IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO: SC20-1225

DCA CASE NOS.: 3D18-1976 and 3D18-1975
L.T. CASE NO.: 16-028473 CA 01 (21)

MINTZ TRUPPMAN, P.A.

Petitioner,

v.

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

Respondents.
_____/

RESPONDENT, LEXINGTON INSURANCE COMPANY'S ANSWER BRIEF ON MERITS

On Discretionary Review from the District Court of Appeal of Florida – Third District

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INTRODUCTION[1]

"Prohibition lies to prevent an inferior tribunal from acting in excess of jurisdiction . . . 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 . . . ." *English v. McCrary*, 348 So. 2d 293, 297 (1977) (emphasis added). Historically, the writ of prohibition was developed in the early stages of English law to safeguard the jurisdiction of the King's Court against the encroachment of other courts. *Id.* at 296. The writ of prohibition is a mechanism that keeps courts within the "limits and bounds of their several jurisdictions prescribed to them by the laws and statutes of the realm" by restraining a lower court from acting in excess of its jurisdiction. *Id.*

While this Court has cautioned that writs of prohibition should be granted in limited circumstances and that its use is narrow in scope, the nature and substance of the claims Petitioner, MINTZ TRUPPMAN, P.A. ("Mintz"), raised in the circuit court fit well within this scope as jurisdiction over said issues already vested in the federal court, which previously resolved the issues. *Id.*; *see also Carnival Corp. v. Middleton*, 941 So. 2d

[1] Lexington hereby joins, adopts, and incorporates Co-Respondents, COZEN O'CONNOR, PLC and JOHN DAVID DICKENSON's Initial Brief on the Merits in its entirety by reference here.

421, 424 (Fla. 3d DCA 2006).

Here, the Third District correctly granted a writ of prohibition in order to estop Mintz's causes of action from proceeding before the circuit court because Mintz's claim to redetermine its fee award was merged into the federal court's final judgment. This case presents neither an express nor direct conflict with this Court's holdings in *English v. McCrary* and *Mandico v. Taos Construction, Inc.*, 605 So. 2d 850 (Fla. 1992), because the unique facts and circumstances presented herein show that the circuit court was without jurisdiction to entertain the claims presented by Mintz. In state court, Mintz represents the same interests as they maintained as counsel for the plaintiff in the prior federal court action, dressing up its complaint regarding the federal court's adjudication and award of attorney fees as a cause of action under § 626.9373, Fla. Stat., and seeks to re-litigate the fee claim that the federal court determined with finality. As such, a writ of prohibition preventing the circuit court from further action in the underlying case was proper as there exists no subject matter jurisdiction for the lower court to re-decide an issue that was litigated in the prior suit.

STATEMENT OF THE CASE

Mintz seeks review of the Opinion of the Third District Court of Appeal in *Cozen O'Connor, PLC v. Mintz Truppman, P.A.*, 306 So.3d 259, 263 (Fla.

3d DCA 2020), which prohibited the Circuit Court for the Eleventh Judicial Circuit from proceeding further in an action brought by Mintz that asked the Circuit Court to redetermine an issue already determined by a prior federal court judgment. Mintz claims the Opinion conflicts with the decisions of this Court in *English v. McCrary*, 348 So. 2d 293 (1977) and *Mandico v. Taos Construction, Inc.*, 605 So. 2d 850 (Fla. 1992).

STATEMENT OF THE FACTS

I. The Federal Action

The underlying civil action originated from a federal case, *Daphne Query v. Lexington Insurance Company*, Case No. 1:15-cv-21951-JLK-TORRES, in which Ms. Query sued her insurance company, Lexington Insurance Company ("Lexington"), for indemnification after a broken pipe caused water damage to her home. R. 104–105, 496 ¶1.[2] Ms. Query was represented in that action by Mintz, and Lexington was represented by Cozen O'Connor, PLC and John D. Dickenson (collectively, "Cozen"). *See* R. 69. The lawsuit was removed from Miami Dade Circuit Court to the U.S. District Court for the Southern District of Florida. R. 79 ¶1. Upon removal, a second law firm, Kramer, Green, Zuckerman, Greene & Buchsbaum, P.A. ("Kramer, Green") joined Mintz as co-counsel for Ms. Query for its "extensive

[2] Citations to the record shall be referred to as "R." PDF page number.

experience in federal court and property damage litigation." R. 46, 106.

Once in federal court, Ms. Query and Lexington engaged in mediation and settled the property loss claim for $125,000. R. 38, 71, 176. The settlement included a stipulation that Mintz was entitled to a reasonable sum for attorneys' fees, reflected by the "Agreed Order" entered by the federal court that approved the "Parties' Notice of Partial Settlement and Stipulation Regarding plaintiff's Entitlement to Attorneys' Fees and Costs." R. 41.

The Agreed Order required the parties to meet and confer to resolve the attorneys fee and costs amount pursuant to Local Rule 7.3 for the Southern District of Florida. *Id.* at ¶4. As the attempt to resolve the fee amount without court intervention failed, Mintz filed Plaintiff's Verified Motion for Award of Attorneys' Fees and Non-Taxable Costs and Expenses ("Motion"), which commenced the federal court's adjudication and determination of the reasonable fee award for Ms. Query's counsel. R. 44. The Motion asserted that the settlement represented "100% of the property damage sustained from the plumbing loss at issue." R. 46, 59, 63. It also set forth the total hours Mintz and Kramer, Green each worked on the case and the hourly rates of the partners and associates on the case. R. 46–47. The Motion also sought the application of a contingency risk multiplier of 2.0 for a total demand of $828,056 for attorneys' fees. R. 62; *see* R. 109.

Thereafter, Lexington filed its Response in Opposition to the Motion ("Response"), arguing that the fees sought were unreasonable. R. 71–90. In order to rebut the false statement repeatedly made to the Court in the Motion—that Lexington had paid 100% of the property damage claim—Lexington's Response noted that Ms. Query's Pre-Mediation Demand requested damages far in excess of the amount of money that was paid to settle the claim and attached a copy of the Demand. R. 83–84. This information was provided to correct the misrepresentations in the record made by Mintz and to show that a partial recovery of the property damage claim actually occurred. *Id.* Mintz filed a Reply and did not object to the use of the filing of the Pre-Meditation Demand. R. 93–103. Mintz did not seek to strike Lexington's Response and Mintz failed to raise a mediation confidentiality objection based on Lexington's act of attaching the Pre-Mediation Demand in the course of the attorney fee litigation, which the federal court had jurisdiction over. *Id.*; R. 42–43.

The Motion and Response were referred to a Magistrate Judge, who in his Report and Recommendations ("R&R") granted in part and denied in part the Motion. R. 104–132. After a thorough review of applicable Florida law and the Motion, the Magistrate Judge determined that "the facts of this case do not rise to the level of proposed hourly rates" for a clear-cut property

damage case. R. 112. The R&R reduced the requested hours of counsel and determined that the contingency risk multiplier should not be applied because the lodestar method was a sufficient calculation of entitled fees, which was a sum of $259,502.81 in total costs and fees. R. 114, 125, 131. Mintz had fourteen days from the date of the R&R to serve and file written objections. R. 131. On March 17, 2017, the District Judge acknowledged the lack of objections filed by either party regarding the R&R, conducted a *de novo* review of the R&R, and affirmed and adopted it. R. 133–134. Mintz did not appeal the federal district court's final judgment and, on March 28, 2017, Lexington paid all sums owed. *See* R. 360 ¶72.

