

IN THE CIRCUIT COURT OF THE NINTH  
JUDICIAL CIRCUIT, IN AND FOR  
OSCEOLA COUNTY, FLORIDA

NATIONAL SPECIALTY  
INSURANCE COMPANY,

Petitioner,

CASE NO: 2020-AP-000013-AP  
Lower Case No.: 2020-CC-79-CL

v.

BRIAN & ADELE BOYD,

Respondents.

\_\_\_\_\_ /

DATE: December \_\_, 2020.

Petition for Writ of Certiorari  
from the County Court for Osceola County, Florida  
Gabrielle N. Sanders-Morency, County Court Judge

William M. Mims and  
Brian P. Henry,  
for Petitioner.

Michael Germain,  
for Respondent.

Before Schreiber, Shaffer, and Madrigal, JJ.

**PER CURIAM.**

**FINAL ORDER DISMISSING PETITION FOR WRIT OF CERTIORARI**

**THIS MATTER** comes before the Court for consideration of Petitioner National Specialty Insurance Company's Petition for Writ of Certiorari Pursuant to Rule 9.100(f), filed on September 2, 2020, seeking review of the trial court's Order on Plaintiff's motion to Amend Complaint & to Transfer Case to Circuit Court, which granted a motion allowing Respondents, Brian and Adele Boyd, to amend their complaint and transferred the case to circuit court. We dispense with oral argument and dismiss the petition for lack of jurisdiction. *See* Fla. R. App. P. 9.320.

## **Background**

Petitioner provided homeowners' insurance to Respondents. On August 29, 2019, Respondents filed an insurance claim with Petitioner. Petitioner denied the claim.

On January 10, 2020, Respondents filed a complaint in the trial court. The complaint was filed in the county court, and the complaint alleged that the case involved "an action for damages that does not exceed Thirty Thousand Dollars (\$30,000.00), exclusive of costs, interest and attorneys' fees."

On March 16, 2020, Respondents' counsel communicated a global settlement offer of \$144,928 to Petitioner, which was based on damages of \$139,307 as reflected in an engineer's report and consisted of \$136,000 in indemnity, \$7,500 in fees, and \$1,428 in costs.

On March 30, 2020, Petitioner mailed a check for \$31,208.51 to Respondents' counsel. Then, on March 31, 2020, Petitioner responded to records and documents produced by Respondents to show the amount of damages to their property by entering a "Confession of Judgment" in the amount of \$31,208.51. This consisted of the maximum potential award under the county court's jurisdiction, plus pre-judgment interest. Petitioner further stipulated to Respondents' entitlement to attorney's fees.

On April 20, 2020, Respondents filed a Motion to Amend Their Complaint and To Transfer the Case to Circuit Court. In the motion, Respondents stated that "the damages are well in excess of Thirty Thousand Dollars (\$30,000.00)" and that the case was improperly filed in the county court. Respondents sought leave to amend their complaint and to transfer the case to circuit court. Respondents attached an amended complaint to their motion, in which they alleged that the case involved an action for damages that exceed \$30,000.

Respondents returned the \$31,208.51 check to Petitioners on May 5, 2020.

On August 6, 2020, the trial court granted Respondents' motion, authorizing the amendments to Respondents' complaint and transferring the case to circuit court.

Petitioner filed its Petition for Writ of Certiorari Pursuant to Rule 9.100(f) on September 2, 2020. Respondents filed their response on October 16, 2020, and Petitioner filed its reply on November 13, 2020.

### **Standard of Review**

A party seeking certiorari review must establish that (1) the contested order departs from the essential requirements of the law, (2) the order caused a material injury in the proceedings, and (3) the injury cannot be corrected on appeal from the final judgment. *See Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011); *Damsky v. Univ. of Miami*, 152 So. 3d 789, 792 (Fla. 3d DCA 2014). The final two elements, which are referred to as irreparable harm, are jurisdictional in nature and must be analyzed before the reviewing court can consider the first element. *See Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344, 351 (Fla. 2012); *Williams*, 62 So. 3d at 1132; *Fernandez-Andrew v. Fla. Peninsula Ins. Co.*, 208 So. 3d 835, 837–38 (Fla. 3d DCA 2017).

