

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

Northland Insurance Company,

CASE NO.: 2015-CA-9686-O

Appellant,

v.

S&M Transportation, Inc.,

Appellee.

Appeal from the County Court,
for Orange County, Florida,
Andrew L. Cameron, County Judge.

Maureen G. Percy, Esq., Andrew E.
Grigsby, Esq., and Joseph V. Manzo, Esq.,
for Petitioner.

V. Rand Saltgaver, Esq., and
Charles Parker, Jr., Esq.,
for Respondent.

Before WHITEHEAD, BLECHMAN, and LEBLANC, J.J.

PER CURIAM.

**FINAL ORDER GRANTING PETITION FOR
WRIT OF PROHIBITION IN PART**

Petitioner Northland Insurance Company seeks a writ of prohibition preventing the county court from proceeding in the small claims case S&M Transportation filed against Northland. This Court has jurisdiction. Art. V, § 5(b), Fla. Const.; Fla. R. App. P. 9.030(c)(3); *DuPont v. Hershey*, 576 So. 2d 442, 443 (Fla. 4th DCA 1991) (holding petition for writ of prohibition directed to county court should have been filed in circuit court, as “circuit court has jurisdiction of appeals from the county court,” and “[e]xtraordinary writ jurisdiction follows

appellate jurisdiction.”). Because the county court would exceed its jurisdiction in proceeding, the Court grants the Petition in part.

On August 30, 2007, S&M Transportation filed a complaint for declaratory judgment against Northland Insurance in the Ninth Judicial Circuit Court for Orange County (the “declaratory judgment action”). S&M Transportation asked the Circuit Court to declare that its truck was insured by Northland when it was stolen. The jury in the declaratory judgment action found that S&M Transportation did “suffer a loss under the physical damage provision of the insurance policy with the Defendant for the theft of the Freightliner tractor truck.” (App. 61.) The Circuit Court then entered a final declaratory judgment, which stated that S&M Transportation

suffered a cause of loss that would be covered under the physical damage provision of the insurance policy with the Defendant . . . for the theft of its Freightliner tractor truck. The Court further determines and declares that there has been no proof of a loss for recovery of damages that would be payable under the insurance policy, and no evidence that the insurance company wrongfully withheld payment of any proceeds or benefits of the policy.

(App. 9.) It appears that the evidence in the declaratory judgment action was that the truck was repossessed from S&M Transportation and then returned to the financing company.

In a motion for supplemental relief, S&M Transportation asked the Circuit Court to enter a judgment for damages against Northland for Earned Freight Charges, damages under the physical damage provisions of the insurance policy, and nominal damages. Before the Circuit Court ruled on the motion, S&M Transportation appealed the final declaratory judgment to the Fifth District Court of Appeal on December 3, 2014, and Northland filed a cross-appeal two weeks later. The Circuit Court then entered an order finding that it was without jurisdiction to

rule on the motion for supplemental relief due to the ongoing appeal in the Fifth District. That appeal is still pending.

Two weeks after the Circuit Court's order, S&M Transportation filed a small claims case in Orange County Court, asserting a statement of claim against Northland for compensatory and nominal damages (the "county court action"). In the complaint in the county court action, S&M Transportation alleged that the judgment in the declaratory judgment action stated that the truck was stolen and that it had insurance coverage for the theft with Northland.

Northland filed a motion to dismiss the county court action, or, in the alternative, to transfer it to the declaratory judgment action or stay it pending the appeal at the Fifth District. Northland argued that the county court action interferes with the Fifth District appeal. On June 30, 2015, the county court denied the motion, but stayed discovery for six months.

After S&M Transportation filed its Initial Brief in the Fifth District appellate case, Northland filed a motion for reconsideration in the county court action of the order denying the motion to stay. Northland argued that the Initial Brief demonstrated that damages were litigated in the declaratory judgment action, and that this contradicted representations made to the county court during the hearing on the motion to dismiss.

