

Case No. 3D24-_____

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

ORBIS INSURANCE GROUP, LLC,

Petitioner,

v.

**ORLANDO T. LLANES, SOUTHWESTERN INSURANCE, LLC, AND
SOUTHWESTERN INSURANCE SERVICES, INC.**

Respondents.

ON CERTIORARI REVIEW FROM THE ELEVENTH JUDICIAL CIRCUIT
COURT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA
L.T. Case No. 21-013326 CA 01

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Pursuant to Florida Rule of Appellate Procedure 9.100(c) Petitioner, Orbis Insurance Group, LLC (“Orbis”) petitions this Court for a writ of certiorari to review an order rendered by the Honorable Charles Johnson on December 3, 2023. The order effectively compels the disclosure of documents, information, and communications protected by the accountant-client privilege. A copy of the order appears at pages 4 - 6 of the accompanying Appendix (“Order”).ⁱ

The Order departs from the essential requirements of law and, if this Court does not overturn the Order, it will cause Orbis irreparable harm. Therefore, this Court should grant this petition for writ of certiorari and quash the trial court’s order.

BASIS FOR INVOKING JURISDICTION

The Order is a non-final, non-appealable order. Florida Rule of Appellate Procedure 9.030(b)(2)(A) specifically authorizes this Court to issue writs of certiorari to review such orders.

The clerk docketed the Order on December 3, 2023. Therefore, the Order was rendered on that date. Fla. R. App. P. 9.020(h). This petition is

ⁱ Citations to the Appendix will appear as: App. [PDF page #].

timely because it was “filed within 30 days of rendition of the order to be reviewed.” Fla. R. App. P. 9.100(c)(1).

STATEMENT OF THE FACTS

Orbis And Its Members

Orbis is a Florida limited liability company. (App. #302). A written operating agreement governs Orbis’ operations. (“Operating Agreement”). (App. #7-37).

At all material times, Simplex Professional Services, Inc. (“Simplex”) owned 51% of Orbis’ membership interests. (App. #297). At all material times, Southwestern Insurance, LLC, as successor to Southwestern Insurance Services, Inc. (collectively “Southwestern”), owned the remaining 49% membership interests. (App. #297; 303-304). Orlando Llanes (“Llanes”) is Southwestern’s principal. (App. #296-297).

Pursuant to the Operating Agreement, Simplex had the right to appoint one manager and Southwestern also had the right to appoint one manager. (App. #10). In accordance therewith, Simplex appointed Rigoberto Diaz (“Diaz”) and Southwestern appointed Llanes. (App. #10).

Arnaldo Ledesma

Arnaldo Ledesma (“Ledesma”) is a certified public accountant. (App. #219-220; 240; 325). He, for several years, provided accounting services to Orbis. (App. #300, 325-326; 332).

Critically, Llanes testified that Ledesma **never** provided accounting services to Llanes. (App. 307). Llanes further conceded that Ledesma **never** provided accounting services to Southwestern. (App. 307-308). Rather, Llanes, himself, admitted that “[Ledesma] was Orbis’ accountant:”

sir. It is not your sworn testimony, is it, that you hired Arnaldo Ledesma? You're not telling Judge Johnson that, are you?

A. I'm sorry, that what?

Q. That Arnaldo Ledesma was your, Orlando Llanes', accountant. That's not what you're telling Judge Johnson, are you?

A. No. He was Orbis' accountant, and he --

Q. Thank you, sir.

...

Q. And the fact of the matter is, Mr. Llanes, Mr. Ledesma did not provide accounting services to Southwestern Insurance, as you've just stated under oath, Mr. Ledesma provided accounting services to Orbis Insurance Group; isn't that correct, sir?

A. Correct.

(App. #307-308).

The Lawsuits

On June 8, 2021, Simplex commenced two lawsuits against Southwestern and Llanes in the Eleventh Judicial Circuit in and for Miami-Dade County; one lawsuit was a direct action (Case No. 2021-013327-CA-01) (App. #38) and one was filed derivatively on Orbis' behalf (Case No. 2021-013326-CA-01) (the "Orbis Lawsuit") (App. #53). Simplex filed those lawsuits because it had discovered, among other things, that Southwestern and Llanes had breached the Operating Agreement and the fiduciary duties they owed to Simplex and Orbis by unlawfully using, diverting, and misappropriating customers, potential customers, confidential information, customer lists, and an insurance program that was exclusive to Orbis. (App. #38-68).

