

IN THE SUPREME COURT OF FLORIDA

UNIFIRST CORPORATION,

Petitioner,

v.

Case No. SC22-181

JOEY'S NEW YORK PIZZA LLC,

L.T. Case No. 2D21-891

Respondent.

_____ /

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The trial court entered an order vacating an arbitration award in Petitioner's favor because Petitioner's Notice of Intention to Arbitrate was defective and not served in conformity with Florida law and ordered the parties to "restitute" arbitration. Petitioner appealed the order; the Second District dismissed the appeal for lack of jurisdiction; UniFirst now asks this Court to review the Second District's decision.

There is not, as Petitioner suggests, considerable disarray on this issue. Although there is a conflict between the district courts, this Court now has the occasion to affirm the Second District's decision, which accords with the Fourth and Fifth Districts. These courts correctly identified, analyzed, and interpreted the law regarding appellate review of an order vacating an arbitration award and allowing for reinstatement of the arbitration.

The issue before the Court is purely a legal question. There are four material facts, none of which are disputed: (1) there is an agreement to arbitrate; (2) a dispute arose, and an arbitration occurred (albeit with improper notice and only one party present); (3) the trial court vacated that arbitration award; and (4) the trial court ordered a reinstatement of arbitration. (R. at 43 – 44, 77 – 78, 122 – 123). Notwithstanding, a brief recital of the background and record timeline are set out below and are important in framing the legal issues.

Factual Background

The dispute arises out of the following arbitration provision in the December 21, 2017, contract between Petitioner UniFirst Corporation (“Petitioner” or “UniFirst”) and Respondent Joey’s Pizza. (R. at 122 – 123):

All disputes of whatever kind between the Customer and UniFirst based upon past, present or future acts, whether known or unknown, and arising out of or relating to the negotiation, formation or performance of this Agreement shall be resolved exclusively by final and binding arbitration. The arbitration shall be conducted in the capital city of the state where the Customer has its principal place of business (or some other location mutually agreed to by Customer and UniFirst) [...] pursuant to the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association and shall be governed by the Federal Arbitration Act. [...] This paragraph is governed by New York law (exclusive choice of law).

Id.

On December 3, 2019, a process server served “a true copy of the Arbitration Demand Letter dated November 20, 2019, and Arbitration Association – Commercial Arbitration Rules – Demand for Arbitration.” (R. at 45). Service was supposedly made upon Joey’s New York Pizza LLC, Michael Trgo, Registered Agent, 9830 Little Road, New Port Richey, FL, by service upon Diane Oscar, a server for Joey’s New York Pizza LLC at the aforesaid address. *Id.* Additional notices were allegedly mailed to “Respondent,” but such letters showed that mailing was made to Michael Trgo at 9830 Little Road, New Port Richey, FL 34655. (R. at 62 – 65).

The Little Road address is not the address listed on the contract for notice to the “Customer.” (R. at 50). Notably, after morphing the Customer, “Joey’s New York Pizza & Italian Restaurant,” into Respondents, “Joey’s New York Pizza LLC, d/b/a, Joey’s New York Pizza II LLC, d/b/a, Joey’s New York Pizza III LLC,” Petitioner failed to serve anyone with the Arbitration Demand other than a waitress at Joey’s New York Pizza LLC. (R. at 45).

On March 16, 2020, at the height of the COVID-19 pandemic and just three days after the President of the United States declared a national emergency, the Petitioner appeared for an evidentiary hearing in front of arbitrator Albert J. Bowden. (R. at 77 – 78). Due to the lack of proper service, the arbitration hearing took place without the Respondent’s presence, and Petitioner was able to secure an *ex-parte* arbitration award in its favor. *Id.* Only after the Arbitration Award was entered did Petitioner (actually) serve Michael Trgo at the address listed in the contract. *Id.*

On January 15, 2021, the trial court heard Petitioner’s Motion to Confirm Arbitration Award and Joey’s Pizza’s Countermotion to Vacate the Arbitration Award. (R. at 43 – 44). On February 23, 2021, the trial court entered an order vacating the Arbitrator’s Award and allowing Plaintiff to “re-institute arbitration by the service of a Notice of Intention to Arbitrate that conforms to the requirements of *N.Y. C.P.L.R. 7503(c)*.” (R. at 43 – 44). Specifically held in the order was “the [trial court’s] find[ing] that the contract requires that disputes be arbitrated and that the

Federal Arbitration Act and the State of New York law govern the agreement to arbitrate.” *Id.* In addition, the trial court found that the Notice of Intent to Arbitrate, served upon a waitress at one Respondent entity, was not served in conformity with § 48.062, Fla. Stat. *Id.*

Clearly opposed to a fair arbitration hearing on the merits, Petitioner filed its Notice of Appeal of the February 23, 2021 order. (R. at 6). On August 25, 2021, the Second District ordered Petitioner to show cause why the appeal should not be dismissed as from a non-appealable order. (R. at 286).