II. The Underlying Civil Action

Meanwhile, in a deliberate move, Mintz filed the underlying action against Lexington, Cozen O'Connor, and John D. Dickenson in Miami Dade Circuit Court while the attorneys' fee issue remained pending in federal court and prior to the federal court's entry of a final judgment on the attorneys' fee issue. R. 353–354 ¶39. Mintz's Second Amended Complaint (the operative pleading[3]) argued that the disclosure by Lexington of the Pre-Mediation

[3] The circuit court, presided over by a prior judge, previously dismissed Count II for breach of the mediation contract against Cozen, Count III for breach of the mediation contract against Lexington, Count VII for bad faith against Lexington, Count VIII for fraud in the inducement against Lexington, and Counts IX-X for fraud in the inducement against Cozen, of Mintz's Amended

Demand it authored somehow deprived Mintz of the opportunity to "have an unadulterated and unbiased fee evaluation conducted" in violation of Florida's Mediation Confidentiality and Privilege Act. § 44.406(1), Fla. Stat. (2018). R. 435, ¶40.

Lexington and Cozen each moved to dismiss Mintz's Second Amended Complaint and the circuit court denied the motions. R. 214, 492–538, 539–579, 580–589. Lexington and Cozen each then timely filed separate Petitions with the Third District, seeking writs of certiorari and prohibition.[4] R. 3–28, 217–240. Lexington and Cozen argued certiorari and/or prohibition was appropriate because (1) Lexington and Cozen's decision to include the Pre-Mediation Demand as an exhibit to Lexington's Response – the act that formed the basis of all of Mintz's claims – was immunized by the litigation privilege; (2) Mintz lacked the requisite standing under Florida's Mediation Confidentiality and Privilege Act to pursue its claims because it was a mediation participant, rather than a mediation party, and only a mediation party had the right to pursue remedies under the Act

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Complaint for failure to state a cause of action as a matter of law. However, after a new judge was assigned to the case, Mintz filed a Second Amended Complaint and re-plead the exact six counts previously dismissed. *See* R. 386, 424–464.

[4] Lexington and Cozen each adopted the other's petition filed with the Third District.

for a purported breach of confidentiality; and (3) the gravamen of Mintz's state court claims was to recover additional attorneys' fees in the federal court action, which left the trial court no jurisdiction to hear successive litigation of an already-rendered federal final judgment. *Id.*

The Third District ultimately agreed with Lexington and Cozen's third theory, holding that the Circuit Court lacked the subject matter jurisdiction to adjudicate what was essentially Mintz's claim for additional fees in the federal court action. R. 908–920. As a result, in its Opinion, the Third District granted Lexington and Cozen a writ of prohibition, dismissed the petitions for writ of certiorari as moot, and directed the Circuit Court to dismiss the case. R. 920.

Mintz now seeks review of the Third District's grant of a writ of prohibition, claiming the Third District's decision, as well as the Third's decisions 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 (Fla. 3d DCA 2007), conflict with this Court's points of law in *English v. McCrary* and *Mandico v. Taos Const., Inc.*, 605 So. 2d 850 (Fla. 1992).

POINTS ON APPEAL

I. The Third District's Decision Is Not in Conflict with Any Decision of This Court or Another District Court of Appeal.
II. The Third District Properly Granted a Writ of Prohibition Because the Circuit Court Lacked Jurisdiction to Adjudicate Mintz's Claims.
III. Alternatively, a Writ of Certiorari was Appropriate Because Mintz's Claims were Barred Based on Collateral Estoppel, the Litigation Privilege and Mintz's Lack of Standing.

SUMMARY OF THE ARGUMENT

The unique facts and circumstances of this case fail to present an express and direct conflict with this Court's prior decisions in *English v. McCrary*, 348 So. 2d 293 (Fla. 1977) and *Mandico v. Taos Construction, Inc.*, 605 So. 2d 850 (Fla. 1992). The Third District's Opinion does not "revoke an order already entered," contrary to *English*; rather, it "commands the one to whom it is directed not to do the thing which the supervisory court is informed the lower tribunal is about to do." 348 So. 2d at 297. Thus, the Third District's Opinion is properly preventative rather than corrective, as it grants prohibition to prevent the Circuit Court from continuing to exercise jurisdiction over a proceeding that is clearly barred by collateral estoppel. Furthermore, the existence of jurisdiction here does not depend on controverted facts; rather, the facts portray a cause of action which "clearly and specially" appears to be outside of the circuit court's jurisdiction based on collateral estoppel. *Id.* Thus, there is also no express and direct conflict with this

Court's decision in *Mandico* on the same question of law. Jurisdiction should, therefore, be discharged as improvidently granted and this appeal should be dismissed.

Nevertheless, the Third District properly granted a Writ of Prohibition in this matter because the Circuit Court lacked jurisdiction to adjudicate Mintz's claims. Specifically, the Third District properly concluded that collateral estoppel applied, as Mintz's Second Amended Complaint sought to relitigate an issue that merged into the final judgment of the federal court, for the purpose of recovering additional fees that were sought—but not obtained—in the federal action. And, while it is true that the circuit court is a court of general jurisdiction, *English* clearly identifies an exception to the broad grant of jurisdiction to the circuit courts—namely, "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 Constitute and statutes enacted thereto." This notion indicates prohibition is an appropriate vehicle for challenging a trial court's decision to continue to exercise jurisdiction over a case, not just jurisdiction over the parties or subject matter.

A writ of prohibition is the proper claim for relief in this case because the circuit court had no jurisdiction to hear and rule on Mintz's causes of action from its inception, as it only invokes the previous litigation of attorney

fees—an issue that was finally determined by the federal court action. Specifically, the statute under which Ms. Query (and by extension, Mintz) claimed a right to attorneys' fees in the first place—section 626.9373—requires that those fees be assessed by the trial court in which the insured's action against the insurer was filed and that those fees be included in the final judgment issued by that court. Thus, under section 626.9373, the federal district court was the sole court vested with case and subject matter jurisdiction to determine the reasonable amount of fees and costs "as well as any other claims related thereto." Once those fees were awarded in the Final Judgment (which was not appealed), collateral estoppel precluded any court, state or federal, from having jurisdiction over this case and its subject matter to re-determine the amount of those fees.

When identical parties attempt an end run around the federal court's adverse determination by re-litigating the same issues in state court, that court is without authority to adjudicate the issue any further under collateral estoppel, thus warranting the issuance of a writ of prohibition. The Third District's decision therefore comports with this Court's decisions in *English* and *Mandico* because the Third District's act of preventing the circuit court from continuing to exercise case and subject matter jurisdiction over the issue of Mintz's entitlement to additional attorney fees, which it is precluded

from re-litigating, is within the writ of prohibition's narrow scope as set out by the prior decisions of this Court.

Alternatively, a Writ of Certiorari was appropriate because Mintz's claims were barred based on collateral estoppel, the litigation privilege, and Mintz's lack of standing. Entitlement to certiorari was properly raised in the appellate process and, therefore, this Court has jurisdiction to consider the issues. Therefore, should this Court conclude the Third District's grant of prohibition under the facts and circumstances presented herein was inappropriate, Lexington respectfully urges this Court to reverse the Third District's decision that Lexington and Cozen's Petitions for Writ of Certiorari were moot and either find certiorari was appropriate for the reasons stated below or remand to the Third District with instructions to rule on the merits of the Petitions for Writ of Certiorari.