On November 19, 2021, in the Orbis Lawsuit, the trial court entered an Omnibus Order. (App. #69). Therein, the trial court, among other things, consolidated Simplex's direct and derivative lawsuits for discovery purposesⁱⁱ and substituted Orbis as plaintiff in the Orbis Lawsuit, enabling it to assert direct causes of action against Southwestern and Llanes. (App. #69).

ⁱⁱ Subsequently, on April 10, 2023, the trial court consolidated the cases for all purposes.

Orbis filed its operative complaint on September 12, 2022. (App. #73). As revealed by the operative complaint, the claims alleged against Southwestern and Llanes have remained the same. (App. #73-98).

**The Notice Setting Ledesma for Deposition
And The Related Motions For Protective Order**

On October 14, 2021, before the trial court substituted Orbis in as plaintiff, Southwestern and Llanes noticed Ledesma for deposition *duces tecum* on November 2, 2021. (App. #208). Although Southwestern and Llanes noticed the deposition for that date, it did not proceed as scheduled. (App. #219-220).

On January 24, 2023, Ledesma filed a motion for entry of protective order (“Ledesma’s Motion”). (App. #219). In *his* motion, Ledesma explained that he is a certified public accountant that provided accounting services to Simplex, a Simplex subsidiary, and Orbis:

2. Arnold Ledesma is a Certified Public Accountant and Non-Party to the action.
3. Arnold Ledesma was employed by Regis HR Group, a subsidiary of Plaintiff, SIMPLEX PROFESSIONAL SERVICES, INC. (“SIMPLEX”) and provided accounting services for Regis HR Group and Simplex Group from August 2006 through October 2015.
4. During Mr. Ledesma’s employment, SIMPLEX entered into a business agreement with Orbis Insurance Group, LLC (“Orbis”) creating a joint venture. Mr. Ledesma was then instructed by Plaintiff to oversee the accounting and financial records of Orbis.
5. Accordingly, during Mr. Ledesma’s tenure with Regis HR Group, Mr. Ledesma was the accountant for Regis HR Group, SIMPLEX, and Orbis.

(App. #219-220). Noteworthy, Ledesma does *not* state that he has any accountant-client relationship with either Southwestern or Llanes.

Ledesma also cautioned the trial court. He explained that Southwestern and Llanes sought information that is protected by the accountant-client privilege:

13. The information sought will require Mr. Ledesma to disclose the Plaintiff's business information, that may be in opposition to his Termination of Employment and Severance Agreement and in violation of the Accountant-Client Privilege.

(App. #220).

On March 16, 2022, Orbis filed *its* motion for protective order regarding the Ledesma deposition (“Orbis’ Motion”). (App. #223). In that motion, Orbis, like Ledesma, argued that Southwestern and Llanes were seeking the disclosure of communications, documents, and information protected by the accountant-client privilege. (App. #224-225).

On April 8, 2022, Orbis supplemented its motion. (App. #227). In the supplement, Orbis again advanced its right to assert the accountant-client privilege in connection with the Ledesma deposition. (App. #228-229). Also, if the trial court compelled the deposition to proceed, Orbis requested the trial court to implement a procedure to enable Orbis to effectively assert the accountant-client privilege. (App. #227-228; 229).

**The April 14, 2022, Hearing On The
Relevant Motions For Protective Order**

On April 14, 2022, the trial court convened a hearing on Ledesma’s Motion and Orbis’ Motion. (App. #237). During the hearing, Ledesma’s

counsel highlighted that Ledesma is a certified public accountant. (App. #240). Ledesma's counsel also explained that Ledesma was previously employed by a Simplex subsidiary and that he had provided accounting services to that subsidiary as well as Simplex and Orbis. (App. #240). Ledesma's counsel further indicated that Ledesma was in possession of communications with Orbis or Simplex that fall within the scope of the accountant-client privilege. (App. #242-243).