### **Analysis**

In its petition, National Specialty Insurance Company first argues that it was “deprived of its ability to remove the case to federal court by Respondents’ intentional actions of purposely filing a claim they knew, or should have known, exceeded the jurisdictional limits of the County Court.” Petitioner contends that, had it attempted to remove the case to federal court after “a demand in excess of \$30,000.00 had been received,” the federal court would not have permitted the removal, because the removal would have been from county court and federal courts are aware

of the jurisdictional limits of the county court. Petitioner therefore concludes that Respondents' actions, in increasing the amount of damages sought, prevented the Petitioner from exercising its right to remove the case to federal court. Petitioner also argues that it suffered irreparable injury because it has entered a "Confession of Judgment" that can be used against it by Respondent. Petitioner next contends that neither of these alleged injuries can be remedied on appeal, because a post-judgment appeal cannot restore the right to remove the case to federal court and because a post-judgment appeal cannot restrict the use of the Confession of Judgment against Petitioner. Finally, Petitioner argues that the trial court's order "is clearly a departure from the essential requirements of the law," because Petitioner's Confession of Judgment rendered the case moot and deprived the trial court of jurisdiction to take any action other than to enter judgment in favor of Respondents in the amount of the Confession of Judgment. Thus, according to Petitioner, the trial court lacked jurisdiction to grant Respondents' motion to amend the complaint or to transfer jurisdiction to the circuit court.

Contrary to Petitioner's argument, Petitioner fails to establish that the trial court's order caused irreparable harm. First, although the Fourth District Court of Appeal has held that the loss of the ability to remove a case to federal court constitutes an irreparable harm, the Fifth District Court of Appeal has held that "[c]ertiorari does not lie" "to protect a litigant's right to remove a state court action to federal court." *Compare Cont'l Baking Co. v. Vincent*, 634 So. 2d 242, 244 & n.3 (Fla. 5th DCA 1994), with *Safeco Ins. Co. of Illinois v. Beare*, 152 So. 3d 614, 615–16 (Fla. 4th DCA 2014). Second, even if certiorari is appropriate to protect a litigant's ability to remove a case to federal court, Respondents' actions in amending its complaint to increase its demand for damages did not prevent Petitioner from removing this case to federal court. To the contrary, a civil action may be removed to federal court on the basis of diversity jurisdiction "within 30 days

after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.” 28 U.S.C. § 1446(b)(3); *see Owings v. Deere & Co.*, 441 F. Supp. 2d 1011, 1012–14 (S.D. Iowa 2006). Such an action may be removed to federal court for up to one year after commencement of the action; moreover, the deadline for removal may be extended if “the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal.” 28 U.S.C. § 1446(c)(1), (3)(B). Therefore, given that (1) Respondents filed their complaint on January 10, 2020, (2) Respondents moved to amend the complaint on April 20, 2020, and (3) the trial court granted the motion to amend on August 6, 2020<sup>1</sup>, which was well within the one year period during which Petitioner could have removed the case, Respondents’ actions did not defeat Petitioner’s right of removal.<sup>2</sup> *See* 28 U.S.C. § 1446(b)(3) (authorizing filing of notice of removal within 30 days after receipt of amended pleading that indicates case has become removable); 28 U.S.C. § 1446(c)(1) (authorizing removal on the basis of diversity jurisdiction up to one year after commencement of the action); *Bollinger v. State Farm Mut. Auto. Ins. Co.*, 538 Fed. App’x 857, 863–64 (11th Cir. 2013) (holding

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<sup>1</sup> We express no opinion whether Respondents’ settlement offer of \$144,928, conferred on March 16, 2020, constitutes an “other paper” that would have made the case removable. *See* 28 U.S.C. § 1446(b)(3) (authorizing a party to file a notice of removal within 30 days after receipt of “a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is or has become removable”).