ARGUMENT

I. The Third District's Decision Is Not in Conflict with Any Decision of This Court or Another District Court of Appeal

Mintz invoked this Court's discretionary jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), which provides for review of a decision from a district court of appeal that "expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question

of law." "Expressly" has been interpreted by this court to mean "to represent in words" and "to give expression to." *Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980).

When this Court accepted conflict jurisdiction over this matter it was without the benefit of the complete record on appeal; however, now that the Court has the benefit of the complete record that formed the basis for the Third District's Opinion, Lexington urges this Court to find that the Third District's Opinion does not "expressly and directly conflict" with a decision of this Court on the same question of law. *See* R. 41, 44, 71–90, 93–103, 104–132, 133–134, 143 ¶33, 144—45 ¶36, ¶38, 146 ¶40–41. No such conflict exists and the Court should discharge jurisdiction as improvidently granted and dismiss this appeal. *See, e.g., Noa v. Florida Ins. Guar. Ass'n*, 248 So. 3d 60, 61 (Fla. 2018) (per curiam) (having initially accepted jurisdiction based on express and direct conflict, this Court concluded after merits briefing that review was improvidently granted and discharged jurisdiction); *Richards v. State*, 237 So. 3d 935, 935–36 (Fla. 2018) (per curiam) (same); *Gresham v. State*, 220 So. 3d 1133, 1133 (Fla. 2017) (per curiam) (same); *Sells v. CSX Transp., Inc.*, 214 So. 3d 1232, 1232 (Fla. 2017) (per curiam) (same).

A. There is no conflict with *English v. McCrary*

Mintz suggests the decision below conflicts with this Court's decision

in *English v. McCrary*, 348 So.2d 293 (Fla. 1977). I.B. 1, 5.[5] This Court's decision in *English* does not, however, concern the same point of law decided by the Third District. In *English*, a trial judge denied a news reporter access to a court proceeding. *English*, 348 So. 2d at 294. The journalist sought a writ of prohibition and was denied by the appellate court, which determined that the petitioner did not state a prima facie case for the issuance of the writ. *Id.* This Court agreed with the appellate court, explained the historical significance of the use of the writ, and emphasized that its use is "preventative and not corrective." *Id.* at 296. Further, this Court explained, "where proceedings sought to be prohibited have been completed . . . prohibition may not be used for the sole purposes of establishing principles to govern future cases." *Id.* at 297.

Mintz argues a conflict exists based on the rule statement in *English* that writs of prohibition cannot be used to revoke an order already entered. *Id.*; I.B. 19. Mintz's attempt to implicate a conflict of law fails, however, because the facts and circumstances below fit within the scope of a writ of prohibition. The Third District's Opinion does not "revoke an order already entered;" rather, it "commands the one to whom it is directed not to do the

[5] Citations to the Petitioner's Initial Brief shall be referred to as "I.B." PDF page number.

thing which the supervisory court is informed the lower tribunal is about to do." *English*, 348 So. 2d at 297. In denying Defendants' Motions to Dismiss, the Circuit Court contemplates ongoing actions, which Lexington and Cozen assert the court does not have jurisdiction to take. *See Stokes v. Jones*, 319 So. 3d 166, 171 (Fla. 1st DCA 2021) (granting a writ of prohibition to prevent the trial court from hearing a challenge on an issue that became final when not appealed within 30 days). The Third District's Opinion is properly preventative rather than corrective, as it grants prohibition to prevent the Circuit Court from continuing to exercise jurisdiction over a proceeding that is clearly barred by collateral estoppel. R. 917.

Moreover, the underlying proceedings were not complete or even near completion, unlike in *English*. Here, the circuit court denied Lexington and Cozen's Motions to Dismiss, and no affirmative relief had been entered. R. 214, 492–538, 539–579, 580–589. The circuit court, if it were permitted to proceed, would be improperly presiding over an action that "is essentially Mintz's claim for additional fees in the federal court action," *Cozen O'Connor, PLC v. Mintz Truppman, P.A.*, 306 So.3d 259, 263 (Fla. 3d DCA 2020), which, based on the doctrine of collateral estoppel, it lacked jurisdiction to adjudicate. R. 915. Lexington and Cozen affirmatively showed the circuit court's lack of jurisdiction to hear the issue already decided by the federal

court, as required by *English v. McCrary*, and the Third District agreed with Lexington and Cozen that it was necessary to prevent their impending injury by prohibiting the continuance of the proceeding in trial court. *English*, 348 So. 2d at 298. Thus, there is no express and direct conflict between the Third District's Opinion and this Court's decision in *English* on the same question of law.

B. There is no conflict with *Mandico v. Taos Construction, Inc.*

Mintz also contends the Third District's decision conflicts with *Mandico v. Taos Construction, Inc.*, 605 So. 2d 850 (Fla. 1992), which provided that prohibition may not 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." *Id.* at 854 (citing *English*, 348 So. 2d at 298) (emphasis added). Again, however, this Court's decision in *Mandico* does not concern the same point of law decided by the Third District.

Specifically, this Court in *Mandico* held that "prohibition may not be employed to raise the defense of workers' compensation immunity" because "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." *Id.* Here, the existence of jurisdiction does not depend on controverted facts; rather, the

facts herein portray a cause of action which "clearly and specially" appears to be outside of the circuit court's jurisdiction based on collateral estoppel. *Id.* Jurisdiction to determine the statutory attorneys' fees claim was committed to the federal court by section 626.9373, Florida Statutes, and the fee award was required to be entered in the Final Judgment in the federal case. R. 41. The Third District's Opinion confirms that collateral estoppel was apparent from the face of Mintz's Second Amended Complaint. Mintz's draconian viewpoint on the writ of prohibition is not supported by this Court's precedent and quashing the below-issued writ would permit the floodgates to open on a never-ending series of new cases that amount to a collateral attack on the judgment of another court. Thus, there is no express and direct conflict between the Opinion and this Court's decision in *Mandico* on the same question of law.

II. The Third District Properly Granted a Writ of Prohibition Because the Circuit Court Lacked Jurisdiction to Adjudicate Mintz's Claims.

A writ of prohibition may only be granted when it is shown that a lower court is without jurisdiction or attempting to act in excess of jurisdiction. *Scott v. Francati*, 214 So. 3d 742, 748 (Fla. 1st DCA 2017). While narrow in scope, a writ of prohibition is utilized when there is a "need to prevent an impending injury where there is no other appropriate and adequate legal remedy."

Mandico, 605 So. 2d at 854.

Mintz asks this Court to overturn the Third District's Opinion, as well as its prior decisions in *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 (Fla. 3d DCA 2007), as incorrect issuances of the extraordinary writ of prohibition. As will be shown below, the Third District's decisions are sound applications of the writ and relevant jurisdictional principles. Therefore, they should be affirmed in all respects.