During that hearing, the trial court began revealing its misconception regarding an accountant-client relationship -- or total lack thereof -- between Ledesma, on the one hand, and Southwestern and Llanes, on the other. For example:

- a. the trial court suggested that Southwestern and Llanes were part of Orbis: “[O]ne of the essences of the arguments here was that [] Llanes and Southwest[ern]...were, for all intents and purposes...part of Orbis[?]” (App. #236);
- b. the trial court suggested that Southwestern was a subsidiary of Orbis: “these Orbis/Simplex/RG records that [] Llanes was a 49 percent owner, and that Southwestern...was kind of under the umbrella of Orbis;” (App. #243-244); and

- c. the trial court suggested that Ledesma worked for Southwestern and Llanes: “it seems, superficially...that [] Ledesma worked for Llanes and Southwestern...as well as Orbis and Simplex. (App. #244).

Grounded in its misconceptions regarding the corporate distinctions between Simplex, Orbis, and Southwestern, the trial court *sua sponte* suggested that the common interest exception to the accountant-client privilege may apply. The trial court then referred the parties to the *Transmark, U.S.A., Inc. v. State, Dept. of Insurance*, 631 So. 2d 1112, 1113 (Fla. 1st DCA 1994) opinion. (App. #244-245). While Orbis disagrees with the trial court’s conclusion that the common interest exception applies in this case, the trial court did correctly note that in *Transmark, U.S.A., Inc.* the parties were all represented *jointly*. (App. #244).

Orbis’ counsel sought to disabuse the trial court of its misconceptions. Specifically, Orbis’ counsel emphasized that Ledesma was not Southwestern’s accountant:

Mr. Ledesma was Orbis' accountant.
Period. Full stop. Mr. Ledesma did not
provide accounting services to Southwestern.
I don't think Mr. Martinez will tell you
otherwise. He was Orbis' accountant.

(App. #246).

Additionally, Orbis' counsel challenged the suggestion that Southwestern was part of Orbis. Specifically, he argued that Southwestern's counsel:

uses the phrase 'part of Orbis.' There is no legal concept in Florida jurisprudence as 'part of Orbis.' His client is a minority owner....[T]he mere fact that [Southwestern is] a [member] doesn't simply destroy the privilege that attaches between the client, [Orbis], and the accountant[, Ledesma].

(App. #255).

Orbis' counsel highlighted that Southwestern was a minority interest holder in Orbis and that Llanes simply served as a manager of Orbis. (App. #247-248). Nevertheless, Orbis' counsel explained that Llanes serving as a manager did not destroy Orbis' accountant-client privilege with Ledesma. (App. #249-248).

Orbis' counsel, relying upon *Brennan v. Ruffner*, 640 So. 2d 143 (Fla. 4th DCA 1994), argued that "the mere fact that the [accountant] renders [accounting services] to the company does not, in and of itself, create a flow of information to the [members] of that company." (App. #255). Although *Brennan* was an attorney-client privilege case, Orbis' counsel argued that its reasoning applied below. (App. #255-256). Therefore, to preserve the accountant-client privilege that Orbis shared with Ledesma, Orbis requested

that the trial court implement a procedure to enable Orbis to effectively assert the accountant-client privilege. (App. #248; 258-260).ⁱⁱⁱ

Orbis' counsel made an additional argument at the April 14 hearing. Specifically, Orbis' counsel argued that an evidentiary hearing was necessary if the trial court was going to find that the privilege had been waived. (App. #248-249).

The "Order" Following The April 14, 2022, Hearing

The trial court did not enter a formal order following the April 14, 2022, hearing. Instead, on May 9, 2022, the trial court sent counsel the following email:

Folks, reading Brennan, it seems clear that the party seeking to abrogate the privilege has the burden of proof here. I cannot base such a decision solely on representations concerning the facts, but rather it requires a full evidentiary hearing. It seems Mr. Llanes may need to testify, or others who may or may not support the defense contentions concerning ownership, the operating agreement, the employment of Ledesma by Orbis, Simplex, or Southwest, etc. Please coordinate a convenient time for such a hearing. If challenges arise, contact my bailiff Rick Diaz with all parties on the line to hash out a time that works for you all. Thank you.

(App. #273).