Petitioner responded to the show cause order arguing that pursuant to *Heart Surgery Center v. Bixler*, 128 So. 3d 169, 173 (Fla. 1st DCA 2013) and *Felger v. Mock*, 65 So. 3d 625, 626 (Fla. 1st DCA 2011) the appeal should not be dismissed. (R. at 287 – 291). On December 22, 2021, the Second District dismissed Petitioner’s appeal and certified conflict with the First District’s decisions in *Felger*, *Heart Surgery*, and *Amalgamated Transit Union, Local 1579 v. City of Gainesville*, 264 So. 3d 375, 377–79 (Fla. 1st DCA 2019). (R. at 292 – 294). The Second District held “[t]his court lacks jurisdiction because the order on appeal is a nonfinal, nonappealable order” and cited *Loewenstein, Inc. v. Draheim*, 898 So. 2d 1129, 1130 (Fla. 4th DCA 2005) and *Zabawa v. Penna*, 868 So. 2d 1292, 1292 (Fla. 5th DCA 2004) in support. *Id.* The Second District further declined to treat the appeal as a petition for writ of certiorari because “[Petitioner] cannot demonstrate irreparable

harm that cannot be remedied on direct appeal.” *Id.* The Second District denied rehearing on February 4, 2022. (R. at 304).

This Court has invoked its discretionary jurisdiction to review the Second District’s opinion. (R. at 318 – 319; 322)

SUMMARY OF ARGUMENT

Argument I. The Second District was correct in dismissing UniFirst's appeal of the trial court's order vacating the arbitration award and allowing the parties re-institute arbitration. The order is non-final and non-appealable, and it is not reviewable under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv) because the order did not determine either party's entitlement to arbitration. All parties agree they are entitled to arbitrate. The trial court order merely vacated one arbitration award for jurisdictional deficiencies and obvious due process concerns while allowing the parties to re-institute arbitration. Plaintiff's mischaracterization of the order cannot overcome the sound legal reasoning articulated by the Second, Fourth, and Fifth Districts in holding that an order vacating an arbitration award and allowing re-institution of arbitration proceedings is a non-final, non-appealable order that does not fall within the narrow exception of Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv).

Argument II. By declining to treat the appeal as a petition for writ of certiorari, the Second District rightly determined that Petitioner could not demonstrate irreparable harm that could not be remedied on direct appeal. Certiorari jurisdiction is exercised only in exceptional cases and under extremely limited circumstances. This is not one of those exceptional cases.

The trial court's order does not, as the Petitioner states, "[frustrate] the finality that this Court has repeatedly attached to arbitration awards." Instead, the order promotes fair and just finality in arbitration proceedings. The trial court vacates an arbitration award for a good reason. The mere expense and inconvenience of an additional arbitration proceeding does not rise to the level of irreparable harm. By ordering the re-institution of arbitration proceedings, the trial court showed deference and respect to the contracting parties' intent to arbitrate while promoting a fair and just arbitration process.

ARGUMENT

The Second District's analysis of the trial court's order was proper. The order was a non-final, non-appealable order, nor is the order subject to certiorari review. Petitioner's argument mischaracterizes the trial court's order and also misplaces its reliance on Rule 9.130.

The parties are entitled to arbitrate. They have always been entitled to arbitrate, and no court has ever held to the contrary.

The Florida Rules of Appellate Procedure foreclose interlocutory appeals under the present circumstances. Florida law is clear that the narrow and limited exceptions for interlocutory appeal under Rule 9.130 are inapplicable where an order vacates an arbitration award and allows for a reinstatement of the arbitration proceedings.