A. The Third District properly concluded that collateral estoppel applied.

The legal doctrine of decisional finality exists to guarantee a "terminal point in every judicial proceeding at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein." *Fla. Power Corp. v. Garcia*, 780 So. 2d 34, 44 (Fla. 2001) (citing *Austin Tupler Trucking, Inc. v. Hawkins*, 377 So. 2d 679, 681 (Fla. 1979); *see also* 32A Fla. Jur. 2d, Judgments and Decrees, § 2. Finality of a judgment occurs when no appeal is taken. *Milio v. Leinoff and Silvers, P.A.*, 668 So.2d 1108, 1110 (Fla. 3d DCA 1996) (citation omitted); *see also* 32A Fla. Jur. 2d, Judgments and Decrees, § 2. Generally, Florida courts apply federal common law when addressing the preclusive effect of a federal court's judgment. *Semtek Int'l v. Lockheed Martin Corp.*, 531 U.S. 497, 507–

08 (2001).

Collateral estoppel or "issue preclusion . . . bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment," even if the cause of action is not the same. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (emphasis added). By preventing parties from contesting issues they had a full and fair opportunity to litigate, collateral estoppel protects against "the expense and vexation attending multiple lawsuits, conserve[s] judicial resources, and foster[s] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 892 (citing *Montana v. U.S.*, 440 147, 153–54 (1979); *In re Palm Beach Finance Partners, L.P.*, 568 B.R. 874, 892 (Bankr. S.D. Fla. 2017) (citation omitted).

When the second lawsuit is "bottomed upon a different cause of action than that alleged in the prior case," estoppel by judgment is the appropriate test, which forecloses matters actually litigated and determined in the initial action. *Gordon v. Gordon*, 59 So. 2d 40, 43 (Fla. 1952). This Court explained in *Gordon* that where there are two different causes of action, the judgment in the first suit estops the parties from litigating in the second suit issues common to both causes of action. 59 So. 2d at 44. The "identity of the facts essential" to the causes of action, meaning the testimony produced by the

plaintiff in the second suit, must be essentially the same as that which was produced in the former action. *Id.*

The essential elements to a collateral estoppel defense are that "the parties and issues are identical, and [that] the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction." *Mobile Oil Corp. v. Shevin*, 354 So. 2d 372, 374 (Fla. 1977). For collateral estoppel to apply, Florida requires "mutuality" and "identity of the parties," which do not exist unless the same parties or their privies participated in the prior litigation that resulted in a final judgment by which they are mutually bound. *Id.* (citation omitted); 32A Fla. Jur. 2d, Judgments and Decrees, § 106.

Here, in state court, collateral estoppel prevents anyone claiming by, through or under Ms. Query, from litigating the federal court's determination as to the amount of attorneys' fees recoverable. Mintz asserted the rights of Ms. Query by virtue of being in privity of contract with her relative to attorneys' fees. *See* R. 135–136 ¶2. The facts demonstrate that Mintz's interests as legal representative of Ms. Query, in litigating the reasonable amount of Ms. Query's attorneys' fees, were adequately represented in the federal court's adjudication of Ms. Query's attorney fees. *See Taylor*, 553 U.S. at 894; *see also* R. 44–69, 71–90, 93–103. Moreover, as representative

of Ms. Query in the federal court litigation, Mintz was essentially in control over the litigation in which that judgment was rendered. *See Taylor*, 553 U.S. at 894.

The gravamen of Mintz's Second Amended Complaint seeks to relitigate an issue that merged into the final judgment of the federal court, for the purpose of recovering additional fees that were sought—but not obtained—in the federal action. R. 135; *Town of Miami Springs v. Marshall*, 83 So.2d 852 (Fla. 1955) ("A final judgment terminates the proceedings, merges the cause of action on which it is founded, and forms the basis of an estoppel or claim of res judicata."). The Second Amended Complaint invokes, relies on, and is dependent upon the principal assertion that, Lexington and Cozen's act of appending the Pre-Mediation Demand to Lexington's Response in Opposition to Ms. Query's Motion violated Florida's Mediation Confidentiality and Privilege Act, sections 44.401–44.406, Florida Statutes. R. 143 ¶33, 144—45 ¶36, ¶38, 146 ¶40–41.

After mediation and settlement, the parties to the federal court action filed a stipulation—that was approved by the federal district court—that reasonable sum for attorneys' fees were owed and were to be determined by the federal court along with "any other claims related thereto." R. 38, 41. Thereafter the parties litigated the appropriate fee award in the federal district

court. R. 44–69, 71–90, 93–103. The Florida Statute which bestows the right to recover reasonable attorneys' fees against an insurer plainly requires that the award of fees is to be made by the trial court that entered the judgment on the insured's underlying claims against her insurer—here, the federal district court. *See* § 626.9373 Fla. Stat. (2018).

It was during this thorough litigation that Mintz claims an alleged mediation confidentiality breach occurred and affected its fee award, and yet their Reply to Lexington's Response in Opposition to Ms. Query's Motion failed to raise this objection prior to the final judgment on the merits of their attorney fees and costs award. R. 93–103, 133–134. Indeed, rather than objecting in the district court to the filing of its Pre-Mediation Demand, moving to seal or strike the Pre-Mediation Demand, or seeking a re-determination of fees by a judge not contaminated by knowledge of the Pre-Mediation Demand, Mintz instead sought a second bite at the apple in a different court, presumably one in which Mintz believed it could achieve a better result.

The doctrine of collateral estoppel bars Mintz's collateral attack on a judgment duly rendered in federal court by which the parties are mutually bound. *See Mobile Oil Corp. v. Shevin*, 354 So.2d 372, 374 (Fla. 1977). As in *Carnival Corp. v. Middleton*, 941 So. 2d 421 (Fla. 3d DCA 2006), where the federal court made conclusive findings on the issues of forum selection

and statute of limitations, the federal court in the relevant prior action made conclusive findings on the issue of attorney fees and costs. The federal court exercised its jurisdiction over the fee award and had competent jurisdiction to determine those issues "directly related" to the amount of attorneys' fees. R. 38 ¶3, 41 ¶2. As a result, the Third District correctly concluded that the circuit court was without jurisdiction to act further on the attorneys' fees and costs—an issue already conclusively decided and disposed of in federal court.

B. Collateral estoppel precluded the circuit court from obtaining jurisdiction, as jurisdiction for Mintz's claims resided with the federal court.

While it is true that the circuit court is a court of general jurisdiction, *English* clearly identifies an exception to the broad grant of jurisdiction to the circuit courts—namely, "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 Constitute and statutes enacted thereto." *English*, 348 So. 2d at 297. This notion indicates prohibition is an appropriate vehicle for challenging a trial court's decision to continue to exercise jurisdiction over a case, not just jurisdiction over the parties or subject matter. *See Baden v. Baden*, 260 So. 3d 1108, 1111 (Fla. 2d DCA 2018) (citing *Mandico v. Taos Constr., Inc.*, 605 So. 2d 850, 853 (Fla. 1992) (granting prohibition where the

trial court continued to exercise jurisdiction over a trust where the action was previously dismissed)); *Katke v. Bersche*, 161 So. 3d 574, 576 (Fla. 5th DCA 2014) (granting writ of prohibition where the court lost case jurisdiction because a party voluntarily dismissed a claim, which deprived the court of jurisdiction over the subject matter of the claim dismissed); *see also* R. 20–25 (discussion analyzing the species of subject matter jurisdiction). "Case" jurisdiction involves the power of the court over a particular case that is within its subject matter jurisdiction. *Tobkin v. State*, 777 So. 2d 1160, 1163 (Fla. 4th DCA 2001) (citing *English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977) (granting prohibition where the trial court no longer had jurisdiction over a case which was previously dismissed).