That email implies that the trial court found that Orbis, on the one hand, and Ledesma, on the other, shared an accountant-client relationship. Otherwise, there would have been no need for an evidentiary hearing for Southwestern and Llanes to shoulder their burden of demonstrating that the privilege had been "abrogated," i.e., waived.

ⁱⁱⁱ Tellingly, even Southwestern and Llanes' counsel acknowledged that such a procedure was, indeed, appropriate. (App. #263).

The November 28, 2023, Evidentiary Hearing

On November 28, 2023, the parties appeared before the trial court for an evidentiary hearing regarding the accountant-client privilege and waiver issues. (App. #280-281).

During this hearing, the trial court articulated its belief that, to shoulder their burden, Southwestern and Llanes would have to prove that Ledesma **jointly** provided accounting services to Orbis and Southwestern:

if [Ledesma's] talking about accounting work and the nature of that work, then the privilege would, on its face, apply...but...I'm guessing that [Southwestern's] burden here is going to go into some of the work that the accountant did **jointly**. That's what I presume folks are going to try to present here."

(App. #285-286) (emphasis added).

As revealed by the transcript, the First District Court of Appeal's opinion in *Transmark, U.S.A., Inc.* guided the trial court's thinking:

I mean, you folks have both looked up the Transmark case. Here's a quote, "When a communication is relevant to a matter of common interest and made to a lawyer or

accountant retained or consulted in common," so that's -- and then one of the other comments was, "It applies regardless of whether or not both clients were physically present at the time the communication was made, provided the professional relationship between the clients and accountant existed at the time of the communication."

In this particular case the lawyers represented GSL and Transmark jointly in matters pertinent to the transactions at issue. And in that case there was no expectation of confidentiality among the various companies in the Transmark family. This is the only case, I think, on point.

(App. #290-291).

During the evidentiary hearing, Southwestern and Llanes only called one witness to testify, Llanes. Llanes testified that:

- a. Orbis is a limited liability company. (App. #302);
- b. Orbis and Southwestern are two separate companies. (App. #303);
- c. Simplex owns 51% of Orbis. (App. #297);
- d. Southwestern owns 49% of Orbis. (App. #297; 304);
- e. Diaz and Llanes managed Orbis' operations. (App. #308-309; 310);

- f. Ledesma served as the controller for Simplex and Orbis. (App. #300);
- g. Ledesma **has never provided accounting services** to Llanes. (App. #307); and
- h. Ledesma **has never provided accounting services** to Southwestern. (App. #307-308).
- i. **Ledesma was Orbis' accountant.** (App. #307).

With respect to the concept of "common interest," Llanes' total testimony was simply that the parties had a common interest in growing Orbis' business, (not a common interest in securing accounting advice and services):

Q. Did you and Simplex have -- or Southwestern and Simplex have a common interest in growing the business of Orbis?

A. Yes, we did.

Q. Did you and Orbis have a common interest in growing the business of Orbis?

A. Yes, we did.

(App. #300).

In addition to the foregoing testimony, Southwestern and Llanes stipulated that the Operating Agreement does not mention the accountant-client privilege. (App. #306). They further stipulated that the Operating Agreement does not contain any waiver of such privilege. (App. #306).

After Southwestern and Llanes rested, Orbis moved the trial court for, in effect, a directed verdict. (App. #313-321). Orbis argued that *Transmark, U.S.A., Inc.* was inapposite because no evidence revealed *any joint* representation of Orbis and Southwestern/Llanes with respect to *any* matter whatsoever. (App. #314; 317-318).

Orbis also revisited the argument it had made at the April 14, 2022, hearing. (App. #318). Specifically, Orbis reminded the trial court of the *Brennan* opinion and directed the trial court to another case that confirmed the *Brennan* analysis, *Tail of the Pup, Inc. v. Webb*, 528 So 2d 506 (Fla. 2d DCA 1988). (App. #318-320)

Orbis highlighted that, in *Tail of the Pup*, a minority shareholder -- like Southwestern -- sought to secure information that was protected by the attorney-client privilege. (App. #318-319). Orbis also pointed out that such minority shareholder -- like Southwestern -- argued that he was entitled to such information because he was privy to it prior to being removed from the company. (App. #319).

