IN THE THIRD DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

CHARLOTTE SARAVIA and the Estate Of RAFAEL GONZALEZ, deceased, Through Personal Representative Fatima Blanco,

Petitioners,

vs.

TAYYABA ZAIDI as Personal Representative Of the Estate of SYED ZAIDI, deceased,

Respondent.
_____/

CASE NO: 3D07-441

L.T. Case No. 06-15906 CA 21

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent Tayyaba Zaidi, as Personal Representative of the Estate of Syed Zaidi, deceased, respectfully requests the Court dismiss for lack of jurisdiction the petition for writ of certiorari because Petitioners will not suffer any harm, much less irreparable harm that cannot be remedied on final appeal, due to the trial court's denial of their motion to abate. Alternatively, Respondent respectfully requests the Court deny the petition for writ of certiorari because the trial court's denial of the motion to abate did not depart from the essential requirements of law as the actions at issue do not involve a complete identity of parties. The actions are

actually cross-suits, which the Florida Supreme Court has held are not subject to abatement.

"A non-final order for which no appeal is provided by Rule 9.130 is reviewable by petition for certiorari only in limited circumstances. The order must depart from the essential requirements of law and thus cause material injury to the petitioner throughout the remainder of the proceedings below, effectively leaving no adequate remedy on appeal." *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1099 (Fla. 1987) (citing *Brooks v. Owens*, 97 So. 2d 693 (Fla. 1957); *Kilgore v. Bird*, 6 So. 2d 541 (Fla. 1942)). The latter requirement is jurisdictional—a "'petitioner must establish that an interlocutory order creates material harm irreparable by postjudgment appeal before [a district] court has power to determine whether the order departs from the essential requirements of the law.'" *Sabol v. Bennett*, 672 So. 2d 93, 94 (Fla. 3d DCA 1996) (quoting *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 649 (Fla. 2d DCA 1995)). A petitioner's failure to demonstrate satisfaction of this jurisdictional element should result in dismissal, rather than denial, of the petition for writ of certiorari. *Parkway Bank,* 658 So. 2d at 649.

I. The Court should dismiss this petition for writ of certiorari because any potential harm that Petitioners might suffer can be remedied on appeal from final judgment.

When there is no irreparable harm caused by the denial of a motion to abate, a petition for writ of certiorari challenging the nonfinal order should be dismissed. *See Int'l Wire Corp. v. State Farm Fire & Cas.*, 816 So. 2d 159, 159 (Fla. 2d DCA 2002). Here, Petitioners have failed to demonstrate that they will suffer any harm that could not be remedied on final appeal as a result of the trial court's nonfinal order denying their motion to abate. Their petition should, therefore, be dismissed.

In May 2006, Petitioner Saravia filed a complaint in Miami-Dade County Circuit Court against several defendants, including Respondent Zaidi, for damages arising out of an automobile accident. (A7-17). At the same time, Petitioner Blanco, as personal representative of the estate of Rafael Gonzalez, filed a complaint in the same court against the same defendants for damages arising out of the same accident. (A 18-29). A few months later, Respondent, the Zaidi estate, filed a wrongful death action in Miami-Dade County Circuit Court against Petitioners. (A 52-56). That December, Petitioners' actions were consolidated for discovery and trial purposes. (A 42-43).

Petitioners moved to abate the action filed by Zaidi, but the trial court instead consolidated Zaidi's action with the actions filed by Petitioners. (A 1). As a result, discovery in each of these actions will be conducted at the same time,

saving the parties time and money. After reading the petition for writ of certiorari, it is difficult to imagine how the parties will be inconvenienced by consolidation rather than abatement, much less how petitioners will be irreparably harmed.

The only result of the trial court's denial of the motion to abate is that Zaidi's action will be litigated concurrently with Petitioners' actions, as it would have been if Zaidi had decided to bring his action as a counterclaim in Petitioners' actions. This is not sufficient for a writ of certiorari. As this Court has repeatedly made clear, "'The mere expense and inconvenience of litigation does not constitute harm sufficient to permit certiorari review, even if the order departs from the essential requirements of the law.'" *Cuneo v. Conseco Servs.*, 899 So. 2d 1139, 1140 (Fla. 3d DCA 2005) (quoting *Royal Caribbean Cruises v. Sinclair*, 808 So. 2d 231, 232 (Fla. 3d DCA 2001)).

Unnecessary litigation, a multiplicity of law suits, and a risk of conflicting decisions are the potential harms that might result when multiple actions involving the same parties and the same legal issues are pending simultaneously. *See Graham v. Graham*, 648 So. 2d 814, 815 (Fla. 4th DCA 1995); *REWJB Gas Invs. v. Land O'Sun Realty*, 645 So. 2d 1055, 1056 (Fla. 4th DCA 1994). Those harms are not present here because the trial court consolidated Zaidi's action with the original actions filed by the Petitioners. So, each of the cases are before the same judge who will be able to control the proceedings. *See Cheezem Dev. Corp. v.*

Maddox Roof Serv., 362 So. 2d 99, 101 (Fla. 2d DCA 1978) (noting that where multiple cases are assigned to one judge, the judge "should be in a position to control any untoward activities"); *Anderson v. Anderson*, 563 So. 2d 169, 170 n.1 (Fla. 3d DCA 1990) (finding abatement issue on appeal was mooted by trial court's transfer of action).

