

In the Supreme Court of Florida

CASE NO. SC22-1042
DCA CASE NO. 3D22-645

KEVIN VERICKER,
Petitioner,

v.

NORMAN C. POWELL,
Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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Statement of the Issue

1. Whether certiorari jurisdiction is properly invoked to review trial court orders denying a motion under Fla. Stat. § 768.295 where the Trial Court has complied with any process requirements for addressing such motions.

The answer is: “No.”

Jurisdiction and the District Court Decision(s)

Five of Florida’s District Courts of Appeal have already chimed in on the question of whether certiorari can be properly utilized to review trial court orders disposing of motions under Fla Stat. § 768.295. The **Second District** has said **yes**. See e.g., *Gundel v. AV Homes, Inc.*, 264 So. 3d 304 (Fla. 2nd DCA 2019); *Baird v. Mason Classical Academy, Inc.*, 317 So.3d 264 (Fla. 2nd DCA 2021); and *Davis v. Mishiyev*, 339 So. 3d 449 (Fla. 2nd DCA 2022). **Every other District Court of Appeal, including the Third District in this case,** has said **no**: (a) Third District [*Vericker v. Powell*, 343 So. 3d 1278 (Fla. 3d DCA 2022), and *Pastorella v. Singer*, 2023 WL 5248208 (Fla. 3d DCA Aug 16, 2023)]; (b) Fourth District [*WPB Residents for Integrity in Government, Inc. v. Materio*, 284 So. 3d 555 (Fla. 4th DCA 2019); and *Geddes v. Jupiter Island Compound, LLC*, 341 So. 3d 353 (Fla. 4th DCA 2022)]; (c) First District [*Bosshardt v. Drotos*, 351 So.

3d 257 (Fla. 1st DCA 2022)]; and (d) Fifth District [*Johnston v. Fischer*, 5D22-3052, 2023 WL 5491475, (Fla. 5th DCA Aug. 25, 2023)]. The reasoning of the “no” decisions largely agree with the Fourth District Court of Appeal’s assessment in *Materio, supra*.

This Court accepted this case, presumably to address the conflict, and admittedly has jurisdiction given the certified conflict. Art. V, § 3(b)(4), Fla. Const; Fla. R. App. P. 9.030(a)(2)(A)(vi).

For the reasons articulated further herein, this Court should conclude certiorari jurisdiction may **not** be invoked to review trial court decisions under Fla. Stat. § 768.295. This Court should also **reject** Vericker’s invitation to amend Fla. R. App. P. 1.540.

Statement of the Case and Facts

With respect to Vericker’s Statement of the Case and Facts, he fails to paint a complete picture. For example, Vericker states that he relied on “public records and journalistic sources in his opinion pieces [about Powell].” See Initial Brief at p. 5. However, as explained by Powell in his response to Vericker’s Motion for Summary Judgment, many of the “public records and journalistic sources” did not come anywhere near supporting Vericker’s defamatory remarks against Powell. [R. at pp. 435-440]. Vericker published that Powell

obtained an “illegal” severance payment when he left his role as village attorney. [R. 247]. Vericker’s claimed “source” for this statement was an interview with an unnamed individual who told Vericker that Powell’s severance was the highest he had seen. [R. 247]. Yet, Vericker provided no basis for saying that the payment was “illegal.” [R. 439]. Additionally, Vericker published that Powell committed a crime by filing a fabricated and false police report [R. 245]. But Vericker’s cited source for this was a Police report that said nothing that supported Vericker’s contention. [R. at pp. 438-439].

In sum, Vericker focuses on only a handful of the multiple defamation allegations made by Powell and which formed the basis for the operative, Amended Verified Complaint [R. 128-192] and ignores the vast majority of them.

In addition to not telling a complete factual story, Vericker also omits some of the relevant procedural history.

Vericker did not file a Motion for relief pursuant to Florida’s Anti-SLAPP Statute (Fla. Stat. § 768.295) until December 30, 2021, **more than three years** after the original Verified Complaint was filed. [R. at pp. 30-34], and after 131 docket entries in this case. [R. at pp. 30-34]. Indeed, as the dates from the docket make clear,

Vericker did not file his Motion for Summary Judgment and Anti-SLAPP Motion until 12 days prior to the commencement of the second scheduled trial period. [R. at pp. 30-34].