The Fourth District's holding in *Loewenstein* and the Fifth District's holding in *Zabawa* are correct and support the Second District's denial of certiorari jurisdiction. In comparing the First District's holdings in *Felger*, *Heart Surgery*, and *Amalgamated Transit Union*, the simplicity and soundness of the Second, Fourth, and Fifth Districts holdings is apparent.

As set forth below, review of the order is not available under Rule 9.130 or by way of certiorari review. The Court should affirm the Second District's decision to dismiss Petitioner's appeal for lack of jurisdiction.

I. The Trial Court’s Order is Not Appealable.

A. Florida Rules of Appellate Procedure.

Florida Rule of Appellate Procedure 9.030(b) sets forth the four categories where a district court has jurisdiction, two of which Petitioner relies on to argue that the Second District has jurisdiction to review the instant order: (1) Appeal Jurisdiction, and (2) Certiorari Jurisdiction. FLA. R. APP. P. 9.030(b). However, under the circumstances presented, district court’s do not have appellate jurisdiction, nor do they have certiorari jurisdiction to review a trial court’s order vacating an arbitration award and allowing for the re-institution of arbitration proceedings.

Appeal jurisdiction allows for district courts to review, by appeal: (A) final orders of trial courts not directly reviewable by the supreme court or a circuit court; (B) nonfinal orders of circuit courts as prescribed by rule 9.130, and (C) administrative action if provided by general law. FLA. R. APP. P. 9.030(b)(1). Only under these narrow circumstances may a district court review a nonfinal order.

B. A full and fair reading of the Florida Rules of Appellate Procedure demonstrates that Rule 9.130(a)(3)(C)(iv) is inapplicable under the circumstances.

Review of nonfinal orders by appeal is specifically limited to the orders enumerated in Rule 9.130. FLA. R. APP. P. 9.130(a)(3).

“[T]he rules of construction applicable to statutes also apply to the construction of rules.” *Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1182 (Fla. 2020) (quoting *Brown v. State*, 715 So. 2d 241, 243 (Fla. 1988)). In construing a

statute’s plain language, words or phrases in a statute must be construed by their common and ordinary meaning, and phrases within a statute are not to be read in isolation but should be construed within the context of the entire section. *Lewars v. State*, 277 So. 3d 143, 145 (Fla. 2d DCA 2017) (citing *Atwater v. Kortum*, 95 So. 3d 85, 90 (Fla. 2012) and *Thompson v. State*, 695 So. 2d 691, 692 (Fla. 1997)). The purpose of Rule 9.130 was to reduce the number of appealable orders and discourage piecemeal review. See *Reeves v. Fleetwood Homes of Florida, Inc.*, 889 So. 2d 812 (Fla. 2004); see also, *Diversicare Mgm’t Services Co. v. Estate of Catt by and through Cook*, 267 So. 3d 560 (Fla. 2d DCA 2019). Therefore, Rule 9.130, and particularly Rule 9.130(a)(3)(C)(iv) relied on by Petitioner, must be read in its entirety and be strictly and narrowly construed.

With these guiding principles in mind, the intent and applicability of Rule 9.130(a)(3)(C)(iv) to the subject order is evident. First, the Rule states, “[a]ppeals to the district courts of appeal of nonfinal orders are limited to those that determine the entitlement of a party to arbitration....” FLA. R. APP. P. 9.130(a)(3)(C)(iv). When viewing the subsection in its entirety, an order vacating and permitting re-institution of arbitration does not fall within the narrow and ordinary meaning of the Rule’s subsection because such an order does not “determine the entitlement of a party to arbitrate.” *Id.*

District courts have utilized Rule 9.130(a)(3)(C)(iv) to hear appeals only where the trial court order determines the parties' entitlement to arbitrate the matter at all. These circumstances arise when an order determines the validity of an arbitration clause in a contract. *Brasington v. EMC Corp.*, 855 So. 2d 1212 (Fla. 1st DCA 2003) (reviewing order compelling arbitration based on an arbitration clause in a contract). Where an order determines the existence of a valid agreement to arbitrate. *Avatar Properties, Inc. v. Greetham*, 27 So. 3d 764 (Fla. 2d DCA 2010) (reviewing an order denying a motion to compel arbitration). Where an order grants or denies a motion to compel arbitration. *See, e.g., GBR3 v. Largo Dev. Corp.*, 807 So. 2d 723 (Fla. 3d DCA 2002) (reviewing non-final order denying a motion to compel arbitration according to a contract provision). Or where an order compels arbitration under an incorrect statutory provision. *Leon Med. Center v. Martell*, 972 So. 2d 1103 (Fla. 3d DCA 2008) (reviewing an order compelling arbitration under an incorrect statute).

