

IN THE SUPREME COURT OF FLORIDA

Case No. SC14-1360

L.T. CASE NO.: 2D13-3872

REBECCA HANOS,

Petitioner,

v.

CITIZENS PROPERTY
INSURANCE CORPORATION,
a Florida government entity,

Respondent.

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

In this sinkhole dispute, the trial court entered an order finding that Citizens' participation in litigation waived its right to neutral evaluation and the statutorily-mandated stay. Citizens petitioned the Second District Court of Appeal for a writ of certiorari to quash the order. Before the petition in *Hanos* was granted, the Second District issued its opinions in *Citizens Prop. Ins. Corp. v. Trapeo*, 136 So. 3d 670 (Fla. 2d DCA 2014), *reh'g denied* (Apr. 1, 2014) and *Citizens Prop. Ins. Corp. v. Finley*, 39 Fla. L. Weekly D248 (Fla. 2d DCA Jan. 31, 2014), *reh'g denied* (May 16, 2014). These decisions are final and not before this Court.

In *Trapeo*, the Second District Court of Appeal held that neutral evaluation is mandatory when requested, a party cannot waive the "optional but statutorily guaranteed process", and entry of the automatic stay is a "ministerial act with no room for [trial court] discretion...." *Trapeo*, 136 So. 3d at 677-79. Accordingly, the Second District quashed the order to the extent it prohibited neutral evaluation and directed the trial court to stay the proceedings pursuant to the neutral evaluation statute. *Id.* at 680. The petition in *Finley* was granted based on *Trapeo*. See *Finley*, 39 Fla. L. Weekly D248.

Likewise, the Second District granted Citizens' petition in this case based on *Trapeo*. The decision, dated March 19, 2014, states in full:

Citizens Property Insurance Corporation seeks certiorari review of the trial court's order denying its request for an automatic stay pursuant to

section 627.7074(10), Florida Statutes, in the breach of contract action brought against Citizens by Rebecca Hanos.

That underlying action stems from a dispute between the parties over repairs made to Hanos' home after sinkhole damage was discovered. Prior to trial, Citizens invoked the neutral evaluation process outlined in section 627.7074 and filed a notice of automatic stay pursuant to subsection (10) of the statute. The trial court then entered an order denying Citizens' "request" for a stay.

To the extent that order prohibits Citizens from invoking the neutral evaluation process, we grant the petition and quash the order. *See Citizens Prop. Ins. Corp. v. Trapeo*, — So.3d — (Fla. 2d DCA 2014); *Citizens Prop. Ins. Corp. v. Finley*, — So.3d — (Fla. 2d DCA 2014). Furthermore, we treat the remaining portion of Citizens' petition before this court—the portion that challenges the trial court's refusal to enter the automatic stay—as a petition for writ of mandamus and grant the petition. The trial court is directed to stay the underlying proceedings pending the completion of the neutral evaluation as required by section 627.7074(10).

Certiorari petition granted; order quashed; mandamus petition granted with directions.

Citizens Prop. Ins. Corp. v. Hanos, 39 Fla. L. Weekly D577 (Fla. 2d DCA March 19, 2014).

After her motions for rehearing, certification and/or rehearing en banc were denied, Hanos filed a notice to invoke the discretionary jurisdiction of this Court. The basis for Hanos' request for discretionary jurisdiction review claims that the Second District's decision misapplied Supreme Court decisional law.

SUMMARY OF THE ARGUMENT

Hanos seeks to invoke the discretionary review jurisdiction of this Court pursuant to Article V, Section 3(b)(3), of the Florida Constitution solely on the grounds that the Second District's *Hanos* opinion misapplies the decisional law of this Court. However, Hanos fails to identify a single decision from this Court that was relied upon by the Second District that involved a situation materially at variance with the one under review. In fact, no decision from this Court was cited in the *Hanos* opinion.

Hanos attempts to create misapplication conflict by asserting that the Second District's interpretation of the neutral evaluation statute in the earlier Second District *Trapeo* decision violated Article II, Section 3 of the Florida Constitution. However, conflict must be direct, not derivative, and must be with decisional law, not the constitution. Moreover, the constitutional doctrines raised by Hanos in her jurisdictional brief were not decided in this case or *Trapeo*. Accordingly, the Second District had no reason to apply or misapply them. Because of the complete lack of misapplication conflict, this Court must decline to exercise its discretionary jurisdiction to review the Second District's *Hanos* decision.