On March 3, 2022, the trial Court conducted a thirty-minute specially set hearing on Defendant's Motion for Summary Judgment and Anti-SLAPP Motion. [R. 972]. On March 15, 2022, the Trial Court entered its Order Denying Defendant's Motion for Summary Judgment and Anti-SLAPP Motion (hereinafter the "Trial Court Order"). [R. at pp. 1023-1025]. In its Order, the Trial Court entered the requisite findings that there was substantial evidence of disputed material fact regarding the falsity of the alleged statements and whether they were made with actual malice. [R. 1023-1025]. The trial Court also concluded "that the evidence produced by Plaintiff on these issues is sufficient for a jury to find that Plaintiff has produced clear and convincing evidence of Malice as required by the appropriate legal standard." [R. 1023-1024].

Vericker filed a petition for writ of certiorari before the Third District Court of Appeal [R. 3-27] which was dismissed for lack of jurisdiction. [R. 1079]. These proceedings followed.

Standard of Review

Powell acknowledges this Court's standard of review for the legal questions presented is *de novo*.

Summary of the Argument

Certiorari is an extraordinary remedy, reserved for those limited instances where an interlocutory order creates material injury for the remainder of a case that cannot be corrected on post-judgment appeal (i.e., causes "irreparable harm") and departs from the essential requirements of law. Certiorari is **not** intended to provide a second appeal, is **not** available because someone must continue to defend litigation, is **not** a mechanism of policy enforcement, is **not** a means to end-around the limited number of interlocutory orders reviewable under Fla. R. App. P. 9.130, and is intended to protect the process, **not** evaluate the merits of trial court decisions.

Certiorari jurisdiction (irreparable harm) does not exist in this case. Initially, much of Vericker's contention is Fla. Stat. § 768.295 creates immunity from suit. That is **not** correct. Instead, § 768.295 is a garden-variety fee-shifting statute intended to create consequences for those who act contrary to the Legislature's policy against SLAPP suits. This has been recognized by the Third District

and Federal Court decisions, and the statutory language is clear in this regard. A look at what is missing from § 768.295 also supports this conclusion. For example, unlike other statutes referenced in certain cases Vericker discusses, and unlike 13 other statutory sections within Fla. Stat. Ch. 768 alone, § 768.295 has no reference to the term “immunity.” It also does not contain statutory language providing “there shall be no liability” or “no action shall be filed.”

Vericker’s reliance on other states and a constitutional connection to SLAPP litigation is also unavailing. First, other states contain various provisions that are noticeably absent from Fla. Stat. § 768.295. Those include the absence of (a) any discovery or litigation staying mechanism, (b) any burden-shifting framework, (c) any changes of evidentiary standards, (d) any “special motion” procedure, (e) any mention of appellate review, or (f) any mention of “immunity.” This was intentional, not mere happenstance.

The case law utilized by Vericker also does not support his constitutional argument. In the end, whether the question is constitutional or not, irreparable harm is still required to obtain certiorari review. It is noticeably absent here, and this Court’s own

jurisprudence demonstrates certiorari should not be utilized under the circumstances. As a result, the Third District got it right.

Because the jurisdictional basis for certiorari does not exist, any discussion of a departure from the essential requirements of law is unnecessary and would be mere *dicta*. Should the Court decide otherwise, though, the result is there has been no departure from the essential requirements of law. First, the Trial Court's Order was fine under the circumstances. Next, certiorari does not permit a review of whether the Trial Court was right or wrong, and having to continue litigating is not a proper consideration. Those realities, not to mention the information the Trial Court had in front of it that demonstrated the viability of the defamation claims brought by Powell against Vericker, and Vericker's delay in pursuing any remedy he may have had before the Trial Court, defeat the key issues Vericker raises and demonstrate no departure from the essential requirements of law.

Finally, this Court should reject Vericker's invitation to amend Fla. R. App. P. 9.130. To start with, this Court has already declined to amend the Rule to permit interlocutory review of orders denying a motion under Fla. Stat. § 768.295. Vericker's position presents

nothing new, and his attempt to get a second bite at the apple, especially where this Court stayed this case pending the outcome of those proceedings, should be rejected.

Argument

I. Certiorari and Its General Application.

a. Certiorari Review is Limited.

