IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC17-344
DCA CASE NO.: 1D16-4555
L.T. NO.: 2012 CA 002019

SILVER BEACH INVESTMENTS OF DESTIN, LC., and THE CLUB AT SILVER SHELLS, INC.,

Petitioners,

SILVER BEACH TOWERS PROPERTY OWNERS ASSOCIATION, INC., SILVER BEACH TOWERS EAST CONDOMINIUM ASSOCIATION, INC., and SILVER BEACH TOWERS WEST CONDOMINIUM ASSOCIATION, INC.,

Respondents.

_____/

RESPONDENTS' MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS

Respondents, SILVER BEACH TOWERS PROPERTY OWNERS ASSOCIATION, INC., SILVER BEACH TOWERS EAST CONDOMINIUM ASSOCIATION, INC., and SILVER BEACH TOWERS WEST CONDOMINIUM ASSOCIATION, INC., through counsel and pursuant to Florida Rules of Appellate Procedure 9.030(a), 9.100, 9.120, and 9.300(a), hereby move to dismiss Petitioners' Petition for Writ of Mandamus, and state:

INTRODUCTION

On February 21, 2017, the First District Court of Appeal issued an interlocutory opinion denying Petitioners' submission in their Motion for Review to the Court and holding that "rule 9.310(b)(1) is not the only avenue for obtaining a stay of a money judgment," because "a trial court has the authority, upon the motion of a party pursuant to rule 9.310(a), to enter a stay upon conditions other than a bond, so long as the conditions are adequate to ensure payment." (Pet. A-9, at 72). The Court joined the Second District Court of Appeal, which had previously reached the same conclusion, *Platt v. Russek*, 921 So. 2d 5, 7-8 (Fla. 2d DCA 2004); *Waller v. DSA Grp., Inc.*, 606 So. 2d 1234, 1235 (Fla. 2d DCA 1992), and expressly certified conflict with *Mellon v. United National Bank v. Cochran*, 776 So. 2d 964 (Fla. 3d DCA 2000). (Pet. A-9, at 74).

Petitioners now request this Court to "issue a writ of mandamus" and claim they are either unable or unwilling to utilize the Court's proper discretionary review procedure. As the Court is well aware, its discretionary jurisdiction may be sought to review cases that "are certified to be in direct conflict with decisions of other district courts of appeal." Fla. R. App. P. 9.030(a)(2)(A)(vi). Petitioners may not circumvent the procedure for discretionary review of a certified conflict by styling their request for relief as one for a writ of mandamus. And Petitioners do not satisfy the requirements to be entitled to a writ of mandamus because

Petitioners do not have a clear legal right to the relief requested, the First District does not have an indisputable legal duty to perform the requested action, and Petitioners have not exhausted all other remedies. *See Pleus v. Christ*, 14 So. 3d 941, 945 (Fla. 2009) (setting forth the requirements of mandamus relief).

Respondents' Motion to Dismiss is not intended to address the merits of the conflict certified by the First District Court of Appeal, e.g., the entirety of the substantive arguments set forth in the Petition for Writ of Mandamus, as this Court has not issued an Order to Show Cause under Rule 9.100(h) (requiring the Court to first evaluate whether the Petition "demonstrates a preliminary basis for relief"). Rather, their Motion to Dismiss is limited to establishing the propriety of dismissal because the mandamus remedy sought by Petitioners is legally incorrect. As Petitioners cannot establish "a preliminary basis" that the exercise of this Court's mandamus jurisdiction is appropriate, the Petition should be dismissed.[1]

ARGUMENT IN SUPPORT OF DISMISSAL

A. Standard for Issuance of a Writ of Mandamus

A writ of mandamus is an order compelling a tribunal or a public official to perform a non-discretionary, ministerial duty. *Cordovano v. State*, 129 So. 3d 1067 (Fla. 2013). Mandamus is not awardable as a matter of right. *State ex rel. Haft v.*

[1] Were the Court to find that the Petition sets forth "a preliminary basis" for relief, it must still afford Respondents the opportunity to respond to the merits of the arguments in the Petition. Fla. R. App. P. 9.100(h).

