IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO.:

CENTRAL CONCRETE SUPERMIX, INC.,

Petitioner,

v.

JOSE A. “PEPE” CANCIO, SR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ from an Order of the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida

CASE NO. 14-8409-CA-01

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PREFACE

This Petition seeks certiorari review of an order dated December 15, 2020 granting Respondent, Jose A. Pepe Cancio, Sr.'s, former counsel, Lawrence J. McGuinness's, Motion to Quash Subpoena for Deposition and/or Motion for Protective Order ("Motion for Protective Order") (App. 05-08). The trial court refused to allow Supermix to examine Mr. McGuinness concerning his letter to Supermix dated March 14, 2014 after Cancio was terminated on March 10, 2014 to discuss the circumstances surrounding that communication to develop a record to challenge the admissibility of the handwritten note upon which the Respondent primarily relies to establish his most significant part of his wage claim. The Petitioner seeks to examine Mr. McGuinness on his communication with Supermix to ascertain whether McGuinness's communication was in furtherance of settlement in response to the terms memorialized in the handwritten note that Cancio is exclusively using as written evidence of Supermix's purported promise to pay him a commission or bonus (Exhibit "3" to the verified amended complaint).

Petitioner, Central Concrete Supermix, Inc., will be referred to herein as "Petitioner" or "Supermix".

Respondent, Jose A. "Pepe" Cancio, Sr., will be referred to herein as "Respondent" or "Cancio".

Cancio's former counsel, Lawrence McGuinness, will be referred to herein as "McGuinness".

Petitioner's Appendix, filed simultaneously with this Petition for Writ of Certiorari, will be referred to herein as "App.__".

The transcript of the December 8, 2020 hearing on the Motion for Protective Order is included in the Appendix at App. 15-22 and will be referred to herein as "App. __" and "Tr.__" followed by the page number in the original transcript.

The operative Verified [Second] Amended Complaint dated June 21, 2016 is included in the Appendix at App. 03-04 and will be referred to herein as "SAC".

STATEMENT OF THE FACTS AND THE CASE

Cancio was employed by Supermix as its Chief Executive Offer from 1989 through March 10, 2014. (SAC at ¶ 1). On March 10, 2014, the employment was severed. (SAC at ¶ 1, 39 and 40). During his tenure, Cancio was handsomely compensated and provided significant autonomy. A written employment agreement dated January 29, 2004 detailed the terms of Cancio's employment. (App. 76-78). After Supermix notified Cancio that his employment would not be continued after March 10, 2014, Supermix held an

exit meeting with Cancio on March 13, 2014 to discuss an amicable severance of their relationship. During the meeting on March 13, 2014, a dispute arose over what was due to Cancio. Supermix, through its founder, Bernardo Dias, made a settlement offer to resolve Cancio's wage and benefits claim. It was memorialized informally in a handwritten note. Cancio attaches this note to the SAC as Exhibit "3". (App. 03-04). Cancio rejected Supermix's settlement offer memorialized in Exhibit "3".

The following day, on March 14, 2014, Supermix received a formal letter from Cancio's attorney, Mr. McGuinness, that explicitly stated:

> "...while Mr. Cancio appreciates the settlement discussions between him and Supermix that occurred this week, all of the offers made by Supermix are rejected…

(App. 01-02, p. 1). Supermix contends that Exhibit "3" is an inadmissible compromise or offer to compromise and cannot be used as evidence of an enforceable oral promise to pay a bonus.

Cancio filed his first complaint on March 31, 2014. (App. 134-138). At that time, McGuiness appeared as Cancio's lawyer. The initial complaint had only one count for breach of agreement based on a document that now appears as Composite Exhibit "1" to the SAC. (App. 74-75). On March 9, 2016, Cancio filed a motion to amend that complaint. (App. 141-151). On April 14,

2016, Judge Schlesinger determined that the "purported employment contract" attached to the original complaint, and continued with the proposed amended complaint, "lacks essential forms". (App. 139-140). Judge Schlesinger, therefore, found that "because Count I of the proposed amended complaint is based on the same contract [as the original complaint], it fails as a matter of law and presentation of this amendment will be futile." Judge Schlesinger, however, allowed Count II – "Claim for Owed Wages & Benefits" in the proposed amended complaint to proceed. (App. 141-151 at p. 6). Count II of the amended complaint was based on the documents that now appear as Composite Exhibit "1" in the SAC. (App. 74-75). Importantly, Count II of the amended complaint sought the same alleged unpaid wages and benefits that are now pled in Count I of the SAC. The machination behind the SAC is that Count I is built around Exhibit "3" to the SAC. (App. 03-04).