On October 15, 2015, and before the scheduled hearing on the motion for reconsideration,¹ Northland filed a Petition for Writ of Prohibition with the Fifth District, asking that the county court be restrained from proceeding any further. The Fifth District, without making any rulings on the Petition, including jurisdictional ones, transferred it to this Court.

¹ The hearing on the motion for reconsideration in the county court was scheduled for February 5, 2016, but the parties have not advised this Court of the outcome.

A. Standard of Review

Questions of law presented in a petition for writ of prohibition are reviewed de novo. *Brevard Cnty. v. Morehead*, 181 So. 3d 1229, 1232 (Fla. 5th DCA 2015) (petition for writ of prohibition challenging trial court's subject matter jurisdiction due to sovereign immunity claim); *DHL Express (USA), Inc. v. State ex rel. Grupp*, 60 So. 3d 426, 428 (Fla. 1st DCA 2011).

B. Discussion

S&M Transportation, in its Response to the Petition for Writ of Prohibition, asks this Court to dismiss the Petition. The Court denies the request and grants the Petition in part.

1. Whether the Petition for Writ of Prohibition should be dismissed

S&M Transportation argues that the Petition for Writ of Prohibition should be dismissed for several reasons, including that the Petition was filed several months after the order denying the motion to dismiss was entered, and therefore the Petition is untimely; that issuing a writ would be inappropriate because Northland has an adequate alternative remedy by direct appeal; that this Court does not have jurisdiction to issue a writ that impinges on the Fifth District Court of Appeal's exclusive jurisdiction over the appellate case and the issues raised therein; that Northland has taken inconsistent positions; and that proof of undisputed facts are necessary before a writ may issue.

a. Jurisdiction to review the Petition for Writ of Prohibition

S&M Transportation makes several arguments regarding whether a petition for writ of prohibition is the appropriate vehicle to review the trial court's order denying the motion to

dismiss, especially as the Petition was filed three-and-a-half months after the trial court entered the order denying Northland's motion to dismiss, stay, or transfer the county court action.

In *Professional Roofing & Sales, Inc. v. Flemmings*, 138 So. 3d 524, 527 n.1 (Fla. 3d DCA 2014), the Third District Court of Appeal rejected the respondent's argument that the petition for writ of prohibition to review the trial court's orders on two motions to dismiss was untimely. The Florida Rules of Appellate Procedure do not require "a petition for writ of prohibition [to] be filed within a certain time period of the order to be reviewed." *Id.*

As there is no time requirement for filing a petition for writ of prohibition to review an order denying a motion to dismiss, the argument that the Petition was untimely filed is rejected.

S&M Transportation also argues that a petition for writ of prohibition is not available because Northland has an adequate alternative remedy by direct appeal. Northland's Petition for Writ of Prohibition is based on its argument that the county court lacks jurisdiction due to the appeal pending in the Fifth District.

In *Dixie Towing Corp. v. Mobley*, 590 So. 2d 1090, 1091 (Fla. 1st DCA 1991), the defendant appealed the trial court's order granting a new trial. While the appeal was pending, the plaintiffs filed a motion to amend their complaint and set it for hearing in the trial court. *Id.* The defendants then filed a petition for writ of prohibition in the appellate court, "contending that the trial court lacked jurisdiction to proceed with the litigation . . ." *Id.* The First District stated that "filing of the notice of appeal vests jurisdiction in the appellate court." *Id.* It then held "that the trial court was without jurisdiction to permit plaintiffs to amend their complaint and prohibition is appropriate to prevent the trial court from entertaining that motion." *Id.* See also *Northbrook Property & Casualty Co. v. Colton*, 641 So. 2d 440, 441-42 (Fla. 4th DCA 1994) (holding that "[p]rohibition is available to prevent the trial court from improperly exercising jurisdiction while

an appeal is pending[.]” and granting writ of prohibition “to prevent the trial court from exercising jurisdiction over that part of the . . . injunction” that was on appeal); *Columbo v. Legendre*, 397 So. 2d 1043, 1044 (Fla. 5th DCA 1981) (granting petition for writ of prohibition based on trial court’s lack of subject matter jurisdiction and rejecting argument that there was adequate remedy by direct appeal if petitioner was eventually adjudged in contempt); *Markin v. Markin*, 877 So. 2d 785, 787 (Fla. 4th DCA 2004) (“Prohibition lies where a trial court is about to act in excess of its subject matter jurisdiction.”)