The common law writ of certiorari “functions as a safety net and gives the upper court the prerogative to reach down and halt a miscarriage of justice where no other remedy exists. The writ is discretionary and was intended to fill the interstices between direct appeal and the other prerogative writs. The writ never was intended to redress mere legal error, for common law certiorari—above all—is an extraordinary remedy, not a second appeal.” *Broward County v. G.B.V. International, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001) (internal footnotes omitted). Accordingly, “[a] non-final order for which no appeal is provided by rule 9.130 may be reviewable by petition for writ of certiorari, but only in very limited circumstances.” *Bd. of Trustees of Internal Improvement Tr. Fund v. Am. Educ. Enterprises, LLC*, 99 So. 3d 450, 454 (Fla. 2012); *Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214, 214–15 (Fla. 1998) (Certiorari “should not be used to

circumvent the interlocutory appeal rule.”). “Limited certiorari review is based upon the rationale that ‘piecemeal review of nonfinal trial court orders will impede the orderly administration of justice and serve only to delay and harass.’” *Bd. of Trustees of Internal Improvement Tr. Fund*, 99 So. 3d at 454 (citation omitted).

This all follows naturally from the applicable appellate rules, which make clear:

“[B]ecause [the writ of certiorari] provides a remedy only if the petitioner meets the heavy burden of showing that a clear departure from the essential requirements of law has resulted in otherwise irreparable harm, *it is extremely rare that erroneous interlocutory rulings can be corrected by resort to common law certiorari. It is anticipated that because the most urgent interlocutory orders are appealable under this rule, there will be very few cases in which common law certiorari will provide relief.*”

Citizens Property Insurance Corp. v. San Perdido Association, Inc., 104 So. 3d 344, 349 (Fla. 2012) (emphasis supplied); *see also M.M. v. Florida Dept. of Children & Families*, 189 So. 3d 134, 138 (Fla. 2016) (“The difference between certiorari review and appellate review is important, as the standard of review available when a district court considers a matter by common law certiorari is much higher than when a court reviews a matter as an appeal.”) (internal citation omitted).

b. The Certiorari Requirements.

It is well settled that to obtain a writ of certiorari, there must exist “(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal.” *Reeves v. Fleetwood Homes of Florida, Inc.*, 889 So. 2d 812, 822 (Fla. 2004). “The last two prongs together are ‘referred to as irreparable harm.’ They are also ‘jurisdictional and must be analyzed before the court may even consider the first [prong].’” *Univ. of Florida Bd. of Trustees v. Carmody*, — So. 3d —, 2023 WL 4359498, at *4 (Fla., 2023) (internal citation omitted; ending citation omitted). A departure from the essential requirements of law requires the “violation of a clearly established principle of law resulting in a miscarriage of justice.” *Combs v. State*, 436 So. 2d 93, 95–96 (Fla. 1983); *see also Carmody*, 2023 WL 4359498, at *4 (“[t]he writ never was intended to redress mere legal error”).

Moreover, “the continuation of litigation and any ensuing costs, time, and effort in defending such litigation does not constitute irreparable harm. Thus, the use of certiorari review is improper in

such an instance.” *Rodriguez v. Miami-Dade County*, 117 So. 3d 400, 405 (Fla. 2013). Specifically:

this Court has never held that requiring a party to continue to defend a lawsuit is irreparable harm for the purposes of invoking the jurisdiction of an appellate court to issue a common law writ of certiorari. In fact, in *Martin-Johnson*, 509 So.2d at 1100, we recognized that to establish the type of irreparable harm necessary in order **to permit certiorari review, a party cannot simply claim that continuation of the lawsuit would damage one’s reputation or result in needless litigation costs.** To hold otherwise would mean that review of every non-final order could be sought through a petition for writ of certiorari. Under such a ruling, appellate courts would be inundated with petitions to review non-final orders and trial court proceedings would be unduly interrupted. This **must be differentiated from those cases involving absolute immunity, which is intended to prevent a party from becoming involved in a lawsuit altogether.**

Citizens Prop. Ins. Corp., 104 So. 3d at 353 (emphasis added).

Perhaps because of this reality, Vericker argues throughout his Brief that Fla. Stat. § 768.295 creates immunity. Perhaps because of this reality, the Second District in *Gundel* reasoned its way to an erroneous conclusion that certiorari was appropriate based on a contention that “the harm that results from the court’s improper denial of a motion to dismiss or in its failure to rule on pending motions for summary judgment and judgment on the pleadings is precisely the harm that the Anti-SLAPP statute seeks to prevent—

unnecessary litigation.” *Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 311 (Fla. 2d DCA 2019). Vericker is incorrect. Respectfully, *Gundel* is also incorrect – at least to the extent the *Gundel* holding went beyond addressing the Trial Court’s failure to rule on the pending motion before it at the time.

Fla. Stat. § 768.295 is instead a fee-shifting statute, and the Third District was correct in this case to deny certiorari relief. See discussion *infra*.

c. Substantive vs Procedural/Process Questions.

Especially critical in the certiorari context, there is a distinction between an alleged failure to comply with a statutorily mandated legal process and a trial court allegedly reaching the wrong substantive outcome.