<sup>2</sup> Petitioner cites two cases for the proposition that defeating the right to remove a case to federal court constitutes irreparable harm, both of which are easily distinguishable. First, in *Sunrise Mills (MLP) Ltd. P’ship v. Adams*, 688 So. 2d 464, 465 (Fla. 4th DCA 1997), the court held that not allowing certiorari review of the trial court’s order, which sustained the plaintiff’s objection to a request for admission that would have provided a basis to establish that the amount in controversy in the case exceeded the minimum requirement for federal diversity jurisdiction and which therefore prevented the defendant from removing the case, “would have the effect of defeating defendant’s statutory right of removal to a federal court having constitutional jurisdiction of the claim.” Similarly, in *Safeco Ins. Co. of Illinois v. Beare*, 152 So. 3d 614, 615–16 (Fla. 4th DCA 2014), the appellate court found irreparable harm when the trial court denied Safeco’s motion to dismiss a claim that was an amendment to a suit that was filed more than one year prior to Safeco’s joinder to the suit, thereby preventing Safeco from removing the case. Here, by contrast, Respondents amended their claim for damages, thereby establishing the necessary amount in controversy to support diversity jurisdiction and providing Petitioner with the information necessary to seek removal of the case to federal court, well within the one year statutory period for removal.

that 30-day clock for filing notice of removal begins to run on date state trial court grants motion to amend complaint and deems amended complaint filed).

Second, a confession of judgment is a legal fiction that applies when an insurance company denies benefits to an insured, forcing the insured to file suit, and then agrees to settle the dispute by paying the claim. *See Wollard v. Lloyd's & Cos. Of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983); *State Farm Fla. Ins. Co. v. Lorenzo*, 969 So. 2d 393, 397 (Fla. 5th DCA 2007); *Basik Exports & Imports, Inc. v. Preferred Nat. Ins. Co.*, 911 So. 2d 291, 294 (Fla. 4th DCA 2005). As such, it is a “proposal for settlement” that is governed by Florida Rule of Civil Procedure 1.442. Fla. R. App. P. 1.442(a) (“This rule applies to all proposals for settlement authorized by Florida law, *regardless of the terms used to refer to such offers, demands, or proposals*, and supersedes all other provisions of the rules and statutes that may be inconsistent with this rule.” (emphasis added)); *see Allstate Ins. Co. v. Chaple*, 774 So. 2d 742, 745 (Fla. 3d DCA 2000); *see also Fridman v. Safeco Ins. Co. of Illinois*, 185 So. 3d 1214, 1229 (Fla. 2016) (holding that “the trial court did not err in denying the motion to confess judgment”). Under that rule, “[e]vidence of a proposal or acceptance thereof is admissible only in proceedings to enforce an accepted proposal or to determine the imposition of sanctions.” Fla. R. Civ. P. 1.442(i). Therefore, Petitioner’s assertion that the “existence of [the] possibility” that Respondents might use the “Confession of Judgment” against Petitioner fails to establish that the trial court’s order caused a material injury in the proceedings.

Because Petitioner fails to establish that the trial court’s order caused irreparable harm to Petitioner, we lack jurisdiction over this petition. Nevertheless, even if Petitioner had established irreparable harm, Petitioner failed to show that the trial court’s order departs from the essential requirements of the law. In its petition, Petitioner argues that the trial court departed from the essential requirements of law by exercising jurisdiction over the case in order to grant

Respondents' motion to amend and to transfer the case to circuit court, because, according to Petitioner, Petitioner's filing of the "Confession of Judgment" deprived the trial court of jurisdiction to take any action other than to determine the amount of the appropriate fees to be awarded in the case. Petitioner further contends that the case was rendered moot when it tendered payment "to the jurisdictional limits" of the county court and that "no further relief could be awarded by the County Court."