What is common in analyzing these decisions applying Rule 9.130(a)(3)(C)(iv) is the trial court's determination of whether arbitration is available to the parties at all. That is not the case here. No party has ever disputed that the contract provides for arbitration or that arbitration is the proper forum to resolve the dispute. (R. at 122 – 123). By any definition, the parties are and have always been entitled to arbitrate this dispute. The trial court's order merely vacated

one arbitration award¹ and expressly permits the parties to re-initiate the arbitration proceedings after proper service under the statutes and rules. (R. at 43 – 44).

Rule 9.130(a)(3)(C)(iv) cannot be utilized to confer jurisdiction where an order vacates an arbitration award and at the same time allows for re-institution of the arbitration proceedings because it does not determine the parties' entitlement to arbitrate. In fact, district courts have affirmatively foreclosed review under these circumstances.

C. District courts have already addressed and foreclosed Rule 9.130(a)(3)(C)(iv)'s applicability under these circumstances.

Despite Petitioner's assertion that district courts have foreclosed this type of review under Rule 9.130(a)(3)(C)(iv) without ever discussing the issue, the First District examined the issue in *Heart Surgery*, 128 So. 3d at 169.

In *Heart Surgery*, before determining whether certiorari jurisdiction was properly invoked, the First District evaluated and determined that review under appeal jurisdiction was not available. *Id.* at 172. The court affirmatively held that an order vacating an arbitration award and allowing for re-institution of arbitration is a non-appealable order because it is not specifically enumerated in Rule 9.130(a)(3).

Id. The First District reasoned that:

Florida Rule of Appellate Procedure 9.130(a)(3) describes the non-final orders that may be appealed to the district court of appeal. An order

¹ For reasons immaterial to this jurisdictional issue, that are appropriately reviewed on appeal, if necessary, after entry of a final order.

vacating an arbitration award and remanding for renewed arbitration is not listed in Rule 9.130(a)(3), and is therefore non-appealable. Because petitioners are unable to obtain review through appeal of the circuit court's order to vacate, we consider whether petitioners have properly invoked this court's certiorari jurisdiction.

Id.

In *Henderson v. Tandem Health Care of Jacksonville*, 898 So. 2d 1191 (Fla. 1st DCA 2005), the First District succinctly explained the distinction between an order rescheduling or re-instituting arbitration and an order determining entitlement to arbitration. An appeal was filed seeking review of an order that "required the plaintiff to reschedule non-binding arbitration and to proceed at the rescheduled non-binding arbitration in a reasonable manner and in good faith." *Id.* at 1192. The appellant argued that the nonfinal order was appealable pursuant to Rule 9.130(a)(3)(C)(iv) because the order determined entitlement to arbitration. *Id.* However, the First District specifically held the "order did not determine 'the entitlement of a party to arbitration' as required under rule 9.130. *Id.* Rather, the determination of entitlement was made in the trial court's original order referring the parties to arbitration...." *Id.*

Petitioner relies on *Carpet Concepts of St. Petersburg, Inc. v. Architectural Concepts, Inc.*, 559 So. 2d 303 (Fla. 2d DCA 1990), to support its position that the district court has jurisdiction under Rule 9.130(a)(3)(C)(iv). (*See* Petitioner's Initial Brief at 18). However, the trial court order in that case is not analogous.

In *Carpet Concepts*, while the Second District mentioned—in a footnote—that it was exercising its jurisdiction according to Rule 9.130, it does not appear that the court’s jurisdiction was a contested issue on appeal and the court never discussed jurisdiction beyond the single sentence assertion in the footnote. *Carpet Concepts*, 559 So. 2d at 303. Once again, Petitioner itself cited that “[u]nder Florida law, ‘no decision is authority on any question not raised and considered, although it may be involved in the facts of the case.’” (Petitioner’s Initial Brief at P. 20) (*quoting State ex rel. Helseth v. Du Bose*, 99 Fla. 812, 128 So. 4, 6 (1930); *citing Twyman v. Roell*, 123 Fla. 2, 166 So. 215, 217 (1936) and *Speedway SuperAmerica, LLC v. Tropic Enters., Inc.*, 966 So. 2d 1, 3 (Fla. 2d DCA 2007)). Thus, because the issue of jurisdiction was not raised nor considered in *Carpet Concepts*, that opinion is not dispositive.²