On October 19, 2016, the *Verified* [Second] Amended Complaint dated June 21, 2016 (SAC) became the final operative complaint to close out the pleadings. The SAC is a three-count verified complaint (Count I – "Unpaid Wages and Benefits Against Supermix", Count II – "Breach of the 2004 Agreement Against Edison and Supermix"; and Count III – "Breach of the Commission Agreement Against All Defendants"). The only remaining count

is Count I where Cancio seeks to recover "certain wages, bonuses, severance, unused accrued vacation, benefits and other amounts for his services". (SAC at ¶ 37). Count I is the lone claim because Supermix successfully obtained summary judgments on Count II and Count III. (App. 69-73 and 51-68, respectively). The procedural journey that led to the entry of multiple summary judgments warrants discussion.

On August 29, 2018, Judge Miguel M. de la O granted Plaintiff's Motion for Partial Summary Judgment as to Count III of the SAC. In Count III of the SAC, Cancio contended Supermix had breached an alleged 2012 oral agreement to pay him a bonus because he facilitated Supermix's acquisition of a competitor, Continental Florida Materials, Inc. Judge de la O found that this alleged March 2012 oral agreement was, in reality, an attempt not to collect a bonus, but a disguised unenforceable commission agreement in violation of Florida law:

> The questions raised by the Motion are whether (1) the alleged March 12, 2012 oral agreement is supported by enforceable consideration; and (2) the March 12, 2012 oral agreement to pay Plaintiff a commission for the "Continental Deal" is enforceable under Fla. Stat. §475.01, et. seq. **The answer to both is "no".**

(App. 51-68 at p. 1) (emphasis added). Essentially, the trial court found that Cancio could not legally enforce a commission agreement for successfully

brokering a transaction for which he had no license to broker and independently, the trial court found that the services for which Cancio requested this added compensation ("bonus") was exactly the services Cancio was employed to perform for which he was paid a hefty salary and benefits as CEO of Supermix. In the SAC, Cancio himself refers to Exhibit "3" only as evidence or acknowledgment of an alleged "Commission Agreement" for services rendered to Supermix in relation to the acquisition of Continental Florida Materials, Inc. (SAC at ¶ 5, 6, 22, 24, 26 and 41).

On April 17, 2019, another summary judgment dismissal was entered. (App. 69-73). This time, Judge Rebull granted summary judgment in favor of Supermix on Count II of the SAC construing the 2004 employment agreement (Exhibit "4" to the SAC) (App. 76-78) as technically requiring one year's notice before termination, and no obligation to tender severance pay. Judge Rebull found that since Cancio earned more during the notice period than he would have earned while working for Supermix, Cancio could not recover damages on Count II (Breach of the 2004 Agreement) as he suffered no damages and, in fact, made more money after the termination.

When the dust settled from these dismissals, only a single count remained standing. This is Count I. After a rotation of judges from the division, on October 19, 2020, Judge Veronica Diaz granted partial summary judgment

in favor of Cancio on Count I. The trial court found that Cancio was owed $8,800.00 in unpaid salary and $14,787.00 in accrued vacation. The Court went on to find that Cancio's "claims for bonuses pursuant to [the handwritten] Exhibit 3" to the SAC and his purported right to collect the cash-out value of a key man life insurance policy, undisputedly paid for and owned by Supermix, were open fact issues triable to the jury. (App. 47-50).

Supermix contends that Exhibit "3" to the SAC is evidence of an earlier compromise and offer that Mr. McGuinness rejected on behalf of Cancio, not evidence of an oral agreement to pay a bonus previously called "commission". It is the Petitioner's position that Exhibit "3" is an offer to compromise a dispute between Supermix and Cancio of what Cancio claimed to be due to him on the day of the exit meeting (March 13, 2014).

Unquestionably, Mr. McGuinness is a material witness based on his written communication to Supermix. In particular, on March 14, 2014, Mr. McGuinness sent Supermix a letter, as counsel for Cancio at the time, which explicitly referred to the post-termination meeting, where Exhibit "3" was exchanged between Cancio and Supermix, as "settlement discussions". Cancio has placed Mr. McGuniness's communications with Supermix at issue. Simply put, the issue is whether Exhibit "3" of the SAC is evidence of an offer to compromise and hence, cannot serve as evidence of an oral

agreement to pay a bonus. Mr. McGuinness's correspondence came shortly after Cancio had his exit discussion with Supermix. Mr. McGuinness refers to offers made that he rejects in this correspondence.