Orbis pointed out that the *Tail of the Pup* court disagreed with the minority shareholder. (App. #319). The appellate court in that case ruled that the shareholder could neither compel the revelation of privileged

communications nor waive the privilege. To the contrary, authority to waive the privilege rested with the company's board of directors. (App. #319-320).

The trial court denied Orbis' "motion for directed verdict." (App. #321).

Orbis then called Diaz to testify. Diaz testified that:

- a. He is a manager of Orbis. (App. #324);
- b. Ledesma is a certified public accountant. (App. #325);
- c. Orbis hired Ledesma. (App. #331);
- d. Ledesma provided Orbis with accounting services. (App. #325-326; 332);
- e. Simplex also hired Ledesma. (App. #331-332);
- f. Ledesma provided Simplex with accounting services. (App. #325-326; 332);
- g. Southwestern never hired Ledesma. (App. #332);
- h. Ledesma never provided accounting services to Southwestern. (App. #332);
- i. Ledesma never provided accounting services to Llanes. (App. #332);
- j. Ledesma is a former employee of Simplex and Orbis. (App. #325);

- k. Ledesma served as controller for Simplex and Orbis. (App. #325-326);
- l. Ledesma provided accounting services to Orbis and Simplex. (App. #325-326);
- m. Orbis communicated with, and sought counsel from, Ledesma concerning financial matters. (App. #325-326);
- n. Orbis understood that its communications with Ledesma were privileged. (App. #326);
- o. Neither Orbis nor Simplex ever waived their respective accountant-client privileges with Ledesma. (App. #330-331);

The November 28, 2023, Ruling And The Order

After admitting evidence and hearing argument of counsel, the trial court announced its ruling from the bench:

THE COURT: Folks, I don't see this -- I'm not entirely sure that, whether we call it a waiver or no privilege at all, is that the defining analysis. **But Mr. Ledesma represented them jointly. He was an accountant to both of them.** The communications were relevant to a matter of common interests, and there was no expectation of confidentiality here. So I don't think there is a privilege under these circumstances.

(App. #347) (emphasis added).

The trial court did not make any further findings of fact or reach any other conclusions of law. After articulating its ruling, the trial court directed Southwestern and Llanes' counsel to prepare an order. (App. #348). Their counsel did so; the trial court entered such order, and that is the Order that is challenged by this petition for writ of certiorari. (App. #4-6).

NATURE OF RELIEF SOUGHT

Orbis asks that this Court grant this petition; quash the trial court's Order; find that Orbis, on the one hand, and Ledesma, on the other, shared an accountant-client relationship; and direct the trial court to implement a procedure to enable Orbis to effectively assert and preserve its accountant-client privilege with respect to the communications, documents, and information that Southwestern and Llanes seek from Ledesma.

ARGUMENT

Standard of Review

The Order, in effect, compels the disclosure of information, documents, and communications protected by the accountant-client privilege. This Court may review orders compelling discovery by certiorari. *Transmark, U.S.A., Inc.*, 631 So. 2d at 1116 (Fla. 1st DCA 1994). The party seeking certiorari review of a pretrial, nonappealable order “must demonstrate...that the trial

judge ‘departed from the essential requirements of law’ [and] that the harm resulting from the erroneous order is material and cannot be remedied on appeal from the final judgment or order.” *Id.*

**The Trial Court Departed From The
Essential Requirements Of Law**

A. The Accountant-Client Privilege

Florida Statutes, Section 90.5055, codifies the accountant-client privilege. It provides that:

A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications with an accountant when such other person learned of the communications because they were made in the rendition of accounting services to the client. This privilege includes other confidential information obtained by the accountant from the client for the purpose of rendering accounting advice.

§ 90.5055(2), Fla. Stat. (2023) That section further explains that the client and the accountant, among others, may claim the privilege. § 90.5055(2), Fla. Stat. (2023)

In the case below, it is undisputed that Ledesma provided accounting services to Orbis. It is also indisputable that Orbis and its former accountant, Ledesma, have claimed that Southwestern and Llanes seek communications, documents, and information that fall within the scope the accountant-client privilege. Notwithstanding the foregoing, the trial court

ruled that, pursuant to the common interest exception to the accountant-client privilege, none of those communications, documents, or information is privileged.