This distinction was emphasized in this Court’s recent decision of *Univ. of Florida Bd. of Trustees v. Carmody*, 48 Fla. L. Weekly S150, 2023 WL 4359498 (Fla. July 6, 2023). In *Carmody*, the Court was confronted with a conflict case between *University of Florida Board of Trustees v. Carmody*, 331 So. 3d 236 (Fla. 1st DCA 2021) on one hand, and *Clare v. Lynch*, 220 So. 3d 1258 (Fla. 2d DCA 2017) and *Riggenbach v. Rhodes*, 267 So. 3d 551 (Fla. 5th DCA 2019) on the

other. The question was whether, despite the trial court having confirmed compliance with the statutory pre-suit requirements that must be met prior to the filing of a medical malpractice negligence case (see Fla. Stat. § 766.203), certiorari was available to review the trial court's denial of motion to dismiss based upon a determination of whether the doctor that submitted a corroborating expert witness affidavit was a "qualified expert." In concluding certiorari was **not appropriate**, this Court noted:

As we explained in [*Williams v. Oken*, 62 So. 2d 1129 (Fla. 2011)], "Florida courts have permitted certiorari review **solely to ensure that the procedural aspects** of the presuit requirements are met." At a general level, such procedural aspects include whether a plaintiff—before the filing of the medical malpractice lawsuit—gave the defendant "advance notice" and provided an "opportunity [for the defendant] to examine [the] claim." Thus, a district court can grant certiorari review to verify that the plaintiff submitted the corroborating affidavit of an expert witness. *Id.* at 1137. But **here there is no disputing that Carmody checked that box.**

Instead, Shands and UF seek certiorari review of the circuit court's determination that Dr. DeStephens is a qualified expert. But **this, we have said, the district courts cannot do.**

Carmody, 2023 WL 4359498 at *5 (emphasis added) (citations omitted). Simply put, the District Court **can** exercise certiorari jurisdiction to determine **whether a statutory box has been**

checked as part of the procedural/process protection built into a statutory structure, but it **cannot** exercise certiorari jurisdiction to **evaluate decisions made by the trial court** once the box has been checked. In response to Shands and UF’s argument that “the 2013 amendments to the Medical Malpractice Act fundamentally changed the applicability of *Williams* [and] erased whatever discretion trial courts had in making presuit expert qualification determinations, meaning that all such determinations are now so mechanical as to be ‘procedural’ and thus subject to certiorari review” this Court further reasoned:

Because trial courts must continue to exercise discretion in making some of these presuit qualification determinations, not all of their findings qualify as “process-related deficienc[ies]” subject to certiorari review. Instead, some of these findings are “sufficiency of the evidence” determinations, and “granting a petition for writ of certiorari to review” them remains “inappropriate.” *Williams*, 62 So. 3d at 1136.

Carmody, 2023 WL 4359498, at *7 (Fla., 2023) (emphasis added) (internal citation omitted).

Again, certiorari is available to review alleged process deficiencies where a statute imposes such requirements, but certiorari is **not** available to review discretionary decisions by the trial

court or questions such as sufficiency of the evidence.

To be certain, as discussed in greater detail *infra*, Vericker does not argue a Fla. Stat. § 768.295 process failure here – nor could he. He filed a motion, and he got an expeditious hearing on it and determination of it. Vericker instead argues the Trial Court reached the wrong conclusion. That is a classic example of circumstances that are not appropriate for certiorari review. *Carmody, supra*; see also *Williams v. Oken*, 62 So. 2d 1129 (Fla. 2011).

d. Certiorari Is Not a Mechanism of Policy Enforcement.

In addition to there being a clear dividing line between the failure to comply with a statutorily imposed process and an alleged substantive error in the outcome, certiorari is not a proper mechanism of policy enforcement:

After reviewing the relevant case law, including *Mandico, Tucker*, and *Roe*, one principle becomes clear: **the writ of certiorari cannot be used simply because strong policy reasons support interlocutory review.**

Citizens Property, 104 So. 3d at 353 (emphasis added).

The Fourth District in *Materio*, and the Third District in this case, have followed this Court’s clear dictate regarding certiorari and questions of policy. *Vericker*, 343 So. 3d at 1280 (“We agree with the

Fourth District that our Florida Supreme Court has made it clear that ‘when public policy favors interlocutory review, the proper course is for the court to amend the non-final appeal rule, not to expand certiorari jurisdiction.’”); *See also Materio*, 284 So. 3d at 560 (discussing this Court’s decisions and requirement that “when public policy favors interlocutory review, the proper course is for the [Supreme] court to amend the non-final appeal rule, not to expand certiorari jurisdiction.”). The First District (*Bosshardt, supra*) and the Fifth District (*Johnston, supra*) have also abided by the dictates of this Court’s existing certiorari jurisprudence.