Adams, 238 So. 2d 843, 844 (Fla. 1970). "[M]andamus cannot be maintained to control or direct the manner in which [a] court shall act in the lawful exercise of its jurisdiction." *Cordovano*, 129 So. 3d 1067 (quoting *State ex rel. N. St. Lucie River Drainage Dist.*, 11 So. 2d 889, 890 (Fla. 1943)). Nor is mandamus used to correct alleged error. *Id.* (quoting *State v. Petteway*, 117 So. 696 (Fla. 1928)); *see also Migliore v. City of Lauderhill*, 415 So. 2d 62, 63 (Fla. 1982), *approved*, 431 So. 2d 986 (Fla. 1983) (noting mandamus is not appropriate "for review of a merely erroneous decision").[2] Here, Petitioners are merely claiming that the First District erroneously interpreted the law.

"To be entitled to mandamus relief, 'the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available.'" *Pleus*, 14 So. 3d at 945 (quoting *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000)). Mandamus may not be used to establish the existence of a right, but only to enforce a right clearly and certainly established in the law. *Scott v. State*, 130 So. 3d 741, 742 (Fla. 3d DCA 2014). Thus, mandamus is properly denied where a petitioner fails to establish that the lower tribunal has a ministerial

[2] Of course, Respondents' references to these principles should in no way be interpreted as acquiescence that error is present here.

duty to rule in a particular manner or perform a particular action. *Brown v. McNeil*, 46 So. 3d 565 (Fla. 2010); *Garwood v. Campbell*, 9 So. 3d 614 (Fla. 2009).

B. Petitioners Cannot Circumvent Rules 9.030(a)(2)(A)(vi) and 9.120 Under the Guise of Seeking a Writ of Mandamus

The Court has discretionary jurisdiction to review any decision of a district court of appeal that is certified by it to be in direct conflict with a decision of another district court of appeal. Art. V, § 3(b)(4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(vi). Rule 9.120 explains that proceedings to invoke the discretionary jurisdiction of the Court to review scenarios described in Rule 9.030(a)(2) begin with the petitioner filing a notice to invoke the Court's discretionary jurisdiction. The notice is followed by both parties filing briefs on jurisdiction. Fla. R. App. P. 9.120(b), (c), (d). Here, the First District certified conflict with the decision of another district court of appeal, so the foregoing is the procedure by which the Petitioners must abide. Mandamus is simply not the procedure by which this Court reviews the certification of conflict.

Petitioners claim that mandamus is their only remedy because "certified conflict jurisdiction is likely to be meaningless to the petitioners in this case." (Petition, at 2). But whether or not the First District will have resolved Respondents' appeal with finality by the time of disposition of a case on a discretionary review path in this Court is irrelevant to whether the elements of

mandamus lie and thus afford an alternative remedy to the Court's usual manner of resolving certified conflicts in the law. Even if Respondents' appeal in the First District may be resolved before this Court would issue an opinion resolving the certified conflict on a discretionary review path, review in accordance with the same would not be precluded. *Hall v. State*, 752 So. 2d 575, 581 (Fla. 2000); *Holly v. Auld*, 450 So. 2d 217, 218 n.1 (Fla. 1984) (reviewing significant issue despite that case was moot in relation to the parties' interests).

Citing *Pleus*, Petitioners argue that "time limitations on the availability of alternative relief have served as a basis for this Court to exercise its mandamus jurisdiction in the past." (Petition, at 6). The attempted analogy to *Pleus* is disingenuous because *Pleus* involved calling upon the Governor to fill a judicial vacancy, not the express certification of conflict between decisions of district courts of appeal. Nor does the other case Petitioners cite, *Harvard v. Singletary*, 733 So. 2d 1020 (Fla. 1999), support the exercise of mandamus jurisdiction in contrast to the customary discretionary review procedure. There, this Court explained the types of extraordinary writ petitions it would consider in relation to the vast quantity of extraordinary writ petitions it receives as a whole, an issue not implicated in this case. *Id.* at 1022-24. Here, although Respondents do not disagree that the certified conflict issue is not "individualized" to the parties, *Harvard* in no way illustrates that the Court's attention cannot be given to this matter through its

discretionary review procedure in contrast to the inapplicable remedy of compelling the First District to perform an alleged "ministerial" act.