B. The Common Interest Exception To The Accountant-Client Privilege

The accountant-client privilege is subject to three statutory exceptions as codified by Florida Statutes, Section 90.5055(4). *See also, Cone v. Culverhouse*, 687 So. 2d 888, 891 (Fla. 2d DCA 1997). The only exception at issue here is the “common interest” exception:

(4) There is no accountant-client privilege under this section when:

...

(c) A communication is relevant to a matter of common interest ***between two or more clients***, if the communication was made by any of them to an accountant ***retained or consulted in common*** when offered in a civil action between the ***clients***.

§ 90.5055(4)(c), Fla. Stat. (2023) (emphasis added).

This statutory exception to the accountant-client privilege clearly and unambiguously requires that the accountant ***jointly*** represent “two or more ***clients***” in “a matter of common interest.” It further requires that the clients ***jointly*** “***retain[] or consult[]*** [the accountant] in common.” Both requirements must be satisfied before a court may conclude that the common interest exception applies. *See Larson v. Correct Craft, Inc.*, 2007 WL 1231821, at 3

(M.D. Fla. Apr. 26, 2007) (holding that, even if parties consult a professional on a matter of common interest, the parties must **jointly** retain the professional for the common interest exception to apply).

The issue of **joint** representation was central to the appellate court's analysis in *Cone*, 687 So. 2d at 892-93 (Fla. 2d DCA 1997). There accountants and attorneys provided various services to Mr. and Mrs. Culverhouse over the course of many years and in connection with many different matters. *Id.* at 889-890. In some matters, those professionals provided services to Mr. and Mrs. Culverhouse, **jointly**. *Id.* at 890. In other matters, those professionals provided services to Mr. Culverhouse, separately. *Id.*

After Mr. Culverhouse died, Mrs. Culverhouse brought lawsuits against a trustee and her attorneys. *Id.* at 889. In those lawsuits, Mrs. Culverhouse sought the production of documents and communications between Mr. Culverhouse and his accountants and attorneys regarding various matters, including matters where the professionals **did not** represent Mrs. Culverhouse. *Id.* at 891.

The *Cone* court concluded that Mrs. Culverhouse was “entitled to discover documents containing privileged communications in any matter in which the[] professionals represented her[,]” including matters where those

professionals *jointly* represented her and others. *Id.* at 889. However, if Mrs. Culverhouse sought documents maintained by the professionals for separate matters involving other clients, the appellate court directed the trial court to conduct an evidentiary hearing “to determine whether they actually relate to a matter of *joint* representation.” *Id.* (“emphasis added). In other words, the common interest exception *only* entitled Mrs. Culverhouse to documents and communications relating to matters where the professionals **represented her**, either individually or *jointly*.

C. Southwestern And Llanes Were Never Ledesma’s Clients And There Was No *Joint* Representation

In the present case, neither of the two requirements [*joint* representation of “two or more *clients*” and *joint* retention or consultation with the accountant in common] was satisfied. Llanes testified -- without qualification or equivocation -- that **neither he nor Southwestern ever received accounting services from Ledesma**. Further, the unrefuted evidence is that **neither Southwestern nor Llanes ever hired Ledesma**.

That means that a) neither Southwestern nor Llanes was Ledesma’s *clients* and b) neither of them, for themselves, ever retained Ledesma for, or consulted with him on, any matter whatsoever (let alone a matter of common interest with Orbis). Therefore, the common interest exception may not be applied here.

Confoundingly, despite Llanes' sworn admissions that neither he nor Southwestern ever received accounting services from Ledesma, the trial court concluded that Ledesma had **jointly** represented "them" and that he served as an accountant to both. Because there is simply no evidence that supports such conclusions, the trial court departed from the essential requirements of law.

