariel 14-point font and contains 3988 words.

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.,

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