Furthermore, having to defend against Zaidi's allegations in a separate action rather than as a counterclaim in Petitioners' actions is not a legal harm at all. A party that does not file a compulsory counterclaim in a pending action is legally permitted to bring that claim in a separate action. *Cheezem*, 362 So. 2d at 100-101. "The fact that the plaintiff in the second action might have sought the same relief by a cross-bill or a cross-complaint in the prior action brought against him is not ground for abatement of the second action." *Horter v. Commercial Bank & Trust*, 126 So. 909, 912 (Fla. 1930).

As Petitioners will not suffer any harm, much less irreparable harm that cannot be remedied on final appeal, the Court should dismiss their petition for writ of certiorari for lack of jurisdiction.

II. The Court should deny this petition for writ of certiorari because the trial court's denial of Petitioners' motion to abate did not depart from the essential requirements of law.

If the Court decides not to dismiss this petition for writ of certiorari for lack of jurisdiction, it should deny the petition because the trial court's order denying the

motion to abate did not depart from the essential requirements of law. Abatement is proper only where there is an exact identity of parties, which is not present here because Petitioners' suits contain parties that are not named in Zaidi's suit. The actions are actually cross-suits, which the Florida Supreme Court has held are not subject to abatement.

A court "may abate an action upon a showing that a prior action involving the same parties and cause of action is pending in the same court or another court of like jurisdiction." *Anderson v. Anderson*, 563 So. 2d 169, 170 (Fla. 3d DCA 1990) (citing *Koehlke Components v. S.E. Connectors*, 456 So. 2d 554 (Fla. 3d DCA 1984)). "[A]batement requires complete identity of parties. . . ." *Sauder v. Rayman*, 800 So. 2d 355, 358 (Fla. 4th DCA 2001). "[B]oth actions must have the same plaintiffs and the same defendants." *Bruns v. Archer*, 352 So. 2d 121, 122 (Fla. 2d DCA 1977).

There is not a complete identity of parties in the actions filed by Petitioners and the action filed by Zaidi. Petitioners' actions involve the following parties:

Plaintiffs—Charlotte Saravia; Ramiro Cajigas; Estate of Rafael Gonzalez[1]

[1] Petitioners did not file the motion to consolidate their separate actions until after Respondent Zaidi filed his separate action, which further demonstrates that there was not a complete identity of parties at the time Zaidi's action was filed.

Defendants—Cheema Trucking, Inc.; Asset Management, Inc.; Marston Associates, LLC; Estate of Syed Zaidi

(A 7; A18). Respondent Zaidi's action involves fewer parties than petitioners' actions:

Plaintiff—Estate of Syed Zaidi

Defendants—Charlotte Saravia; Estate of Rafael Gonzalez

(A 52). Because the action filed by Zaidi does not name the exact same parties as those named in the actions filed by Petitioners, abatement is not proper. *REWJB Gas Invs.*, 645 So. 2d at 1056 (finding abatement of action would not be proper where there was not a complete identity of parties because one party in first action was not a party to second action); *Burns v. Grubbs Const.*, 174 So. 2d 476, 478 (Fla. 3d DCA 1965) ("In order for a cause of action to be abated because of another cause already pending, the identity of the parties must be exact. . . .") (citations omitted).

Furthermore, the Florida Supreme Court has held that abatement is not proper where "where the party defendant in the prior suit is plaintiff in the subsequent suit." *Horter v. Commercial Bank & Trust Co.*, 126 So. 909, 912 (Fla. 1930) (citations omitted). Abatement "applies only where plaintiff in both suits is the same person, and both are commenced by himself, and not to cases in which there are cross-suits by a plaintiff in one suit who is defendant in the other. . . ."

Id. This is exactly the situation here—Petitioners are the plaintiffs in the first suits and Respondent Zaidi is the plaintiff in the subsequent suit that Petitioners argue should have been abated. As abatement in this situation would have been improper, the trial court did not depart from the essential requirements of law when denying Petitioners' motion to abate Zaidi's action.

CONCLUSION

The Court should dismiss the petition for writ of certiorari for lack of jurisdiction because Petitioners will not suffer any harm, much less irreparable harm that cannot be remedied on final appeal, as a result of the trial court's denial of their motion to abate. Alternatively, the Court should deny the petition for writ of certiorari because the trial court did not depart from the essential requirements of law when denying the motion to abate as there is not a complete identity of parties in these actions, which are actually cross-suits and not, therefore, subject to abatement.

Dated: March 20, 2007

By: D. Martin

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing were served by US Mail, postage prepaid, this 20th day of March, 2007, upon: **Robert Zimmerman, Esq.**, 6991 North State Road 7, Second Floor, Parkland, FL 33073; **Thomas A. Culmo, Esq.**, 4090 Laguna St., Coral Gables, FL 33146; **John W. McLuskey, Esq.**, The Barrister Building, 8821 S.W. 69th Court, Miami, FL 33156; **Carlos Silva, Esq.**, 236 Valencia Ave., Miami, FL 33156; **Elizabeth K. Russo**, 6101 Southwest 76 Street, Miami, FL 33134, Miami, FL 33134.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Respondent's Response To Petition For Writ Of Certiorari complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l) in that the Initial Brief being submitted is in Times New Roman 14-point font.

D. Martin
Diana L. Martin