By comparison, *Gundel*’s conclusion “if certiorari review is not available, the substantive right created by the Anti-SLAPP statute ‘is illusory and the very policy that animates the decision to’ prevent SLAPP suits is frustrated such that the ‘statutory protection becomes essentially meaningless for the individual defendant’” (*Gundel*, 264 So. 3d at 311) **ignores both** the limited scope of certiorari jurisdiction and the fact that the case *Gundel* cites for this proposition [*Keck v. Eminisor*, 104 So.3d 359, 365-66 (Fla. 2012)] did not involve the expansion of certiorari jurisdiction. To the contrary, in fact, *Keck* specifically held:

[A]n order denying summary judgment based on a claim of individual immunity under section 768.28(9)(a) is subject to interlocutory review where the issue turns on a question of law. **As in Tucker,¹ we do not utilize the common law writ of certiorari for review of a claim of individual immunity.**

Keck, 104 So.3d at 66 (emphasis added).

Consistent with this Court's existing certiorari jurisprudence, the Court should now conclude that **certiorari is not properly utilized** to review the denial of an "Anti-SLAPP" Motion under Fla. Stat. § 768.295 and approve the Third District's decision here.

II. Anti-SLAPP Statutes and Florida's Law, F.S. § 768.295.

It is through the above certiorari lens, and the reality that this Court has already considered and rejected a proposed amendment to Fla. R. App. P. 1540 (discussed *infra*), through which the Second District's jurisprudence regarding Fla. Stat. § 768.295, and Vericker's arguments about Fla. Stat. § 768.295, must be viewed. When done so, the outcome is clear: Certiorari review is inappropriate.

¹ *Tucker v. Resha*, 648 So. 2d 1187, 1190 (Fla. 1994).

a. Fla. Stat. § 768.295 Is A Fee-Shifting Statute, Not an Immunity Statute.

Much of Vericker’s argument is premised on his claim that Fla. Stat. § 768.295 creates immunity from suit. *See e.g.*, Initial Brief at 19-25 and 41-48. This is **incorrect**.

Instead, “Florida’s statute is a garden variety fee shifting provision, which the Florida legislature enacted to accomplish a fundamental state policy—deterring SLAPP suits.” *Lam v. Univision Communications, Inc.*, 329 So. 3d 190, 197 (Fla. 3d DCA 2021) (citations omitted); *see also Corsi v. Newsmax Media, Inc.*, 20-CV-81396-RAR, 2022 WL 18586842, at *3 (S.D. Fla. Jan. 6, 2022) (same); Harris Blum, *Slapping Back in Federal Court: Florida's Anti-SLAPP Statute*, 76 U. Miami L. Rev. 345, 368 (2021) (“The bottom line is that Florida's anti-SLAPP statute is merely a garden variety, fee-shifting provision that attaches to certain types of claims.”).

While Vericker contends that “[m]onetary sanctions are also insufficient to prevent anti-SLAPP lawsuits” (Initial Brief at 23), using the significant financial consequences of fee-shifting to deter conduct is a common legislative tool. *See e.g.*, Fla. Stat. §§ 57.105, 429.87, 501.2105, 542.335, 718.303, 720.305, 768.79 (all providing for the

recovery of attorney's fees). Not only does the legislature make parties liable for attorney's fees for a multitude of reasons, but it also does so through the utilization of different formulas. *Compare e.g.*, Fla. Stat. § 768.295 (prevailing party) and Fla. Stat. § 64.081 (to be determined on equitable principles in proportion to the party's interest in property being partitioned).

Vericker's (a) reference to Fla. Stat. § 57.105 as already providing "for attorney's fees for claims with no basis in law or fact (Initial Brief at 23-24) and (b) view that construing Fla. Stat. § 768.295 as a fee-shifting statute "does little more than duplicate section 57.105" (Initial Brief at 24) ignores the distinction between § 57.105 "sanctions" and the "prevailing party" fee clause contained within Fla. Stat. § 768.295.