JURISDICTIONAL STATEMENT

If a decision of a district court of appeal “expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law,” this Court has discretionary jurisdiction pursuant to Article V, Section 3(b)(3), of the Florida Constitution to review the decisions. Conflict jurisdiction also exists to review district court decisions that misapply Supreme Court decisional law. *See, e.g., Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 86 (Fla. 2005) (accepting jurisdiction based on misapplication of Supreme Court decisional law). “Misapplication occurs when a court relies on a decision that involves a situation materially at variance with the one under review.” *Advanced Chiropractic & Rehab. Ctr., Corp. v. United Auto. Ins. Co.*, 140 So.3d 529, 534 (Fla. 2014) (citing *Gibson v. Avis Rent-A-Car Sys., Inc.*, 386 So.2d 520, 521 (Fla.1980)) (e.s.). This Court must decline to exercise its discretionary jurisdiction over the *Hanos* decision because the Second District did not misapply this Court’s decisional law.

ARGUMENT

I. NO DISCRETIONARY REVIEW JURISDICTION EXISTS BECAUSE THE *HANOS* OPINION DOES NOT MISAPPLY THE DECISIONAL LAW OF THIS COURT.

In order for a misapplication conflict to exist, the decision under review must misapply the decisional law of this Court, i.e., rely on a Supreme Court decision that involves a situation materially at variance with the one under review.

Misapplication conflict is completely lacking because: 1) Hanos reaches back to the *Trapeo* decision, not the *Hanos* one under review for the misapplication argument; 2) no Supreme Court precedent was relied on by the Second District in the *Hanos* decision or in the *Trapeo* decision; and 3) the alleged misapplication conflict is with the constitution, not Supreme Court decisional law.

a. Alleged derivative conflict between *Trapeo* and Supreme Court decisional law is insufficient to allow review of the *Hanos* decision.

Hanos alleges that conflict jurisdiction exists because the Second District's decision in *Trapeo* (cited to in *Hanos*) misapplied decisional law of this Court and rendered the neutral evaluation statute unconstitutional. [Br. 3-4]. However, the jurisdictional issue to be decided is whether the Second District misapplied decisional law in the subject *Hanos* decision, **not** in *Trapeo*. As this Court long ago recognized in *Dodi Pub. Co. v. Editorial Am., S. A.*, 385 So. 2d 1369, 1369 (Fla. 1980),

The issue to be decided from a petition for conflict review is whether there is express and direct conflict in the decision of the district court before us for review, not whether there is conflict in a prior written opinion which is now cited for authority.

(e.s.).

For jurisdiction to exist, the conflict with (or misapplication of) Supreme Court decisional law must be direct, not "derivative." *Compare Young v. State*, 641 So. 2d 401, 402 (Fla. 1994)(noting that case did not involve impermissible

“derivative conflict” because the district court also noted inter-district conflict). Because no direct misapplication is asserted by Hanos or contained within the four corners of the *Hanos* opinion to be reviewed, no discretionary jurisdiction exists for this Court to consider.

b. The Second District did not rely on any decisional law of this Court that involved a situation materially at variance with the one under review.

Even assuming that conflict could derivatively exist in this case through *Trapeo*, there was no misapplication of Supreme Court precedent. This Court recently made clear that “[m]isapplication occurs when a court relies on a decision that involves a situation materially at variance with the one under review.” *Advanced Chiropractic & Rehab. Ctr., Corp.*, 140 So.3d at 534 (e.s.). In *Advanced*, this Court accepted jurisdiction because the Fourth District Court of Appeal’s decision misapplied two Supreme Court cases “that address requests for attorney’s fees at the trial level—to a situation materially at variance with the one under review—a request for appellate-level original writ attorney’s fees.” *Id.*

In contrast, Hanos has not identified a single Supreme Court case that was relied upon or misapplied by the Second District in *Hanos* or *Trapeo*. In fact, no Supreme Court cases are cited in the *Hanos* decision and not one of the Supreme Court cases cited by Hanos in her jurisdictional brief appear in *Trapeo*. Accordingly, there was no misapplication of this Court’s decisional law and no

discretionary jurisdiction exists.

c. Conflict jurisdiction exists only where there is misapplication of decisional law, not the constitution.

The core of Hanos's argument is that the *Trapeo* decision violates the constitution, not decisional law of this Court. The Supreme Court cases cited by Hanos merely explain the doctrines of separation of powers and delegation of authority which are codified and grounded in the Constitution. *See, e.g., Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004) (“the constitutional doctrine [of separation of powers] has been expressly codified in article II, section 3 of the Florida Constitution”); *State v. Raymond*, 906 So. 2d 1045, 1048 (Fla. 2005) (“It is a well-established principle that a statute which purports to create or modify a procedural rule of court is constitutionally infirm. ... This principle is grounded in article V, section 2(a) of the Florida Constitution ...”); *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1978) (delegation of powers doctrine “represents a recognition of the express limitation contained in the second sentence of Article II, Section 3 of our Constitution.”).