The admissibility of Exhibit "3" is clearly material. If Exhibit "3" is a compromise or offer made to resolve a dispute, then it is inadmissible and Cancio cannot base his six-figure bonus claim on Exhibit "3". Supermix should be afforded an opportunity to develop a record to sustain a challenge to the trial admissibility of Exhibit "3". The testimony of Mr. McGuiness is crucial in this regard. The language employed by Mr. McGuiness in his letter appears to address and recognize that Cancio engaged in settlement discussions with Supermix before his exit. An examination of Mr. McGuiness concerning the formation and circumstances surrounding the settlement communication will not inescapably invade attorney-client privileged communications he had with Cancio. The very language in the settlement response evidences knowledge of a compromise or offer to compromise previously made to Cancio by Supermix.

During his deposition, Cancio conceded that Exhibit "3" to the SAC had been an offer made after Supermix terminated him and that at the time the offer was made, the parties had a dispute as to what was purportedly owed to him:

> Q. Okay. So, [Exhibit 3 to the SAC] was what he offered you when you—three days after your employment was terminated, correct?
> A. Yes. [Cancio]
> Q. Okay. And he said, "This was what we're willing to pay you, and you should take it and consider it." Correct?
> A. But our agreement was for seven years, and this was not the deal here. [Cancio]
> * * *
> Q. Okay so, this was—this was basically a way to settle your claim that you were entitled to seven years of EBITDA, and this is what they offered you correct?
> * * *
> A. It was not — [Cancio]
> Q. . . . ***He gave you this piece of paper [Exhibit "3"] as an offer?***
> * * *
> THE WITNESS: ***Yes.*** *[Cancio]*
> * * *
> Q. Did you call him back and say, "No, I'm not going to take this"?
> A. I don't call him back. I told him in person that I don't want to take it. [Cancio]
> Q. ***So, this was an offer that he wanted — he said, "This is what we're willing to pay you." And you told him, "I'm not going to accept it"?***
> * * *
> A. ***Yes.*** *[Cancio]*

(App. 152-154, Cancio Depo. Tr. at 353:20-354:3, 355:2-13, 356:8-18, 357:1-13) (emphasis added) (objections omitted). Cancio also consistently testified that the settlement communication (Exhibit "3" to the SAC) was presented to him by Bernardo Dias (Supermix's founder) three days after he was terminated – on March 13, 2014. (App. 152-154, Cancio Depo. Tr. at

352:15-17; 353:20-23; 355:16-356:2). Despite Cancio's testimony, he takes the position now that Exhibit "3" is proof of his right to a bonus. Bernardo Dias also stated that Exhibit 3 to the SAC was a settlement offer that Supermix made to Cancio during his post-employment meeting and acknowledged receiving the letter dated March 14, 2014 from Mr. McGuinness rejecting the settlement offer. (App. 155-156 at ¶¶ 3 and 4). However, this record evidence of a compromise or offer to compromise was found unclear by the lower court to eliminate Exhibit "3" as evidence of an oral agreement to pay Cancio a bonus. (App. 79-81).

At the December 8, 2020 hearing, which gave rise to the Order at issue, Mr. McGuinness represented to the trial court that he did not see Exhibit "3" when he was counsel for Cancio and that Exhibit "3" was "something that came about long after [Mr. McGuinness] had been representing Mr. Cancio". (App. 15-22, Tr. at 9:5-15). Well, according to Cancio, Exhibit "3" came the day before Mr. McGuinness's settlement response to Supermix. This fact makes it even more imperative that Supermix be allowed to take the sworn testimony of Mr. McGuinness who sent this correspondence to Supermix on March 14, 2014 - the very next day that Cancio testified he had been provided Exhibit "3" by Supermix (March 13, 2014) and, consequently, that Mr. McGuinness addressed by communicating that "all of the offers made by

Supermix are rejected as being totally inadequate…". (App. 01-02) (emphasis added). Summarily preventing the examination of Mr. McGuinness irreparably prejudices Supermix's ability to challenge the most significant monetary exposure in this case. Supermix should be allowed to develop testimony to determine whether Exhibit "3" was an offer to compromise that Mr. McGuinness addressed.