D. *Transmark*

As noted above, the lower court focused on the First District's opinion in *Transmark, U.S.A., Inc.*, 631 So. 2d at 1114 (Fla. 1st DCA 1994). The trial court, in *that* case, applied the common interest exception and compelled the production of documents and communications protected by the accountant-client privilege. *Id.*

Analysis of the *Transmark, U.S.A., Inc.* opinion is instructive. In *Transmark, U.S.A., Inc.*, Transmark and its subsidiaries ("Transmark Family") hired accountants (and attorneys) to represent the Transmark Family in corporate restructurings. *Id.* Because there was substantial competent evidence demonstrating that the Transmark Family was "**jointly** [represented] in matters pertinent to...the corporate restructurings," the appellate court affirmed the trial court's application of the common interest exception. *Id.* at 117.

Noteworthy, in the present case, there was no *joint* representation. In fact, there was no representation of Southwestern or Llanes, at all. As conceded by Llanes, “[Ledesma] was Orbis’ accountant.” Moreover, Southwestern is not a subsidiary of Orbis. Here too, Llanes admitted that Southwestern is a separate company. Therefore, even trying to reconcile the facts below with *Transmark, U.S.A., Inc.*, the common interest exception does not apply in this case.

E. There Is No Common Interest

As revealed above, the record is devoid of any reference to a common interest with respect the accountant-client privilege. Indeed, the words “common interest” were only articulated twice during the evidentiary hearing when Southwestern and Llanes’ counsel asked:

Q. Did you and Simplex have -- or Southwestern and Simplex have a common interest in growing the business of Orbis?

A. Yes, we did.

Q. Did you and Orbis have a common interest in growing the business of Orbis?

A. Yes, we did.

(App. #300).

However, the common interest exception does not include such commercial interests. *Cf. United States v. Patel*, 509 F. Supp. 3d 1334, 1340-41 (S.D. Fla. 2020) (analyzing the joint defense/common interest privilege

and holding that the common interest privilege requires “a common legal interest, rather than solely a common commercial or business interest”).

F. The Trial Court Erroneously Expands The Scope Of The Common Interest Exception

The trial court surmised that there could be no expectation of confidentiality with respect to the communications and documents sought by Southwestern and Llanes. However, as explained above, Florida Statutes, Section 90.5055(4) codifies the common interest exception to the privilege. The “expectation of confidentiality” concept appears nowhere in the statute. Accordingly, the trial court departed from the essential requirements of law by expanding the common interest exception beyond the statute’s express terms.

Orbis Will Suffer Material Harm That Cannot Be Remedied On Appeal

It is appropriate for this court to review the Order because a direct appeal cannot “remedy...the destruction of the privilege.” *Coates v. Akerman, Senterfitt & Eidson, P.A.*, 940 So. 2d 504, 506 (Fla. 2d DCA 2006). Indeed, “[w]hen an order directs disclosure of information that is allegedly privileged, “[t]he next question is whether the order departs from the essential requirements of law.” *Id.* To be idiomatic, once Orbis’ accountant-client privileged communications and documents are disclosed, it will be

impossible to put the toothpaste back in the tube, thereby causing Orbis to suffer material harm that cannot be remedied on appeal.

CONCLUSION

Based upon the foregoing, Orbis asks that this Court grant this petition; quash the trial court's Order; find that Orbis, on the one hand, and Ledesma, on the other, shared an accountant-client relationship; and direct the trial court to implement a procedure to enable Orbis to effectively assert and preserve its accountant-client privilege with respect to the communications, documents, and information that Southwestern and Llanes seek from Ledesma.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that, on January 2, 2024, a true and correct copy of the foregoing document was served by E-mail upon the following: Juan C. Martinez, Esq. (juan.martinez@gray-robinson.com; ecianella@gray-robinson.com) and Veronica Meza (veronica.meza@gray-robinson.com; rosana.dominguez@gray-robinson.com; amador.ruiz-baliu@gray-robinson.com); of Gray Robinson, P.A., 333 S.E. 2nd Avenue, Suite 3200, Miami, Florida 33131 and Daniel Zumpano, Esq. and Antonio Castro, Esq. (daniel.zumpano@zumpanocastro.com; antonio.castro@zumpanocastro.com; nikki.marrero@zumpanocastro.com) of Zumpano Castro, 500 S. Dixie Highway, Suite 302, Coral Gables, FL 33146.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that that the foregoing petition complies with the applicable font and word count limitations set forth in the Florida Rules of Civil Procedure.

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