In this case, Northland seeks to prohibit the county court from exercising jurisdiction that conflicts with the Fifth District’s appellate jurisdiction, just as the petitioner in *Dixie Towing* sought to prohibit the trial court from exercising jurisdiction that would conflict with the appellate court’s jurisdiction. As the appellate court held that a petition for writ of prohibition was the correct vehicle to challenge the trial court’s jurisdiction regarding a matter that may be subject to appellate jurisdiction, S&M Transportation’s argument that the petition should be dismissed because there is an adequate remedy on direct appeal is denied.

Finally, S&M Transportation argues that this Court has no authority to decide the extent of the Fifth District’s jurisdiction and the issues on appeal from the Circuit Court.

When a matter is pending on appeal, whether the trial court has jurisdiction depends “on the nature of the action being taken by the trial court in relation to the subject matter of the pending appeal.” *Bailey v. Bailey*, 392 So. 2d 49, 52 (Fla. 3d DCA 1981). If the trial court’s action “cannot affect or interfere with the subject matter of the appeal, and thus impinge upon the appellate court’s power and authority to decide the issues presented to it by the appeal, then the trial court can act.” *Id.* Appellate court jurisdiction “is exclusive only as to the subject matter of the appeal.” *Id.*

“The lower court is prohibited only from altering the order or acting in any manner with respect to its appealed order as might frustrate the efforts of the appellate court or render moot its labors.” *Bradenton Grp., Inc. v. Dep’t of Legal Affairs*, 701 So. 2d 1170, 1180 (Fla. 5th DCA 1997), *approved in part & quashed in part on other grounds*, 727 So. 2d 199 (Fla. 1998). “[T]he test . . . is whether the trial court is proceeding in a matter which affects the subject matter on appeal.” *Casavan v. Land O’Lakes Realty, Inc. of Leesburg*, 526 So. 2d 215, 215-16 (Fla. 1988).

In *Carraway v. Carraway*, 883 So. 2d 834, 834 (Fla. 1st DCA 2004), the petitioner objected to the trial court ruling on a petition for discharge, arguing that the pending appeal deprived the trial court of jurisdiction to do so. “The trial court eventually held that it had jurisdiction” *Id.* The First District stated that the trial court has jurisdiction to consider an issue “so long as the trial court does not interfere with the subject matter of the appeal or impinge on the power and authority of the district court to decide the issue presented to it on appeal.” *Id.* at 834-35.

In *Carraway*, the trial court necessarily determined the jurisdiction of the appellate court in deciding whether it had jurisdiction. *Id.* at 834. This Court must also determine the Fifth District’s jurisdiction to decide whether the Petition for Writ of Prohibition should be granted. Nothing prevents this Court from doing so, as that decision will not have any effect on the appeal currently pending before the Fifth District. It affects only the county court action. Thus, this Court does have the authority, via a petition for writ of prohibition, to determine whether the county court lacks jurisdiction to proceed because of a case pending in the Fifth District.

As none of S&M Transportation’s arguments regarding dismissal of the Petition based on jurisdictional grounds have merit, the Court rejects them.

b. Inconsistent positions

S&M Transportation argues that the Petition should be dismissed because Northland has taken inconsistent positions on jurisdiction. S&M Transportation contends that the arguments asserted in the Petition are contrary to the position Northland took in the declaratory judgment action that the Circuit Court lacked jurisdiction to decide S&M Transportation's motion for supplemental relief. S&M Transportation also argues that Northland filing a motion for reconsideration of the county court's order denying the motion to dismiss, stay or transfer, was inconsistent with the position taken in the Petition.