Supermix made it abundantly clear to the trial court that it will not be seeking information from Mr. McGuinness that invades attorney-client privileged communications. (App. 15-22, Tr. 4:25-6:20). There is no need to go there. In any event, Cancio can protect his privileges at the deposition. Cancio may interpose a proper objection to any question Cancio believes seeks protected information. The trial court prematurely concluded, without good cause or record evidence, that every possible question in the desired examination, other than the name and address of Mr. McGuiness, would necessarily and inescapably elicit non-discoverable, attorney-client privileged information. It is this error that irreparably prejudices Supermix's right to a fair trial that cannot be remedied after the trial. The challenge here is not simply an attack on collateral evidence. It goes to the core of the claim which seeks a significant six-figure alleged bonus payout. The admissibility of this primary piece of evidence (Exhibit "3") that Cancio grounds the most

significant component of his wage claim should not be insulated from challenge by depriving Supermix of taking the testimony of a material witness.

BASIS FOR JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction to issue writs of certiorari pursuant to Article V, section 4(b)(3), Florida Constitution, and Florida Rules of Appellate Procedure 9.030(b)(2)(A) and 9.100(c). In order to obtain certiorari relief, the party seeking that relief "must demonstrate that the trial court's interlocutory order departs from the essential requirements of the law, and causes irreparable harm that cannot be corrected on direct appeal." *Florida West Realty Partners, LLC v. MDG Lake Trafford, LLC,* 975 So.2d 479, 480 (Fla. 2d DCA 2007); *see also, Foster v. Bank of America, N.A.,* 215 So.3d 158, 160 (Fla. 3d DCA 2017) ("Certiorari relief is appropriate only when the petitioner establishes that the trial court departed from the essential requirements of law, which results in a material injury for the remainder of the case, and which cannot be remedied on appeal." (citation omitted)). Supermix seeks to have this Court issue a writ of certiorari quashing the Order of the circuit court because the trial court departed from the essential requirements of the law by quashing Supermix's subpoena, thereby preventing the examination of a material witness - Mr. McGuiness. *Fortune*

Ins., v. Santelli, 621 So.2d 546, (Fla. 3d. DCA 1993) ("Certiorari is the appropriate method to review the order entered in connection with discovery proceedings"). The Order is a non-final order granting Mr. McGuiness's Motion for Protective Order to prohibit his examination as a witness. Hence, certiorari relief is available to address the propriety of the Order. *Akhnoukh v. Benvenuto,* 219 So.3d 96,97 (Fla. 2d. 2017). Denying the examination of a material witness is irreparable harm that allows for certiorari review. *Medero v. FPL*, 658 So.2d 566, 567 (Fla. 3d DCA 1995); *Nucci v. Simmons*, 20 So.3d 388, 391 (Fla. 2d. DCA 2009); *compare, Sardinas v. Lagares*, 805 So.2d 1024, 1026 (Fla. 3d. DCA 2001).

THE PREJUDICE

The Order prohibits Supermix from taking the examination of a material witness on the substance, nature and circumstances surrounding that witness's *direct communication* with Supermix in order to explore the admissibility of Exhibit "3" where there is no alternative avenue to elicit that testimony from anyone other than the author of that communication. This prohibition irreparably harms Supermix's ability to address the admissibility of Exhibit "3" at trial. The trial court departed from the essential requirements of law by summarily concluding that an examination of Mr. McGuiness relating to his pre-suit correspondence with Supermix cannot be taken

without invading the province of the attorney-client privilege on all or most material questions. (App. 15-22, Tr. at 10:4-14). However, a pre-suit communication that an attorney directs to a potential defendant is not absolutely privileged and consequently, examining the attorney that authored the pre-suit communication will not necessarily and inescapably lead to the wholesale disclosure of attorney-client privileged information. For these reasons, the Order at issue departs from the essential requirements of law and consequently, irreparably harms the Petitioner's ability to develop testimony that would lead to the discovery of admissible evidence relating to the trial admissibility of Exhibit "3" that Cancio advances as the dispositive writing which allegedly proves Petitioner's agreement to pay him a bonus. Without access to the testimony of Mr. McGuiness, Supermix would be significantly impaired in its ability to develop a sufficient evidentiary foundation to demonstrate that Exhibit "3" constitutes an offer of compromise made by Supermix and rejected by Cancio, through Mr. McGuinness, the following day. Therefore, Exhibit "3" cannot serve as admissible evidence of an agreement to pay Cancio a bonus and without Exhibit "3", a large part of Cancio's remaining claim must be dismissed.