C. Petitioners Fail to Satisfy Any of the Elements of Mandamus

1. Petitioners Do Not Have a Clear Legal Right to the Requested Relief of Either the Court Resolving the Certified Conflict or Requiring Respondents to Post a Bond Under Rule 9.310(b)

The Court routinely, summarily denies Petitions for Writs of Mandamus for a petitioners' failure to demonstrate "a clear legal right to the relief requested." *See, e.g., Uppal v. The Health Law Firm*, 2017 Fla. LEXIS 409 (Fla. Mar. 1, 2017); *Fails v. Reid*, 2017 Fla. LEXIS 151 (Fla. Jan. 20, 2017).

The First District's opinion agreed with the *Platt* court that Rule 9.310(b)(1) does not set forth the exclusive method for a party to obtain a stay of execution on a judgment that is solely for the payment of money (which is not even the case here, though the First District did not reach the issue of whether the judgment afforded other, equitable relief). Instead, the First District held that a party may invoke its rights under Rule 9.310(a) and request a trial court to enter an order staying execution on a money judgment subject to conditions that protect the judgment creditors' interests. The mere fact that the First and Second District Courts of Appeal disagree with the Third District in their interpretations of Rules 9.310(a) and (b)(1) confirms that Petitioners cannot demonstrate "a clear legal right to the relief requested." Obviously, prior to the First District's opinion, the

Second District disagreed with Petitioners' reading of these Rules, and now, three learned judges on the First District have disagreed too. If there is a conflict in the law, then it is this Court's task to resolve it upon an aggrieved party's procedurally appropriate request that it do so. Unless and until that conflict were to be resolved in Petitioners' favor, Petitioners cannot establish—and there is no—"clear legal right" for Petitioners or any tribunal to compel Respondents to post a civil supersedeas bond in the full amount of the judgment plus two years' interest, since Respondents availed themselves of the trial court's discretion under Rule 9.310(a).

Because the First District's opinion finds a conflict with another district court of appeal on the same question of law, and Petitioners are bound by the decision of the First District, Petitioners cannot establish a "clear legal right" to the relief requested and their Petition for Writ of Mandamus should be dismissed or denied.

2. The First District Does Not Have an Indisputable Legal Duty to Perform the Requested Action

The absence of a legal duty on the part of the First District to demand that Respondents post a bond pursuant to the formula in Rule 9.310(b)(1) is established from the same reasons that Petitioners cannot establish a "clear legal right" to that relief. In pertinent part, the First District's legal duty was to review Rules 9.310(a) and (b)(1) to evaluate Petitioners' argument in their Motion for Review that Rule

9.310(b)(1) provided the exclusive method for Respondents to obtain a stay of execution on the final judgment entered against them. The First District carried out its legal duty by fairly and impartially reviewing these rules and various authorities bearing on their interpretation. After doing so, the First District held that "rule 9.310(b)(1) is not the only avenue for obtaining a stay of a money judgment" because "[a] trial court has the authority, upon the motion of a party pursuant to rule 9.310(a), to enter a stay upon conditions other than a bond, so long as the conditions are adequate to ensure payment." (Pet. A-9, at 72). The First District did not have an "indisputable legal duty" to interpret the rules as Petitioners wanted, particularly where pre-existing case law supported Respondents' arguments and the First District's interpretation of the Rules' language. *Platt*; *Waller*.

Moreover, Petitioners cannot establish an "indisputable legal duty" on the part of the First District such as to implicate this Court's mandamus jurisdiction where there is a statute directly on point supporting the trial court's stay order and the First District's affirmance thereof. Section 45.045(2), Florida Statutes (2016), provides:

> In any civil action brought under any legal theory, a party seeking stay of execution of a judgment pending review of any amount may move the court to reduce the amount of a supersedeas bond required to obtain such a stay. The court, in the interest of justice and for good cause shown, may reduce the supersedeas bond or may set other conditions for the stay with or without a bond. . . .

Petitioners cannot establish an "indisputable legal duty" where legislative fiat directly refutes their desired interpretation of Rules 9.310(a) and (b)(1). Accordingly, the Petition for Writ of Mandamus must be dismissed or denied.