S&M Transportation's argument is based on Northland contending that the Circuit Court in the declaratory judgment action did not have jurisdiction to rule on S&M Transportation's motion for supplemental relief. Northland's argument was based on the declaratory judgment action being appealed to the Fifth District. Here, Northland also argues that the county court does not have jurisdiction in the county court action due to the appeal to the Fifth District. Northland has repeatedly argued that the Fifth District has jurisdiction, which is consistent with seeking a remedy with this Court to prevent the county court from impinging on the Fifth District's jurisdiction.

S&M Transportation also does not demonstrate how Northland has taken a "totally inconsistent position,"² sufficient to apply the doctrine of judicial estoppel by filing a motion for reconsideration of the county court's order denying the motion to dismiss, stay, or transfer.

Northland has taken one position throughout the declaratory judgment action and the county court action: that the Fifth District has jurisdiction over matters regarding damages in the dispute between Northland and S&M Transportation. Thus, the Court rejects S&M

² *Smith v. Avatar Properties, Inc.*, 714 So. 2d 1103, 1107 (Fla. 5th DCA 1998).

Transportation's argument that Northland has taken inconsistent positions that warrant dismissing the Petition.

c. Factual disputes

S&M Transportation argues that proof of undisputed facts is necessary before a writ may issue. S&M Transportation does not point to any factual disputes relevant to this prohibition proceeding, however. Instead, it asserts that there was no discussion regarding damages as an issue for adjudication in the declaratory judgment action, relying on the pre-trial stipulation and the jury verdict. In response, Northland asserts that damages were argued in the declaratory judgment action, and it points to S&M Transportation's motion for supplemental relief and its Initial Brief filed with the Fifth District. Granting the Petition does not depend on the resolution of this dispute, regardless of whether it is a factual one, and therefore the Court rejects it as a reason to dismiss the Petition.

2. County court jurisdiction

Because none of S&M Transportation's arguments supporting dismissing the Petition have merit, the Court now turns to the merits. Northland argues that a writ of prohibition should be issued to prevent the county court from proceeding because S&M Transportation is asking the county court to award it damages based on a judgment that is currently on appeal at the Fifth District. Northland contends that the county court therefore lacks jurisdiction.

As discussed above, the test to determine whether the trial court's action will exceed its jurisdiction due to a pending appeal is "whether the trial court is proceeding in a matter which affects the subject matter on appeal." *Casavan v. Land O'Lakes Realty, Inc. of Leesburg*, 526 So. 2d 215, 215-16 (Fla. 1988).

The final declaratory judgment states that S&M Transportation suffered a loss that would be covered under Northland's insurance policy, i.e., the truck's theft. Both S&M Transportation and Northland appealed that judgment. Then, S&M Transportation filed the county court action, asking the county court to award it damages based upon the finding in the declaratory judgment that it had already appealed to the Fifth District.

In *Department of Revenue ex rel. Simmons v. Wardlaw*, 25 So. 3d 80, 81 (Fla. 4th DCA 2009), the Department of Revenue entered an order against the appellant, ordering him to pay child support. The appellant then appealed the Department of Revenue order to the First District Court of Appeal. *Id.* Two months after filing the notice of appeal with the First District, the appellant then filed a complaint in circuit court asking the circuit court to vacate the Department of Revenue's order and a motion asking the circuit court to enjoin the Department from withdrawing deductions from the appellant's pay based on the order. *Id.* The circuit court treated the motion as a request for a stay and abated the Department of Revenue's order for thirty days. *Id.* The First District held that the circuit court lacked jurisdiction to stay the Department of Revenue's order because the circuit court's proceeding would affect the appeal pending before the First District. *Id.* at 82. The "complaint related to the same subject matter as the appeal—the Department's final order." *Id.*