"Section 57.105 generally 'provides the basis for sanctions against parties and counsel who assert frivolous claims or defenses or pursue litigation for the purpose of unreasonable delay.'" *Pino v. Bank of New York*, 121 So.3d 23, 41 (Fla., 2013). By comparison, Fla. Stat. § 768.295, like many other statutory "prevailing party" fee

provisions,² is a garden-variety fee-shifting provision designed to make the parties assess their risk in moving forward where there might be the potential of a SLAPP argument. In that regard, the Plaintiff must evaluate whether it believes the lawsuit is a SLAPP suit, because if the Plaintiff is wrong, there is potential attorney's fee liability in favor of the Defendant; and the Defendant must evaluate whether it believes it can prevail on a motion claiming the lawsuit is a SLAPP suit, because if the Defendant is wrong, there is potential attorney's fee liability in favor of the Plaintiff. Simply put, like most prevailing party fee-shifting clauses, § 768.295's attorney's fee provision is indicative of an intentional legislative balancing act.

Beyond awarding attorney's fees to the "prevailing party," Florida's Anti-SLAPP statute simply delineates (in the exact same statutory sub-section) the view that "[a] person or entity sued by a governmental entity or another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in

² The statute provides: "The court shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of this section." Fla. Stat. § 768.295(4). This is not the only statute that uses the concept of awarding fees for an action "in violation of this section." See *e.g.*, Fla. Stat. §§ 92.57, 49.00296, 501.059, 725.07.

violation of this section,” relying on the common litigation mechanisms of a motion to dismiss or a motion for summary judgment. See Fla. Stat. § 768.295(4); *Bongino v. Daily Beast Co., LLC*, 477 F. Supp. 3d 1310, 1323 (S.D. Fla. 2020) (“To be sure, Florida’s statute authorizes the use of procedural mechanisms—the filing of a motion to dismiss or a motion for final or summary judgment. And it establishes that the moving party has the ‘right to an expeditious resolution’ of those motions.”) (internal citation omitted; ending citation omitted).

As interesting about what is in § 768.295 is what is missing: The statute does **not** contain: (a) any discovery or litigation staying mechanism, (b) any burden-shifting framework, (c) any changes of evidentiary standards, (d) any “special motion” procedure, (e) any mention of appellate review,³ or (f) any mention of, or even the term,

³ Though not constitutionally valid absent a rule change from this Court, the Florida Legislature has expressed its will when it specifically wants a trial court order to be reviewable by way of interlocutory appeal. See *e.g.*, Fla. Stat. § 70.001(6)(a) (private property rights statute providing “A governmental entity may take an interlocutory appeal of the court’s determination that the action of the governmental entity has resulted in an inordinate burden.”). This Court ultimately amended Rule 9.130 to make such orders reviewable. *Amendments to the Florida Rules of Appellate Procedure*,

“immunity.”

Despite all of this, Vericker argues § 768.295 creates immunity from suit and that certiorari review should be available. In doing so, he hangs his hat on arguments of statutory construction and a claim that the statute enforces constitutional defenses, as well as his contention about other states’ statutes. Vericker’s position is **incorrect**.

b. Statutory Construction Does Not Alter the Analysis.

Attempting to avoid the realities of § 768.295, Vericker turns to a misguided application of select rules of statutory construction. Initial Brief at 20-23. His argument is unavailing.

“The plain meaning of the statute is always the starting point in statutory interpretation.” *GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007). “Florida case law contains a plethora of rules and extrinsic aids to guide courts in their efforts to discern legislative intent from ambiguously worded statutes. However,

[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.”

894 So. 2d 202, 203 (Fla. 2005). Fla. Stat. § 768.295 does **not** provide for an interlocutory appeal.

GTC, Inc. v. Edgar, 967 So. 2d 781, 785 (Fla. 2007) (citation omitted). “[E]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the [statute], it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.” *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So.2d 1071, 1073 (Fla.1982) (citation omitted).

“It is [also] axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole. Where possible, courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another.” *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) (emphasis supplied) (internal citations omitted; ending citation omitted). An isolationist reading of statutory language is prohibited. *State v. Lewars*, 259 So. 3d 793, 797 (Fla. 2018) (“To answer a question of statutory construction, courts must first look to the statute’s language, considering its words in the context of the entire section rather than in isolation.”); *Overstreet v. State*, 629 So. 2d 125, 126 (Fla. 1993) (“In determining legislative intent, a statute ‘should

not be considered in isolation and without reference to other statutes,' but should be construed with other statutes relating to the same subject matter.”) (McDonald, J., dissenting) (internal citation omitted; ending citation omitted).