A writ of prohibition is the proper claim for relief in this case because the circuit court had no jurisdiction to hear and rule on Mintz's causes of action from its inception, as it only invokes the previous litigation of attorney fees—an issue that was finally determined by the federal court action.[6] *See*

[6] In its Initial Brief, Mintz concedes that some counts in the Second Amended Complaint invoke the issue of attorneys' fees, which "can be considered litigation of the identical issue actually litigated," as a means to preserve other relief sought, such as declaratory and injunctive relief. I.B., 24. Mintz make the argument that these counts are not barred by collateral estoppel in light of the fact that they do not request lost opportunity damages, or damages at all. *Id.* Mintz, however, bases every claim on the issue of the alleged violation of the mediation privilege, which could and should have been raised in the federal action as it occurred within the course of the

Stokes v. Jones, 319 So. 3d 166, 170 (Fla. 1st DCA 2021) ("[T]he trial court loses jurisdiction over a case after it becomes final . . . Respondents did not file a . . . timely motion . . . for rehearing of the trial court's final order . . . . Accordingly, the successor judge lacked case jurisdiction to hear the challenge . . . ."). Here, the statute under which Ms. Query (and by extension, Mintz) claimed a right to attorneys' fees in the first place—section 626.9373—requires that those fees be assessed by the trial court in which the insured's action against the insurer was filed and that those fees be included in the final judgment issued by that court. Thus, under section 626.9373, the federal district court was the sole court vested with case and subject matter jurisdiction to determine the reasonable amount of fees and costs "as well as any other claims related thereto." R. 38 ¶3, 41 ¶2. Once those fees were awarded in the Final Judgment (which was not appealed), collateral estoppel precluded any court, state or federal, from having jurisdiction over this case and its subject matter to re-determine the amount of those fees.

The Circuit Court therefore lacked jurisdiction over Mintz's causes of action because they solely invoked issues of fact and law essential to the

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previous litigation. As such, all claims in the underlying litigation are collaterally estopped.

litigation and final determination by the federal court, prior to its entry of a final judgment. *See Gordon*, 59 So. 2d at 43–44 (explaining that in an assessment of whether collateral estoppel applies, the pointed question is "whether the facts necessary to the maintenance of the second suit are essentially the same as those which were relied upon to establish Plaintiff's right to a decree in the first action . . . .").

Mintz's claim that the doctrine of collateral estoppel has nothing to do with the circuit court's jurisdiction is incorrect. *See* I.B. 14. When a final judgment[7] of a court of competent jurisdiction becomes absolute, the first cause of action estops the parties from litigating in the second suit "points and questions" common to both causes of action. *Gordon*, 59 So. 2d at 43. Collateral estoppel, or issue preclusion, is a form of a jurisdictional objection that "bars relitigation of the same issue between the same parties which has already been determined by a valid judgment." *Kowallek v. Lee Rehm*, 183 So. 3d 1175, 1177 (Fla. 4th DCA 2016). When identical parties attempt "an end run around the federal court's adverse determination by re-litigating the

[7] A final judgment disposes of the merits of a case by declaring whether the plaintiff is entitled to recover, and the judgment must indicate to the reviewing court how the trial court arrived at its award by setting forth the basis of its ruling. *Irving Trust Co. v. Kaplan*, 20 So. 2d 351 (1944); *Indian Lake Maintenance, Inc. v. Oxford First Corp.*, 572 So. 2d 536 (Fla. 2d 1990); *see also* 32A Fla. Jur. 2d, Judgments and Decrees, § 2.

same issues" in state court, that court is without authority to adjudicate the issue any further under collateral estoppel. *E.I. DuPont de Nemours & Co., Inc. v. Melvin Piedmont Nursery*, 971 So .2d 897, 898 (Fla. 3d DCA 2007). That is the exact situation which occurred and warranted the issuance of writs of prohibition in *Carnival Corp. v. Middleton*, 941 So. 2d 421, 424 (Fla. 3d DCA 2006), *E.I. DuPont de Nemours & Co., Inc. v. Melvin Piedmont Nursery*, 971 So. 2d 897 (Fla. 3d DCA 2007), and *Cozen O'Connor, PLC v. Mintz Truppman, P.A.*, 306 So. 3d 259, 263 (Fla. 3d DCA 2020).

In *Carnival*, a passenger of a Carnival cruise ship was injured on board and initiated a negligence cause of action in the Miami Dade Circuit Court. 941 So. 2d at 423. The circuit court dismissed the action based on a forum selection clause within the passenger's ticket that required litigation to occur in the federal district court. *Id.* Thereafter, the federal court dismissed the newly filed federal action based on the one-year statute of limitations period that ran for personal injury actions pursuant to the contracted-for passenger ticket. *Id.* After the state circuit court reinstated the passenger's action, Carnival petitioned for a writ of prohibition in the Third District. *Id.* The Third District explained that the findings by the federal court based on forum selection and statute of limitations grounds were binding upon the circuit court under the principles of collateral estoppel. *Id.* at 424. The issues

already decided by the federal action were controlling and the passenger was collaterally estopped from re-litigating those issues in the circuit court. *Id.* Furthermore, any other issues that related to the forum selection clause issue were "properly subject to determination by the federal court including appellate review of the Southern District's findings." *Id.* As in *Carnival*, the state trial court in *E.I. DuPont* was without authority to conduct further proceedings in a cause of action between the same parties that had litigated the same issue before the federal district court in North Carolina, which entered final summary judgment. 971 So. 2d at 898.

In the prior federal court action, Ms. Query, by and through Mintz, expressly stipulated that the federal court would exercise jurisdiction over and adjudicate the reasonable amount of Ms. Query's fees and costs "as well as any other claims related thereto." R. 38 ¶3, 41 ¶2. Mintz lost the ability to re-litigate any issue related to the attorney fees in Circuit Court as it was adjudicated and finalized by the federal court. *Cozen O'Conner PLC*, 306 So. 3d at 264. If Mintz wanted a re-determination of the amount of fees awarded based on an alleged confidentiality breach, the issue needed to be raised while it was properly subject to the federal court's competent jurisdiction over the issue of attorney fees. R. 131–132; *Carnival*, 941 So. 2d at 424. Mintz had a full and fair opportunity to object to the magistrate

judge's R&R and, subsequently, to appeal any determination by the federal court, but chose not to. R. 131–132 ¶3. Mintz also had a full and fair opportunity to move to seal or strike the Pre-Mediation Demand and to seek a re-determination of fees by a judge not contaminated by knowledge of the Pre-mediation demand, but it failed to do so. Having failed at every instance to object and or appeal its grievances in federal court, Mintz has no right to relitigate these grievances in what it assumes is the more friendly confines of state court because adjudication of Ms. Query's fee claim became finalized. *See Gordon*, 59 So. 2d at 44 (explaining that, where the two causes of action are different, the first suit estops the parties from litigating issues which were litigated and adjudicated in that prior litigation).