Just as in *Wardlaw*, in this case S&M Transportation filed a new action in a different forum regarding an order on review at the district court of appeal. S&M Transportation filed a claim for damages in the county court based on a declaratory judgment both it and Northland are appealing in the Fifth District. The appellant in *Wardlaw* filed a complaint in the circuit court regarding a Department of Revenue order he appealed to the First District. *Id.* at 81-82. Just as the circuit court in *Wardlaw* did not have jurisdiction because the proceeding would affect the

appeal in the First District, the county court here does not have jurisdiction because proceeding would affect the appeal in the Fifth District. S&M Transportation's county court action for damages is based on a judgment both parties are challenging at the Fifth District, and therefore, under *Wardlaw*, the county court action would interfere with and impinge upon the Fifth District's jurisdiction. Thus, the Petition for Writ of Prohibition is granted, and the county court is restrained from proceeding further until the resolution of the appeal at the Fifth District.

S&M Transportation argues that the county court action should not be stayed pending the Fifth District appeal because this Court cannot predict how the Fifth District will rule, and the Fifth District may decline to address damages when it does make a decision. Although this may be true, this argument does not provide the county court with jurisdiction it does not have.

S&M Transportation also relies on *Williams v. Edwards*, 604 So. 2d 930 (Fla. 5th DCA 1992), in opposing staying the county court action. *Williams*, however, is inapposite, as it quashed an order staying a circuit court case pending the appeal of an entirely different case, involving different parties, from the Fifth District to the Supreme Court of Florida. *Williams*, 604 So. 2d at 931-32. The case before this Court is an appeal to the Fifth District by the same parties from a judgment under which S&M Transportation seeks damages in the county court action. Jurisdiction was not an issue in the *Williams* case. None of S&M Transportation's arguments against a stay pending the Fifth District appeal have merit.

In the Petition for Writ of Prohibition, Northland also requests that this Court order the county court to transfer the case to the Circuit Court declaratory judgment action. There is no need to order the county court to transfer the action to the Circuit Court declaratory judgment action at this time. The Fifth District's decision may render a transfer moot. Thus, the request that the county court action be transferred to the declaratory judgment action is denied without

prejudice for Northland to renew the request after the resolution of the appeal at the Fifth District, if appropriate.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Prohibition is **GRANTED IN PART**. The Order on Defendant's Motions to Dismiss and to Stay Discovery, entered on June 30, 2015, is **QUASHED**, and the county court proceedings are stayed pending the resolution of the Circuit Court declaratory judgment appeal in the Fifth District. Northland's request that the county court action be transferred to the Circuit Court declaratory judgment action is **DENIED** without prejudice to renew the request, if appropriate, following the resolution of the Fifth District appeal. This matter is **REMANDED** for proceedings consistent with this opinion.

2. S&M Transportation's motion for sanctions under Florida Statute section 57.105 and motion for appellate attorney's fees are **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 16th day of March, 2016.

/S/ _____
REGINALD K. WHITEHEAD
Presiding Circuit Judge

BLECHMAN and LEBLANC, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **The Honorable Andrew L. Cameron, Orange County Judge**, Orange County Courthouse, 425 N. Orange Ave., Orlando, FL 32801; **Maureen G. Percy, Esq., Andrew E. Grigsby, Esq., and Joseph V. Manzo, Esq.**, Hinshaw & Culbertson LLP, 2525 Ponce de Leon Boulevard, 4th Floor, Coral Gables, FL 33134; **V. Rand Saltgaver, Esq.**, Law Offices of V. Rand Saltgaver, 1215 Mount Vernon St., Orlando, FL 32853-6096; and **Charles Parker, Jr., Esq.**, Mapp & Parker, P.A., 1419 E. Robinson St., Orlando, FL 32801, on this 16th day of March, 2016.

/S/ _____
Judicial Assistant