Even if jurisdiction had been raised and considered, *Carpet Concepts* is distinguishable because the order subject to appeal was “a non-final order referring its action against Architectural Concepts to arbitration and staying the circuit court proceedings.” *Carpet Concepts*, 559 So. 2d at 304. Although the Petitioner takes liberties in stating the Second District characterized the motion as a motion to vacate, in reality the motion was a “motion to dismiss the application or refer it to

² In passing, Petitioner also mentions *Lominska v. Fleet St. Pub. Corp.*, 587 So. 2d 576 (Fla. 3d DCA 1991), but Petitioner acknowledges that, in that case, jurisdiction was not an issue addressed by the court. As such, *Lominska* is also not dispositive.

arbitration.”³ *Id.* This is a distinction with a difference for the same reasons set forth in *Henderson*.

Further, and more importantly, the Second District has previously and directly addressed the jurisdictional issue in the present case. *Parvin v. Valhalla Properties on Sand Key, LLC*, 949 So. 2d 1167 (Fla. 2d DCA 2007). In *Parvin*, the Second District dismissed an appeal of an order vacating an arbitration award because the court lacked jurisdiction. *Id.* The Second District held that the order was not appealable under Rule 9.130(a)(3)(C)(iv) because it “does not address the issue of entitlement to arbitration.” *Id.* at 1168. Over ten years later, the Second District affirmed the *Parvin* holding. *Diversicare*, 267 So. 3d at 560. In *Diversicare*, the Second District noted the difference between issues of entitlement to arbitration – for which Rule 9.130(a)(3)(C)(iv) review is allowed, and collateral matters which are non-appealable. *Id.*

Just as the First District did in *Heart Surgery*, the Second District, in the instant case, contemplated Rule 9.130(a)(3), but affirmatively held that a district court does not have jurisdiction to review an order vacating an arbitration award and permitting re-institution of arbitration. (R. at 43 – 44). Further, it is evident, under the reasoning employed in *Henderson*, that there is a material difference between an

³ The Court stated only “[e]ven if the trial court treated Architectural Concepts’ motion to dismiss as an application to vacate, modify or correct the award, it does not contain any factual basis or legal grounds for relief from the arbitration award.”

order that entitles the parties to arbitration, and an order that vacates an arbitration award and merely allows for re-institution of arbitration.

In conjunction with the plain, ordinary, and narrow meaning of Rule 9.130(a)(3)(C)(iv), review of a trial court order vacating an arbitration award and allowing for re-institution of arbitration is not an order determining entitlement to arbitration. Therefore, district courts do not have appeal jurisdiction to review such an order.

II. Certiorari Review of the Trial Court's Order is Not Available.

Common law certiorari review of non-final orders is an extraordinary remedy, only to be used in the most exceptional of circumstances. None of those exceptional circumstances are present here.

Certiorari jurisdiction of the district courts of appeal may be sought to review either (A) nonfinal orders of lower tribunals other than as prescribed by Rule 9.130; or (B) final orders of circuit courts acting in their review capacity. FLA. R. APP. P. 9.030(b)(2). Petitioner seeks certiorari review under subsection (A), but for the following reasons, it cannot be utilized to review the trial court's order in this matter.

A. Certiorari Standard and Its Evolution.

It is axiomatic that review by certiorari is not the same as review by appeal. *Central Fl. Inv., Inc. v. Orange Cty.*, 295 So. 3d 292, 295 (Fla. 5th DCA 2019). Certiorari was never intended to redress mere legal error. It was intended only to

fill the “interstices between direct appeal and the other prerogative writs’ and allow a court to reach down and halt a miscarriage of justice where no other remedy exists.” *Williams v. Oken*, 62 So. 3d 1129, 1133 (Fla. 2011) (quoting *Broward Cty. v. G.B.V. Int’l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001)).