The trial court did, however, have the ability to award further relief to Respondents—the trial court had the ability to grant leave to amend the complaint in order to correct the Respondents' counsel's erroneous claim for damages. *See Fla. R. Civ. P. 1.190(a)*. When a party files a motion to amend a pleading, "[l]eave of court shall be given freely when justice so requires." *Id.* "Public policy favors the liberal amendment of pleadings, and courts should resolve all doubts in favor of allowing the amendment of pleadings to allow cases to be decided on their merit." *Laurencio v. Deutsche Bank Nat. Trust Co.*, 65 So. 3d 1190, 1193 (Fla. 2d DCA 2011). Refusal by a trial court to permit an amendment of a pleading is an abuse of discretion unless it is clear that amendment would prejudice the opposing party, the privilege to amend has been abused, or the amendment would be futile. *See id.*; *ABC Liquors, Inc. v. Centimark Corp.*, 967 So. 2d 1053, 1057 (Fla. 5th DCA 2007). Because Respondents' motion to amend did not seek to add new claims to their complaint, but rather sought to correct their claim for damages, the trial court's order granting the motion did not prejudice Petitioner and was well within the trial court's discretion. *See Morgan v. Bank of N.Y. Mellon*, 200 So. 3d 792, 795 (Fla. 1st DCA 2016) ("Whether granting the proposed amendment would prejudice the opposing party is analyzed primarily in the context of the opposing party's ability to prepare for the new allegations or defenses prior to trial.").

The case cited by Petitioner, *Geico Cas. Co. v. Barber*, 147 So. 3d 109 (Fla. 5th DCA 2014), does not require a different result. In that case, the insurer had confessed to judgment for the policy limits of the insured's policy. After the insurer filed a motion to enter judgment, the insured was allowed by the trial court to add a claim for a declaratory judgment. The appellate court held, however, that once the insurer had confessed to judgment, "the trial court lacked jurisdiction to take any action other than to enter judgment in the amount of the UM policy limits in favor of" the insured. *Barber*, 147 So. 3d at 111. The court further held that where the policy limits are not disputed and are known to the insured, the amount of the judgment may not exceed those policy limits. *Id.* (quoting *Safeco Ins. Co. v. Fridman*, 117 So. 3d 16 (Fla. 5th DCA 2013), *quashed by Fridman v. Safeco Ins. Co. of Illinois*, 185 So. 3d 1214 (Fla. 2016)). Here, by contrast, Respondent attempted to confess to judgment well below the policy limits, so that a motion to amend would not be futile. Moreover, the Florida Supreme Court, in *Fridman v. Safeco Ins. Co. of Illinois*, 185 So. 3d 1214 (Fla. 2016), held that the trial court in that case "did not err in denying the motion to confess judgment" and that "the trial court did not err by retaining jurisdiction to determine Fridman's right to amend the complaint to add a claim for bad faith," thereby indicating that a confession of judgment does not, regardless of other circumstances in the case, automatically deprive the trial court of jurisdiction to undertake any action other than enforce the confession of judgment. 185 So. 3d at 1229.

Therefore, we find that the trial court did not depart from the essential requirements of the law when it exercised its discretion and granted Respondents' motion for leave to amend their complaint.

**Conclusion**

Based on the foregoing, we conclude that the petition fails to establish that the trial court's order results in irreparable harm. Accordingly we **DISMISS** the petition for writ of certiorari for lack of jurisdiction.

**DISMISSED.**

**DONE AND ORDERED** in Chambers, at Kissimmee, Osceola County, Florida, on this 31<sup>st</sup> day of December, 2020.



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**MARGARET H. SCHREIBER**  
**Presiding Circuit Judge**

SHAFFER and MADRIGAL, JJ., concur.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing order was furnished, via U.S. Mail or E-portal, to: **William M. Mims** and **Brian P. Henry**, Rolfes Henry Co., LPA, 3191 Maguire Boulevard, Suite 160, Orlando, FL 32803, [wmims@rolfeshenry.com](mailto:wmims@rolfeshenry.com) and [bhenry@rolfeshenry.com](mailto:bhenry@rolfeshenry.com); and to **Michael B. Germain**, 3412 W. Bay to Bay Blvd., Tampa, FL 33629, [mgermain@germainlawgroup.com](mailto:mgermain@germainlawgroup.com), on this 31<sup>st</sup> day of December, 2020.

s/ Wendy Blair  
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Judicial Assistant