Lexington and Cozen were free to raise collateral estoppel in their Motions to Dismiss, as Mintz specifically incorporated the prior federal proceedings into its Second Amended Complaint. *See* I.B. 14–15; R. 586; *Duncan v. Prudential Ins. Co.*, 690 So. 2d 687, 688 (Fla. 1st DCA 1997); *Kowallek*, 183 So. 3d at 1177. Here, the mediation and settlement communications that occurred during the federal court's adjudication of the fee award formed the basis of Mintz's Second Amended Complaint in the underlying action. R. 143 ¶33, 144–145 ¶36, ¶38, 146 ¶40–41, 582. The Second Amended Complaint asserted ten counts, each seeking relief based

on the allegation that Lexington and Cozen breached mediation confidentiality, in violation of section 626.9373, Fla. Stat. R. 135–175; *see Gordon*, 59 So. 2d at 40 ("where the second suit is between same parties and is predicated upon same cause of action as was first. . . if second suit is bottomed upon different cause of action than that alleged in prior case, estoppel by judgment comes into play . . . .").

The Third District's decision herein, as well as in *Carnival*, 941 So. 2d 421 and *E.I. DuPont*, 971 So. 2d 897, comports with this Court's decisions in *English* and *Mandico* because the Third District's act of preventing the circuit court from continuing to exercise case and subject matter jurisdiction over the issue of Mintz's entitlement to additional attorney fees, which it is precluded from re-litigating, is within the writ of prohibition's narrow scope as set out by the prior decisions of this Court.

III. Alternatively, a Writ of Certiorari was Appropriate Because Mintz's Claims were Barred Based on Collateral Estoppel, the Litigation Privilege and Mintz's Lack of Standing.

While Mintz correctly recognizes that once this Court accepts jurisdiction over a cause it may in its discretion consider other issues properly raised and argued before the Court, Mintz erroneously asserts this Court has no ability to review the Third District's decision on Lexington and Cozen's Petitions for Writ of Certiorari because the Court "does not have jurisdiction

'to entertain petitions for common law certiorari.'" I.B. 26 (citing *Trepal v. State*, 754 So. 2d 702, 706 (Fla. 2000)). However, it is well settled that, "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." *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982); *see also Caufield v. Cantele*, 837 So. 2d 371, 377 n.5 (Fla. 2002) (explaining that, pursuant to *Savoie*, 422 So. 2d 308, this Court has jurisdiction to review a remaining issue that was not certified by the district court but was properly raised and argued before it); *Murray v. Reiger*, 872 So. 2d 117 (Fla. 2002) ("Once this Court accepts jurisdiction over a cause in order to resolve a legal issue in conflict, we have jurisdiction over all issues . . . [that] are dispositive of the case.").

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). As this Court stated in *Savoie*,

> In *Zirin v. Charles Pfizer & Co.,* 128 So. 2d 594, 596 (Fla.1961), Justice Drew explained the reasons why, once it has jurisdiction, this Court should exercise its discretion and dispose of the entire cause when the issues are properly before it:

> Needless steps in litigation should be avoided wherever possible and courts should always bear in mind the almost universal command of constitutions that justice should be administered without "sale, denial or delay." Piecemeal determination of a cause by our appellate court should be avoided and when a case is properly lodged here there is no reason why it should not then be terminated here.... "[m]oreover, the efficient and speedy administration of justice is ... promoted" by doing so.

Savoie, 422 So. 2d at 312.

Accordingly, Lexington argues this Court has jurisdiction to review the Third District's decision on Lexington and Cozen's Petitions for Writ of Certiorari as part of its exercise of discretionary jurisdiction over this matter. Therefore, should this Court conclude the Third District's grant of prohibition under the facts and circumstances presented herein was inappropriate, Lexington respectfully urges this Court to reverse the Third District's decision that Lexington and Cozen's Petitions for Writ of Certiorari were moot, R. 915, and either find certiorari was appropriate for the reasons stated below or remand to the Third District with instructions to rule on the merits of the Petitions for Writ of Certiorari.

A. The circuit court departed from the essential requirements of law by failing to apply the litigation privilege.

The circuit court departed from the essential requirements of law by

refusing to dismiss Mintz's Second Amended Complaint based on the application of the litigation privilege, which provided Lexington and Cozen with absolute immunity from the suit. As a general rule, Florida's litigation privilege affords absolute immunity for any act occurring during the course of judicial proceedings, so long as the act is "relevant or material to, the cause in hand or subject of inquiry." *Myers v. Hodges*, 44 So. 357, 361 (Fla. 1907); *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380, 383 (Fla. 2007); *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co*., 639 So. 2d 606 (Fla. 1994); *Boca Investors Group v. Potash*, 835 So. 2d 273 (Fla. 3rd DCA 2002) (affirming the dismissal of a claim based on the absolute litigation privilege immunity afforded to acts occurring during judicial proceedings that have some relation to the proceedings).

In *Levin*, 639 So. 2d at 608, this Court extended the litigation privilege, finding that "absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior . . . so long as the act has some relation to the proceeding." *Levin* further held that "[j]ust as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best

judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct." *Id*.

Later, in *Echevarria*, 950 So. 2d at 384, this Court reiterated the purpose of the litigation privilege and the importance of litigants being able to zealously advocate for their clients without the fear of a subsequent lawsuit: "It is the perceived necessity for candid and unrestrained communications in those proceedings, free of the threat of legal actions predicated upon those communications that is the heart of the rule." It further extended the litigation privilege, holding that "[t]he litigation privilege applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a statute, or some other origin. Absolute immunity must be afforded to any act occurring during the course of a judicial proceeding . . . so long as the act has some relation to the proceeding." *Id*. *See also Delmonico v. Traynor*, 116 So. 3d 1205 (Fla. 2013); *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. 3d DCA 2013); *LatAm Investments, LLC v. Holland & Knight, LLP*, 88 So. 3d 240 (Fla 3d DCA 2011) (citing *Levin* and *Echevarria* for the litigation privilege's application to all causes of action including a claim for abuse of process); *Jackson v. BellSouth Telecommunications*, 372 F. 3d 1250, 1275 (11th Cir. 2004) (finding that actions taken in the course of settlement negotiations are inextricably linked

to the process of guiding ongoing litigation to a close and are protected by the litigation privilege).

Below, Mintz attempted to argue that *Debrincat v. Fischer*, 217 So. 3d 68 (Fla. 2017) eviscerated the litigation privilege in the State, R. 612; however, that decision had no impact whatsoever on the application of the litigation privilege to any causes of action other than one for malicious prosecution, and understandably so in that context. In *Debrincat*, the court found that applying the litigation privilege to a claim for malicious prosecution would by definition eviscerate the long-established cause of action for malicious prosecution because malicious prosecution, as a matter of law, cannot occur outside the arena of litigation. In fact, the existence of a judicial proceeding is itself an element of the case of action. *Id*. "[M]alicious prosecution could never be established if causing the commencement or continuation of an original proceeding against the plaintiff were afforded absolute immunity under the litigation privilege." *Id*. That is not the case in the instant action.

The Third District recognized that the litigation privilege remained a strong controlling privilege in Florida in *Two Islands Development Corp. v. Clark*, 2018 WL 522200 (Fla. 3d DCA 2018), acknowledging *Debrincat* but reaffirming that the litigation privilege "affords absolute immunity for any act

occurring during the course of judicial proceedings" and "applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a statute, or some other origin." *Id.* (citing *Echevarria*, 950 So. 2d at 384). Mintz's attempt to preclude the application of the litigation privilege based on *Debrincat* must, therefore, fail.