This Court has jurisdiction to review several constitutional issues, including discretionary jurisdiction to review a district court decision that “expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution,” Art. V, § 3(b)(3), Fla. Const., and mandatory jurisdiction to review a district court decision “declaring invalid a state statute or a provision of the state

constitution,” Art. V, § 3(b)(1), Fla. Const. None of these constitutional-related categories exist or are even raised by *Hanos*. Rather, the conflict jurisdiction raised by *Hanos* is limited to conflicts between decisional law. *See, e.g., Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 93 (Fla. 1995) (“This Court does not have jurisdiction based on alleged conflict with a rule of civil procedure.”). Because there was no misapplication of decisional law, no discretionary jurisdiction exists.

II. THE CONSTITUTIONAL ISSUES RAISED BY HANOS IN HER JURISDICTIONAL BRIEF ARE HYPOTHETICAL AND NOT ADDRESSED IN THE *HANOS* OPINION.

Further, there was no misapplication because the constitutional issues raised by Hanos in her jurisdictional brief were not decided in *Hanos* or even *Trapeo*. As set forth in the *Trapeo* opinion, the basis of the trial court’s decision and the parties’ arguments was waiver of neutral evaluation through litigation conduct, not constitutionality of the statute. *See Trapeo*, 136 So.3d at 673-74, 677-78. The Second District never applied or misapplied the separation of powers or delegation of authority doctrines because it was not central to the waiver issue. Likewise, there is nothing within the four corners of the *Hanos* decision to suggest that the constitutionality of the statute was at issue below - a prerequisite for appellate review. *See Trushin v. State*, 425 So. 2d 1126, 1129-30 (Fla. 1982) (“The constitutional application of a statute to a particular set of facts ... must be raised at the trial level.”).

Moreover, Hanos does not assert that the *Trapeo* decision renders the statute's stay provision unconstitutional on its face. Instead, Hanos asserts that the stay can be invoked in the "early stages of the proceedings" without violating the separation of powers doctrine but not "on the eve of trial, during trial" or "while the jury is deliberating." [Br. 6]. There is nothing within the *Hanos* decision to suggest that the stay was invoked during one of these time periods (it was not) so as to render the statute unconstitutional as applied pursuant to Hanos's argument. *See Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986) ("The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. ... [W]e are not permitted to base our conflict jurisdiction on a review of the record ..."). Essentially, Hanos seeks an advisory opinion from this Court regarding the constitutionality of the neutral evaluation statute as applied to a hypothetical set of facts.

Finally, because the Second District in *Trapeo* found that neutral evaluation cannot be waived, the statement regarding the Department of Financial Services' authority to determine waiver is dictum, *Trapeo*, 136 So. 3d at 678, and the alleged lack of guidelines is immaterial because the waiver issue was submitted to the trial court.

Accordingly, this Court has no basis or reason to address the hypothetical constitutional issues raised by Hanos in her jurisdictional brief because they have

no application to this case. To address it in the context of facts that do not exist would ask this Court to provide an advisory opinion on a potential future hypothetical case.

CONCLUSION

No discretionary jurisdiction exists for this Court to review the *Hanos* decision of the Second District Court of Appeal because the opinion does not misapply the decisional law of this Court. The alleged derivative conflict between the *Trapeo* decision and the constitutional doctrines of separation of powers and delegation of authority is insufficient to create misapplication conflict jurisdiction in this case.

CERTIFICATE OF COMPLIANCE

Counsel for Respondent certifies that the above Jurisdictional Brief has been prepared in Word, Times New Roman 14 font and complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 5th day of August, 2014 to: Robert L. Nipps, Esq. and Kenneth C. Thomas, Jr., Esq., MARSHALL THOMAS BURNETT P.L., 17231 Camelot Court, Land O' Lakes, FL 34638-7203 (Email: jburnett@mtblaw.com; dfontanella@mtblaw.com; ckeene@mtblaw.com); George A. Vaka, Esq., Nancy A. Lauten, Esq., VAKA LAW GROUP, 777 S. Harbour Island Blvd., Suite 300, Tampa, FL 33602 (Email: gvaka@vakalaw.com; nlauten@vakalaw.com; and pbeaumia@vakalaw.com) and via U.S. Mail to: The Honorable Stanley R. Mills, Pasco County Circuit Civil Division, 7530 Little Road, Room 314, New Port Richey, FL 34654.

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