LEGAL ARGUMENTS

Cancio nor Mr. McGuiness made a sufficient showing below that the desired testimony was immaterial or not discoverable because the testimony would necessarily compel disclosure of attorney-client privileged information. On the other hand, Supermix did show why the sought-after testimony of Mr. McGuiness is material by identifying why Mr. McGuiness's testimony was essential for the remainder of the case through trial, in light of the dispositive weight Cancio places on the admissibility of Exhibit "3". (App. 129-133, Pre-Trial Conf. Hrng. Tr. at 22:3-25:9; 35:6-39:12; 42:13-44:21). Without the testimony of Mr. McGuiness, Supermix will be prejudiced by its inability to develop the necessary facts to show that Exhibit "3" was a by-product of compromise and an offer to resolve a dispute. When the testimony of a witness is so material to a party's case, denial of that discovery gives rise to irreparable harm when there is no good cause shown below to silence that discovery. *Hepco Data, LLC v. Hepco Medical, LLC*, 301 So.3d 406-411 (Fla. 2d DCA 2020).

The Order under certiorari review is the type of order that this Court has previously found to inflict the type of harm that cannot be remedied on final appeal. *575 Adams, LLC v. Wells Fargo Bank N.A.*, 197 So.3d 1235 (Fla. 3d DCA). In its ruling, the trial court surmised that the anticipated (yet

unknown) questions would unavoidably “invade attorney-client privilege..” and would further compel Mr. McGuiness “to disclose any privileged communications he had with his client during the presentation of this lawsuit”. (App. 15-22, Tr. at 10:4-14). The trial court reached this conclusion without specific evidence of the anticipated questions that Supermix intended to ask Mr. McGuiness. The ruling was seemingly based on an assumption made by the trial court because Mr. McGuinness happens to be a lawyer.

In fact, the record evidence shows that Mr. McGuinness could be adequately examined while privileged communications are respected. Supermix expressly addressed this concern by informing the trial judge that

> [counsel is] not going to talk to Mr. McGuinness about *what he told his client at that time pre-suit or his discussions*.

(App. 15-22, Tr. at 5:23-25) (emphasis added). Nothing in the record reflects that Supermix's questioning of Mr. McGuiness will require him to reveal attorney-client privileged communications between himself and Mr. Cancio. The burden below was with Mr. McGuiness to articulate how and why the desired questioning would not elicit non-privileged material information that could shed light on whether Exhibit “3” arose from negotiations to

compromise a claim pre-suit or not. The conclusory prohibition against Supermix's discovery request is simply:

> insufficient to demonstrate good cause warranting the entry of a protective order. This error is not remediable on appeal because there is no practical way to determine after judgment how the denial of the right to depose alleged material witnesses would have affected the outcome of the declaratory judgment action.

Busch v. Schiavo, 866 So.2d 136,140 (Fla. 2d. DCA 2004).

Here too, Supermix will be materially harmed if it is not afforded an opportunity to depose Mr. McGuiness on the circumstances and purpose for which he sent the settlement communication to Supermix to ascertain, in particular, what settlement proposal or compromise he was rejecting if it is accurate that Mr. McGuiness was allegedly completely unaware of the events giving rise to Exhibit "3" even though his letter was sent soon after the discussion between Cancio and Supermix. If it was not Exhibit "3" then what compromise or settlement proposal was Mr. McGuiness addressing and rejecting by way of his settlement communication which was so temporally connected to the exit meeting. These are very important yet unanswered questions that can only be answered by Mr. McGuiness. In

answering those and like-kind questions, Mr. McGuiness does not need to rely on exclusively what his client told him.

The analysis should not change simply because Mr. McGuiness is an attorney. In an instructive case from this district, *Somarriba*, this Court allowed the taking of the deposition of an attorney because the attorney would have material and discoverable information on a particular issue on the case. It was conceded that the attorney sought to be deposed, had previously represented the petitioner/movant who sought his deposition. *Somarriba v. Ali,* 941 So.2d 526 (Fla. 3d. DCA 2006). The fact that, in this case, Mr. McGuiness was Cancio's former lawyer does not alter the analysis.