Mintz also improperly argued below that the Legislature intended section 44.406, Florida Statutes to supersede the common law litigation privilege. R. 611. However, there is no language in the statute which indicates any such intent by the Legislature.

It is a well-established principle of Florida law that a statute enacted in derogation of the common law is to be strictly construed and that, even where the Legislature acts in a particular area, the common law remains in effect in that area *unless* the statute specifically says otherwise:

> The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard. Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law.

Major League Baseball v. Morsani, 790 So. 2d 1071, 1077-78 (Fla. 2001) (quoting *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990)).

> [Statutes] will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard. 30 Fla.Jur. Statute, Sec. 130. . . Inference and implication cannot be substituted for clear expression.

Carlile v. Game and Fresh Water Fish Commission, 354 So. 2d 362, 364 (Fla. 1977).

In the present case, not only does the plain language of section 44.406 not expressly change or override the litigation privilege, but it does not mention or allude to the doctrine at all. The presumption, therefore, is that no change in the common law was intended and this argument must thus fail, as well.

Here, the alleged disclosure of confidential mediation communications that form the basis of Mintz's claims occurred in a court filing made in the federal proceeding between Ms. Query and Lexington. R. 83–84. Because these communications unquestionably occurred in the course of a judicial proceeding and were directly related thereto – they were intended to, and in fact did, negate Mintz's false assertions that they recovered 100% of their property damages and that it justified their excessive attorneys' fees –

Lexington and Cozen are indeed to be afforded protection. In fact, communications expressed as a direct defense to an issue raised by the plaintiff are exactly the type of communication this privilege was intended to protect. *Echevarria*, 950 So. 2d at 384.

Accordingly, based on clearly established Florida law, Lexington and Cozen's statements in the federal and underlying litigation are protected by the litigation privilege and should be afforded absolute immunity; and Mintz's Second Amended Complaint should have been dismissed with prejudice in its entirety, as a matter of law.

B. The circuit court departed from the essential requirements of the law by allowing the underlying action to proceed despite Mintz's lack of standing.

The circuit court also departed from the essential requirements of law by refusing to dismiss Mintz's Second Amended Complaint for lack of subject matter jurisdiction as a result of Mintz's lack of standing.

Florida courts lack subject matter jurisdiction to permit maintenance of a claim by a person who lacks a legal interest in the subject matter thereof. *See Rogers & Ford Constr. Corp. v. Carlandia Corp*., 626 So. 2d 1350, 1352 (Fla. 1993) ("The determination of standing to sue concerns a court's exercise of [subject matter] jurisdiction to hear and decide the cause pled by a particular party."); *Silver Star Citizens' Comm. v. City Council of Orlando*,

194 So. 2d 681, 682 (Fla 4th DCA 1967) (Where the record showed no right of the petitioners to bring suit, the circuit court was without jurisdiction over the subject matter); *Kumar Corp. v. Nopal Lines, Ltd*. , 462 So. 2d 1178, 1182 n. 3 (Fla. 3d DCA 1985) (standing acts as a limitation on the subject matter jurisdiction of the court); *Benson v. Benson*, 533 So. 2d 889 (Fla. 3d DCA 1988) (standing impacts a court' s jurisdiction).

This is so because, without standing, a claimant lacks a case or controversy with the defendant, which is required in order to have an action resolvable by a Florida court. *See Olen Properties Corp. v. Moss*, 981 So. 2d 515 (Fla. 4th DCA 2008); *Elston/Leesdale LLC v. CW Capital Asset Management LLC*, 87 So. 3d 14, 16 (Fla. 4th DCA 2012). If a plaintiff lacks standing, the court would be resolving a mere hypothetical and would be issuing an advisory ruling, which is not constitutionally permissible. *See Roberts v. Brown*, 43 So. 3d 673, 683 (Fla. 2010) ("Circuit courts are not authorized to issue advisory opinions."); *1108 Ariola, LLC v. Jones*, 71 So. 3d 892, 898 (Fla. 1st DCA 2011) (without an actual controversy, circuit court lacks jurisdiction); *Schwarz v. Nourse*, 390 So. 2d 389 (Fla. 4th DCA 1980).

Therefore, because of its relationship with subject matter jurisdiction, standing is a threshold determination necessary for the maintenance of all actions. *Aery v. Wallace Lincoln Mercury, LLC*, 118 So. 3d 904, 910 (Fla. 4th

DCA 2013); *McCarty v. Myers*, 125 So. 3d 333, 336 (Fla. 1st DCA 2013) ("Standing presents a threshold inquiry that must be made at the commencement of the case.") (internal quotation omitted); *Solares v. City of Miami*, 166 So. 3d 887, 888 (Fla. 3d DCA 2015) ("standing is a threshold issue which must be resolved before reaching the merits"); *Ferreiro v. Philadelphia Indem. Ins. Co*., 928 So. 2d 374, 378 (Fla. 3d DCA 2006).

In the underlying action, which is based upon alleged violations of section 44.406, all of the causes of action against Lexington and Cozen are based on their alleged disclosure of confidential communications made during a mediation in the prior federal action between Ms. Query and Lexington. Mintz was not a party to that action and, therefore, lacked standing to bring the underlying civil action.

A party has standing if they have a legally protectable right of interest at stake. *Rogers*, 626 So. 2d at 1352. Additionally, the party with the right or interest at stake should also be a "real party in interest" – "the person in whom rests, by substantive law, the claim sought to be enforced." *Id*. The Mediation Confidentiality and Privilege Act similarly defines the parties who have standing to seek remedies for disclosure of communications made during a mediation of their case:

> (2) "Mediation participant" means a mediation party or a person who attends a mediation in person or by

> telephone, videoconference, or other electronic means.
>
> (3) "Mediation party" or "party" means a person participating directly, or through a designated representative, in a mediation and a person who:
>
> (a) Is a named party;
>
> (b) Is a real party in interest; or
>
> (c) Would be a named party or real party in interest if an action relating to the subject matter of the mediation were brought in a court of law.

§ 44.403(2) & (3), Fla. Stat. *See also* § 44.406(1), Fla. Stat. ("Any mediation participant who knowingly and willfully discloses a mediation communication in violation of § 44.405 shall, ***upon application by any party*** to a court of competent jurisdiction, be subject to remedies….") (emphasis added).

Based on Florida case law and the plain language of the statute, Mintz, as merely one of Ms. Query's attorneys, cannot properly be categorized as a "party" to the federal action. Mintz was indeed a participant in the mediation of the federal case, as co-counsel to Ms. Query, but it was not a party to the case. Therefore, Mintz does not have standing to enforce any alleged violation of the statute or seek remedies for any alleged disclosure of confidential communications that took place in the mediation of the federal case.

Moreover, although Mintz has not alleged any assignment of the claim for breach of the mediation confidentiality privilege from his client, Ms. Query,[8] any purported assignment would be ineffective, nonetheless, because such claims are personal and cannot be assigned. The mediation privilege is a personal privilege, *Cf*. *In re District Court, City and County of Denver*, 256 P. Yd 687, 690 (Col. En Banc 2011) ("[T]he right to confidentiality, protects the individual interest in avoiding disclosures or personal matters."); and, under Florida law, personal claims cannot be assigned. *Wachovia Insurance Services, Inc. v. Toomey*, 994 So.2d 980 (Fla. 2008).