As far back as 1882, this Court recognized that certiorari involves merely a “limited review of the proceedings of an inferior jurisdiction.” *Basnet v. City of Jacksonville*, 18 Fla. 523, 526 – 27 (Fla. 1882). FLA. R. APP. P. 9.030(b)(2) sets forth that certiorari is only available where no direct appeal is available, and its use is completely at the discretion of the reviewing court. *See, e.g., Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983) (holding that a district court may refuse to grant a petition for common-law certiorari even though there may have been a departure from the essential requirements of law.).

In fact, as specifically outlined in FLA. R. APP. P. 9.030(b)(2), certiorari review is only available for non-final orders if the order is of the type not already enumerated in Rule 9.130. This Court has already had time to articulate that:

“[T]he writ of certiorari cannot be used simply because strong policy reasons support interlocutory review” and “if strong policy reasons favor interlocutory review, *th[e] Court will direct that the categories of appealable non-final orders be expanded by amendment to the rules and not by expanding use of the common law writ of certiorari.*” (emphasis added).

Citizens Property Ins. Corp. v. San Perdido Ass’n, Inc., 104 So. 3d 344, 352–53 (Fla. 2012).

The categories appropriate for certiorari are narrow, exceptional, and defined. In sum, very few categories of non-final orders qualify for the use of extraordinary writs, and Rule 9.130 has already made an exception for the most urgent interlocutory orders. *See id.* The mere fact that some policy reason exists, even if compelling, cannot be the predicate for certiorari review to be exercised by the district courts.

In *Williams*, the Court articulated that before a court may grant certiorari relief, the Petitioner must establish the following three elements: (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case, and (3) that cannot be corrected on post-judgment appeal. *Williams*, 62 So. 3d at 1132 (quoting *Reeves*, 889 So. 2d at 822). The last two elements are jurisdictional and must be analyzed before the court may even consider the first element. *Id.*

For the reasons set forth below, certiorari review is inappropriate to review orders vacating arbitration and allowing for re-institution of proceedings because irreparable harm has not been shown, and the issues may be remedied on appeal after final judgment.

B. There is no irreparable harm that cannot be remedied on direct appeal.

The Second District exercised its sound discretion when it “decline[d] to treat the appeal as a petition for writ of certiorari because Unifirst cannot demonstrate

irreparable harm that cannot be remedied on direct appeal.” (R. at 292 – 294). Like the Second District, this Court should also hold that there is no irreparable harm where an arbitration is vacated, but re-institution of arbitration is permitted.

A common law writ of certiorari rests on the sound discretion of the court to which the application was made, and thus, a court’s grant [or denial] is subject to an abuse of discretion standard of review. *See Williams*, 62 So. 3d at 1132. Here, the Second District has already determined that Petitioner cannot demonstrate irreparable harm that cannot be remedied on direct appeal. (R. at 292 – 294).

The Second District made this finding based on the sound precedent of the decisions in *Loewenstein* and *Zabawa*, and the Third District’s holding in *Miami-Dade Cty. v. King*, 176 So. 3d 373, 374 (Fla. 3d DCA 2015). These cases relied on the long-standing principle that inconvenience and expense associated with continued litigation do not constitute irreparable harm. *See, e.g., Citizens*, 104 So. 3d at 355; *see also AVCO Corp. v. Neff*, 30 So. 3d 597, 601 (Fla. 1st DCA 2010) (holding the First District has repeatedly declined to grant certiorari review to orders that petitioners claim will cause irreparable harm due to payment of unnecessary litigation and defense expenses.).

Zabawa involved an order that vacated an arbitration award and “remanded the cause back to arbitration authority for a new arbitration hearing before new arbitrators.” *Zabawa*, 868 So. 2d at 1292. The appellant specifically asked the court

to treat the Notice of Appeal as a petition for writ of certiorari. *Id.* at 1293. In analyzing appellant’s claim of irreparable harm, the court determined the harm was “the fact that [appellant] will expend time and money on an unnecessary arbitration. *Id.* This is an insufficient showing of irreparable harm to justify certiorari review.” *Id.* The same is true in this case.