In *Somarriba,* this Court recognized the well-settled rule that the fact the witness is a lawyer does not absolutely disqualify him as a witness. *Somarriba,* at fn. 1. Second, the Order mistakenly shields the taking of the subject deposition because Mr. McGuiness happens to have represented Cancio in the past. That is insufficient too. A protective discovery order that is so overly broad that completely shields Mr. McGuiness from examination, regardless of the questions, necessarily "departs from the essential requirements of law". *Young, Stern & Tannenbaum, P.A. v. Smith*, 416 So.2d 4,5 (Fla. 3d. DCA 1982). The *Shelton* factors play no role under these circumstances involving a former counsel involved in pre-suit

communications, authored by said former attorney and directed to a potential defendant. Mr. McGuinness is not directly involved in the litigation. *Iacono v. Santa Elena Holdings*, 271 So.3d 28, 30 (Fla. 3d DCA 2018); *Zimmerman v. State*, 114 So.3d 446 (Fla. 5th DCA 2013) (examination with limitation permitted of opposing counsel). *Shelton* does not apply where the lawyer has "knowledge of facts relevant to the subject matter of the litigation…" and is advising on a related matter. *Id.* at 447-448. The deposition does not run afoul of *Shelton* even though it was not raised by Mr. McGuinness or Cancio below. *See e.g., Abington Emerson v. Landlash*, 2019 WL 3779779 at *2 (S.D. Ohio 2019) (cases cited therein).

Neither Mr. McGuiness nor Cancio identified to the trial court other witnesses who possessed the same information as Mr. McGuiness who authored his settlement communication. Mr. McGuiness is no longer counsel for Cancio. The concerns that some courts have expressed when the deposition of opposing counsel is sought are not present here. *Nucci v Simmons*, 20 So.3d 388, 390 (Fla. 2d. DCA 2009). Nor is this a situation where Supermix seeks to elicit investigatory and/or work-product information that the requesting party must overcome to depose outside counsel. *Compare, Eller-I.T.O. Stevedoring Co., L.L.C. v. Pandolfo*, 167 So.3d 495, 496-497 (Fla. 3d. DCA 2015).

Cancio is sufficiently protected by objecting at the deposition to any improper questions that he believes require disclosure of privileged information. It is simply premature for the trial court to assume that every single question that will be posed to Mr. McGuiness will certainly invade protected information. Rather than an absolute protection against this discovery, the better practice is to permit the deposition to go forward and afterwards, address any disputes regarding any privilege objections that were made at the deposition. *F.D.I.C. v. Brudnicki*, 2013 WL 5814494 at 2 (N.D. Fla. 2013) (although this case involved the proprietary information of noticed topics, the court discusses the preferred practice of dealing with anticipated privileged communications before deposition). Undoubtedly, a court may intervene beforehand, particularly in situations where the topics on a corporate representative's deposition notice are overly broad or the noticed areas are, on their face, areas that seek protected information. That is not the case here. Accordingly, it was premature to have concluded that Mr. McGuiness only had protected information to disclose. Although Cancio's communication with Mr. McGuiness will be protected, it does not necessarily follow that the facts comprising Mr. McGuiness's communication with Supermix are also protected. *In re Hillsborough Holdings Corp*., 176

B.R. 223, 242 (M.D. Fla. 1994). A lawyer may be compelled to testify about facts.

CONCLUSION

In conclusion, it is clear that the record is void of the requisite good cause showing to permit such a blanket prohibition of the deposition of Mr. McGuiness. Cancio has made the admissibility of Exhibit "3" a prime element of his most significant monetary amount that he seeks to recover under his unpaid wages claim. Supermix will be materially prejudiced in its ability to defend against that claim by prohibiting Supermix from questioning Mr. McGuiness to elicit facts to interpose objections to the admissibility of Exhibit "3" as evidence of compromise and, therefore, evidence that cannot form the evidentiary basis of an oral promise to pay Cancio a bonus. Most assuredly, neither Cancio nor Mr. McGuiness identified to the trial court any other witnesses that would be in the same position to address the circumstances and events giving rise to the communication that Mr. McGuiness authored and communicated to Supermix. Mr. McGuinness is in a unique position. He authored the correspondence. There is no absolute rule that prohibits a discovery deposition of a witness just because that witness happens to be an attorney and, in this case, not even the attorney of record involved in the litigation. Prohibiting a party from taking the testimony of a material witness

inflicts the type of irreparable harm that cannot be remedied after the case is over. Accordingly, this Court should grant certiorari review, quash or reverse the Order, and remand this case to the trial court with instructions to allow the examination to proceed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served via email through the Florida Court's eFiling Portal On January 14, 2021 in accordance with Rule 2.516 of the Florida Rules of Judicial Administration upon all counsel of record.

/s/ Gonzalo R. Dorta

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Petition was prepared using Arial 14-point font and contains 4,583 words, excluding the parts of the document that are exempted by Rule 9.045(e). This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word) used to prepare the document.

/s/ Gonzalo R. Dorta