In sum, Mintz lacks standing to bring the underlying civil action. If it genuinely believed that Ms. Query's mediation privilege had been violated in the federal action, the proper forum in which to have raised the alleged violation was in the federal court action in which the alleged violation occurred, on Ms. Query's behalf, and not in a separate action on behalf of itself. As such, the circuit court lacks subject matter jurisdiction over the

[8] In the Second Amended Complaint, Mintz merely alleges that "Ms. Query has assigned any and all rights she may have had with respect to the payment of attorney's fees to Mintz." R. 144 ¶ 34. However, attorney's fees have been paid in full and no one has alleged otherwise. Since Ms. Query's right to attorneys' fees was finally determined by the federal district court, Mintz's pursuit of attorneys' fees "as her assignee" would be nothing more than an improper collateral attack on a binding federal judgment.

underlying civil action and the Second Amended Complaint should have been dismissed with prejudice in its entirety. *Lucente v. State Farm Mutual Auto. Ins. Co*., 591 So. 2d 1126, 1128 (Fla. 4th DCA 1992) (affirming dismissal of action for lack of standing); *Benson v. Benson*, 533 So. 2d 889, 889-90 (Fla. 3d DCA 1988) (affirming dismissal where appellants lacked standing to sue, and the trial court lacked subject matter jurisdiction).

C. 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.

The circuit court's refusal to dismiss Mintz's Second Amended Complaint despite its claims' necessary reliance upon facts and issues litigated and finally decided by the federal court departed from the essential requirements of law. *See Atlantic Shores Resort, LLC v. 507 South Street Corp.*, 937 So. 2d 1239 (Fla. 3d DCA 2006) (granting petition for a writ of certiorari because the circuit court departed from essential requirements of law by considering issues barred by collateral estoppel). For the same reasons explained herein as to why prohibition relief is warranted, issuance of a writ of certiorari is appropriate because Mintz's claims are barred by collateral estoppel. *See supra* Part II. To permit Mintz to raise the issue of an alleged mediation confidentiality violation when it had to be objected to prior to the federal courts' final judgment on the merits causes Respondent

irreparable harm.

D. The circuit court's refusal to dismiss Mintz's claims will cause Lexington irreparable harm that cannot be remedied on plenary appeal.

The circuit court's refusal to dismiss Mintz's Second Amended Complaint despite the application of the litigation privilege and despite the circuit court's lack of subject matter jurisdiction will cause irreparable harm to Lexington and Cozen that cannot be remedied on plenary appeal, as the purpose of collateral estoppel, absolute immunity from suit, and the requirement of standing to bring a lawsuit cannot be meaningfully enforced on plenary appeal.

The harm in the instant action goes beyond the mere expense and inconvenience of having to litigate the claims, which courts have held will not constitute harm sufficient to permit certiorari review, even when an order departs from the essential requirements of law. *Cf. Fassy v. Crowley*, 884 So. 2d 359, 363 (Fla. 2d 2004); *Royal Caribbean Cruises, Ltd. v. Sinclair*, 808 So. 2d 231, 232 (Fla. 3d DCA 2001). Rather, it is the very action the immunity is intended to protect against. *James v. Leigh*, 145 So. 3d 1006, 1008 (Fla. 1st DCA 2014) ("[A]bsolute immunity protects a party from having to defend a lawsuit at all and waiting until final appeal would render such immunity meaningless if the lower court denied dismissal in error."). As this

Court has explained:

> We stress that while increased litigation expenses cannot alone constitute irreparable harm, we must distinguish cases involving absolute immunity from lawsuits of any nature, where the requisite harm may be demonstrated by requiring the party to submit to the very litigation, which would eviscerate the basic purpose of the immunity. A prime example of this type of immunity is judicial immunity. As the First District has explained:
>
> > [J]udicial immunity is intended to prevent a judicial party from becoming involved in a lawsuit, it would be compromised, and irreparable harm sustained, simply by forcing a judicial party to become involved in litigation, irrespective of its outcome. The harm would be irreparable because if the parties wait to address the issue of judicial immunity until appeal, any protection the immunity affords against suit would be sacrificed.

Citizens Prop. Ins. Corp. v. San Perdido Ass'n, 104 So. 3d 344, 353 n.6 (Fla. 2012) (internal citation omitted); *see also University of Miami v. Ruiz ex rel. Ruiz*, 164 So. 3d 758 (Fla 3d DCA 2015) (stressing the importance of resolving absolute immunity issues early on when the party claiming entitlement thereto is suffering the irreparable harm of having to continue litigating the matter without resolution).

Likewise, the harm associated with allowing a trial court to adjudicate the rights of the parties in an action in which it lacks subject matter jurisdiction

is equally material and irreparable on plenary appeal as subject matter jurisdiction is indispensable to a court's power to adjudicate rights between parties. *Stel-Den of Am., Inc*. *v. Roof Structures, Inc.*, 438 So. 2d 882, 884 (Fla. 4th DCA 1983) ("[a]n incorrect decision on subject matter jurisdiction is fundamental error…It is axiomatic that subject matter jurisdiction is indispensable to a court's power to adjudicate rights between parties.").

Accordingly, in addition to the propriety of the Third District's decision on prohibition, certiorari review was also warranted and requires that the circuit court's orders denying Lexington and Cozen's Motions to Dismiss be quashed and this matter remanded with instructions to dismiss Mintz's Second Amended Complaint with prejudice.

CONCLUSION

Based on the foregoing arguments and cited legal authorities, Lexington respectfully urges this Court to find that the Third District's Opinion does not expressly and directly conflict with any decision of this Court and, therefore, that jurisdiction was improvidently granted.

On the merits, Lexington respectfully urges this Court to find that the Third District properly granted a writ of prohibition because the circuit court lacked jurisdiction to adjudicate Mintz's claims based on collateral estoppel, which precluded the circuit court from obtaining jurisdiction over Mintz's case

because jurisdiction for Mintz's claims resided with the federal court.

Alternatively, a writ of certiorari was appropriate because Mintz's claims were barred based on collateral estoppel, the litigation privilege, and Mintz's lack of standing. Entitlement to certiorari was properly raised in the appellate process and, therefore, this Court has jurisdiction to consider the issues. As such, should this Court conclude the Third District's grant of prohibition under the facts and circumstances presented herein was inappropriate, Lexington respectfully urges this Court to reverse the Third District's decision that Lexington and Cozen's Petitions for Writ of Certiorari were moot and either find certiorari was appropriate for the reasons stated herein or remand to the Third District with instructions to rule on the merits of the Petitions for Writ of Certiorari.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Supreme Court of Florida by using the Florida Courts e-Filing Portal on this 8th day of November, 2021, therefore furnished *via* E-mail to all parties listed in the below **Service List**.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.100 (a)(2)(B) and Fla. R. App. P. 9.045 (b), the undersigned counsel hereby certifies that this brief was submitted in Arial 14-point font. This brief also complies with the word count limit requirements, excluding the parts exempted by Fla. R. App. P. 9.045(e).

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