Petitioner relies on *Felger*, *Heart Surgery*, and *Amalgamated Transit Union* in support of its contention. Petitioner’s reliance on these cases is misplaced. Beginning with *Felger* in 2011, the First District held that,

[t]he effect of an order vacating an arbitration award and ordering a rehearing before another arbitration panel is the same as that of an order granting a motion for a new trial, and **review is warranted for the same reasons which underlie review by appeal of an order granting a motion for new trial.**

Felger, 65 So. 3d at 628. (*emphasis added*). Although the petition for writ of certiorari was granted, *Felger* does not stand for the position that there is irreparable harm where a court vacates an arbitration award and directs rehearing in front of a new panel. *Id.* Instead of certiorari review under Rule 9.030(b)(2), the court relied on Rule 9.110 in supporting its determination. The only mention of irreparable harm in *Felger* is in the dissent. Judge Benton’s dissent articulated that “[w]hile the trial court unquestionably departed from the essential requirements of law, relief by certiorari also requires a showing of irreparable harm, based on error which cannot be remedied on appeal after entry of final order.” *Id.* (C.J. Benton dissenting). In

summary, there was no finding of irreparable harm in *Felger*, and *Felger* cannot be relied on for this position.

Two years later, in *Heart Surgery*, the First District confirmed that *Felger* was wrongly decided and held that any harm caused by the order under review could be remedied on direct appeal of a final order consistent with *Loewenstein* and *Zabawa*. *Heart Surgery*, 128 So. 3d at 169. Although *Felger* controlled the issue, as the *Heart Surgery* court aptly laid out “...for the reasons explained in Judge Benton’s dissent in *Felger*, we believe that *Felger* is wrongly decided on such issue. (citation omitted). Here, in our view, any harm caused by the order under review can be remedied on direct appeal of a final order in this case. See *Loewenstein, Inc. v. Draheim*, 898 So. 2d 1129, 1130 (Fla. 4th DCA 2005); *Zabawa v. Penna*, 868 So. 2d 1292, 1293 (Fla. 5th DCA 2004).” *Id.*

Amalgamated Transit relies on both *Felger* and *Heart Surgery* in holding that certiorari jurisdiction is appropriate. *Amalgamated Transit*, 264 So. 3d at 378. However, the *Amalgamated Transit* court continued to identify “harms” that related to the expense and inconvenience of additional proceedings. *Id.* at 379. The harms identified were: (1) “unnecessary repetition” and “inconsistent determinations” of having a second proceeding; (2) deference to the alternative dispute resolution process; and (3) a catch all that these order “should be subject to some form of

review, despite precedent preventing the court from doing so. *Id.* These harms cannot rise to the level of irreparable harm.

In *King*, the Third District succinctly summarized the controlling case law on this issue. In its *per curiam* opinion, the court dismissed the petition for writ of certiorari because the court lacked jurisdiction. *King*, 176 So. 3d at 374. The court cited to *Loewenstein* and *Zabawa* in support, and *Felger* in opposition. *Id.* However, as detailed above, the Third District similarly found that *Heart Surgery* was in opposition to the holding in *Felger*. *Id.*

Petitioner argues that the “circuitry” of the procedure for confirming an arbitration award frustrates the arbitration right and impairs the pursuit of efficiency and finality. (*See* Petitioner Initial Brief at P. 25). Petitioner argues further that plenary appeal when an arbitration is accepted and confirmed cannot remedy the loss of rights that the parties granted each other when they agreed to remove their disputes from the judicial system and allow them to be resolved at arbitration.” *Id.* However, neither party has lost any rights in this matter. The parties agreed to arbitrate, and the parties will arbitrate. In every meaningful way, the rights contracted by the parties have been respected.

There is no disputing the import of arbitration as a vehicle for dispute resolution. Nor is there a dispute that full, fair, and final resolution are the founding principles upon which arbitration is based. The only “harm” suffered by either party

in this matter is the expense and inconvenience associated with a subsequent arbitration proceeding. As this Court has consistently held, inconvenience and expense do not constitute irreparable harm. *See, e.g., Citizens*, 104 So. 3d at 355; *see also AVCO Corp.*, 30 So. 3d at 601.

For these reasons, certiorari review is not available for an order vacating an arbitration award and allowing for re-institution of arbitration proceedings.

CONCLUSION

For the foregoing reasons, the Second District's dismissal of Petitioner's appeal for lack of jurisdiction was sound and correct, and it should be affirmed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November 2022, a true and correct copy of the foregoing has been filed with the Clerk of the Court via the Florida E-Portal, which will send electronic notification to counsel of record as follows:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font and word length requirements set forth in the Florida Rules of Appellate Procedure.

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