3. Petitioners Have Not Exhausted Other Remedies and Have Not Shown that Discretionary Review is Inadequate as a Matter of Law

"[A] petitioner typically must exhaust his administrative remedies prior to filing a petition for writ of mandamus." *LaFerte-Diaz v. Dep't of Corr.*, 187 So. 3d 908, 909 (Fla. 3d DCA 2016). The requirement that a petitioner exhaust other remedies is tied to the petitioner's need to demonstrate "that no other adequate remedy exists." *Park v. Dugger*, 548 So. 2d 1167, 1168 (Fla. 1st DCA 1989).

Here, when Petitioners filed their Petition for Writ of Mandamus, the rehearing period with the First District Court of Appeal had not even expired. Fla. R. App. P. 9.330. At the time this Motion to Dismiss is filed, the time to do so has passed. Furthermore, Petitioners have not shown that utilizing the Court's typical discretionary review path for consideration of certified conflicts is an inadequate remedy. Although Respondents' underlying appeal could be adjudicated by the time this Court were to resolve the certified conflict, this is merely non-definitive speculation. Lastly, under the First District's opinion, if, as they contend, the issue is protection of their judgment, Petitioners had an adequate remedy by having the opportunity to contest Respondents' Motion to Stay, and then to file a Motion for

Review with the First District. Fla. R. App. P. 9.310(f). Petitioners, however (either strategically or erroneously) made no argument in their Motion for Review that the conditions of the trial court's stay were insufficient to protect their interests during the pendency of Respondents' appeal. (Pet. A-7, at 45-51; Pet. A-9, at 72 n.*.).

CONCLUSION

The Petition for Writ of Mandamus should be summarily denied or dismissed. Petitioners' attempt to circumvent this Court's discretionary review procedures is procedurally improper. Mandamus may not be used to resolve the certified conflict because the First District did not have a "ministerial duty" to rule in the manner desired by Petitioners. Moreover, Petitioners do not satisfy the elements of mandamus because they have no clear legal right to have the First District interpret Rules 9.310(a) and (b)(1) the way they want, and the First District did not have an indisputable legal duty to do so. The reasons showing the absence of the elements of mandamus are precisely intertwined with and demonstrate why the Court may only resolve the certified conflict through its discretionary review procedure.

WHEREFORE, Respondents, SILVER BEACH TOWERS PROPERTY ASSOCIATION, INC., SILVER BEACH TOWERS EAST CONDOMINIUM ASSOCIATION, INC., AND SILVER BEACH TOWERS WEST

CONDOMINIUM ASSOCIATION, INC., respectfully request that this Court enter an Order dismissing or denying Petitioners' Petition for Writ of Mandamus.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on the 13th day of March, 2017, a true and correct copy of the foregoing has been furnished by Electronic Mail via filing with the Florida Courts e-Filing Portal to: **Joseph Eagleton, Esq.** and **Philip J. Padovano, Esq.**, Brannock & Humphries, 131 N. Gadsden Street, Tallahassee, FL 32301 (jeagleton@bhappeals.com; ppadovano@bhappeals.com; eservice@bhappeals.com); **Bruce P. Anderson, Esq**., Bruce P. Anderson Law, 495 Grand Blvd., Suite 206, Destin, FL 32550, Attorneys for Appellees; **Adam Richardson, Esq.** and **Philip M. Burlington, Esq.**, Burlington & Rockenbach, P.A., Courthouse Commons, Suite 350, 444 W. Railroad Ave., W. Palm Beach, FL 33401 (pmb@FLAppellateLaw.com; ajr@FLAppellateLaw.com; kbt@FLAppellateLaw.com), Attorneys for Proposed Amicus Florida Justice Association.

COLE, SCOTT & KISSANE, P.A.
Attorneys for Appellants
Lakeside Office Center
600 N. Pine Island Rd., Suite 500
Plantation, FL 33324
Tel: (954) 343-3956
Fax: (305) 373-2294
Email: daniel.schwarz@csklegal.com
Email: kathryn.ender@csklegal.com
Email: tamara.mihajlovic@csklegal.com
Email: charo.fagundez@csklegal.com

By: *s/ Daniel M. Schwarz*

KATHRYN L. ENDER
FBN: 50803
DANIEL M. SCHWARZ, ESQ.
FBN: 92537