In this case, there are 13 statutory sections within Fla. Stat. Ch. 768 alone where the term “immunity” appears in the title. *See* Fla. Stat. §§ 768.075, 768.095, 768.128, 768.13, 768.1315, 768.1325, 768.1345, 768.135, 768.138, 768.139, 768.14, 768.28, and 768.39. Notably, Fla. Stat. § 768.295 is **not** one of them. Looking beyond Ch. 768, multiple other statutory sections also address the concept of immunity, and they do it head-on. *See e.g.*, Fla. Stat. §§ 397.484 (lawyer assistance programs immunity), 397.6775 (law enforcement immunity), 631.918 (worker’s compensation immunity), 560.116 (money services business immunity), 684.005 (arbitrator immunity), 765.109 (health care facility or provider immunity), 768.1345 (professional malpractice immunity). The Legislature knows how to provide for immunity when it wants to do so. Again, § 768.295 does **not** mention the term immunity.

Vericker nevertheless cites to this Court’s decision in *Fla. Dep’t of Rev. v. Fla. Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001)

for the proposition: “Under fundamental principles of separation of powers, courts cannot judicially alter the wording of statutes where the Legislature clearly has not done so.” That is an interesting cite, given that what Vericker asks this Court to do is to read a term (i.e., Immunity) into Fla. Stat. § 768.295 that is not there. This Court should not judicially create that which does not exist.

Should this Court feel it necessary to look beyond the language of § 768.295 and the plethora of other instances where the Legislature has expressly created immunity to reach the conclusion that the Statute is what it purports to be (a fee-shifting statute) the Legislative History here is informative. In that regard:

When the Florida Legislature amended its anti-SLAPP statute in 2015, it expanded the statute’s coverage to claims brought by private persons, but left the procedures alluded to in the former version untouched. **Early drafts of the former version included a discovery-staying mechanism, a burden-shifting framework, and a “clear and convincing evidence” standard.** But both chambers of Florida’s Legislature ultimately expressed concern that such procedures would violate the separation of powers provision in the Florida Constitution. For that reason, the **Florida Legislature scrapped that version in favor of the one it enacted, which lacks any such discovery-staying mechanism, burden-shifting framework, or “clear and convincing evidence” standard.**

Harris Blum, *Slapping Back in Federal Court: Florida's Anti-SLAPP Statute*, 76 U. Miami L. Rev. 345, 366–67 (2021) (footnotes omitted) (emphasis added).⁴

It's not like the Florida legislature did not consider these issues. It clearly did; it intentionally chose not to adopt them. All the way through today's version of the statute, there is still no burden-shifting framework, no discovery or litigation staying mechanism, and no clear and convincing evidence standard contained within Florida's Anti-SLAPP law.⁵ There is also no "special motion" and no mention of "immunity. This makes Florida's statute markedly different from some other states which arguably create immunity. See discussion *infra*. Again, Fla. Stat. § 768.295 is fee-shifting.

⁴ An earlier Senate draft of 2000 Bill can be located at: <https://www.flsenate.gov/Session/Bill/2000/306/BillText/c1/PDF>

⁵ Interestingly as well, the earlier contemplated version of the statute provided for an award of "costs of litigation, including attorney's fees and expert witness fees incurred in connection with the motion" as well as "such additional sanctions upon the responding party, its attorneys, or law firms as [the court] finds will be sufficient to deter repetition of such conduct by others similarly situated." This was clearly abandoned in favor of the garden variety, "prevailing party" fee-shifting provision that makes up the current statutory framework.

c. Other State's Statutes Do Not Support Vericker's Contention About Immunity Here.

This Court does not need to look beyond Florida to reach the conclusion that § 768.295 is a fee-shifting statute, **not** an immunity statute. That said, given Vericker's mention of other states (*see e.g.*, Initial Brief at 15,), Powell responds here.

While Vericker is correct that Florida and 31 other states have enacted Anti-SLAPP statutes, what is missing from that statement is the reality that they cannot all be viewed through a narrow lens. In that regard, while each addresses a concern about SLAPP suits, they do **not** do it the same way.

Indeed, the Anti-SLAPP Statutes from other States that Vericker references in his Brief, unlike Florida, **all contain at least two or more of the following provisions:**

1. Create a Special" Motions to Dismiss or "Special" Motions to Strike with statutorily indicated timeframes for deciding the Motions;⁶

⁶ See California (Cal. C.C.P. § 425.16); Connecticut (C.G.S.A. § 52-196a); DC (DC ST § 16-5502); Louisiana (LSA-C.C.P. Art. 971); Maine (M.R.S.A. § 556); Massachusetts (M.G.L.A. 231 § 59H); Nevada (N.R.S. 41.650, et seq.); New Mexico (N.M.S.A. § 38-2-9.1); New York (NY CIV RTS § 70-a, 76-a, N.Y. C.P.L.R. 3211(g), 3212(h)); Oklahoma (12 Okl.St. Ann. § 1430, et seq.); Oregon (O.R.S. § 31.150);

2. Require the Defendant to file their “Special” Motion within a specified timeframe (i.e., 30, 45 or 60 days) of being served with the Complaint;⁷
3. Stay discovery during the pendency of the “Special” motion;⁸
4. Contain specific references to “immunity” in the statute;⁹
5. Provide for an immediate appeal of the granting or denial of a “Special” Motion under the statute;¹⁰ and/or
6. Provide substantive changes to the law, such as an increased burden of proof for the Plaintiff or a requirement that a Plaintiff, very early in the litigation, must prove a likelihood of success to be allowed to proceed.¹¹

Pennsylvania (27 Pa.C.S.A. §8301 et seq.); Rhode Island (RI Stat. §9-33-1, et seq.); Texas (V.T.C.A. § 27.0001 et seq.).

⁷ See, California (Cal. C.C.P. § 425.16); Connecticut (C.G.S.A. § 52-196a); DC (DC ST § 16-5502); Louisiana (LSA-C.C.P. Art. 971); Maine (M.R.S.A. § 556); Massachusetts (M.G.L.A. 231 § 59H); Nevada (N.R.S. 41.650, et seq.); Oklahoma (12 Okl.St. Ann. § 1430, et seq.); Oregon (O.R.S. § 31.150); Texas (V.T.C.A. § 27.0001 et seq.).

⁸ See Statutes referenced in footnote 6, *supra*.

⁹ See Nevada (N.R.S. 41.650, et seq.); Pennsylvania (27 Pa.C.S.A. §8301 et seq.); Rhode Island (RI Stat. §9-33-1, et seq.); Washington (RCWA 4.24.510 et seq.).

¹⁰ See California (Cal. C.C.P. § 425.16; Oklahoma (12 Okl.St. Ann. § 1430, et seq.); Oregon (O.R.S. § 31.150); New Mexico (N.M.S.A. § 38-2-9.1); Pennsylvania (27 Pa.C.S.A. §8301 et seq.); Texas (V.T.C.A. § 27.0001 et seq.).

¹¹ See all statutes referenced in footnote 6, *supra*, except New Mexico (N.M.S.A. § 38-2-9.1).

How Florida has chosen to address the Legislative concern associated with SLAPP suits is not the same as other States, including those where immunity was created. Fla. Stat. § 768.295 is **not** an immunity statute. It **is** a fee-shifting statute.

III. Because there is No Irreparable Harm, there is No Certiorari Jurisdiction.

Again, for certiorari jurisdiction to be present, Vericker must establish “irreparable harm,” defined as a “material injury for the remainder of the case that cannot be corrected on postjudgment appeal.” See discussion *supra*.¹² Vericker argues it is present here for two reasons: (a) “the denial of anti-SLAPP motions implicates violations of a party’s constitutional rights, which cannot be remedied through a post-judgment appeal” and (b) “irreparable harm is present because, absent interlocutory review, the right to be

¹² Vericker cites *Fuller v. Truncale*, 50 So. 3d 25, 27 (Fla. 1st DCA 2010) for the proposition that, to demonstrate “irreparable harm” he “must show **either** that the injury cannot be redressed in a court of law **or** that there is no adequate remedy at law.” (emphasis added). That is what *Fuller* said, however, to the extent it implies any less of a requirement than has been mandated by this Court’s certiorari jurisprudence in proving “irreparable harm,” it is not an accurate statement of the law.

immune from suit will be lost forever following a final judgment.”

Initial Brief at 37. Vericker is **incorrect**.

a. Vericker’s Constitutional Analysis is Incorrect and Does Not Support Certiorari Review.¹³

To start with, no one is going to dispute the question of whether actual SLAPP suits touch on First Amendment issues. They do. No one is going to dispute whether actual SLAPP suits are good. They are not. That is not really the point, though. The point is, the fact that a lawsuit is filed by a public figure claiming defamation does not automatically make it a SLAPP suit, and an initial determination as to whether a lawsuit is a SLAPP suit does not automatically make it reviewable by certiorari or through an interlocutory appeal. Vericker nevertheless spends pages of his Brief attempting to work around that reality. His position is misplaced.

First off, Vericker cites the case of *Rodriguez ex rel. Posso-Rodriguez v. Feinstein*, 734 So. 2d 1162 (Fla. 3d DCA 1999) for the proposition of “explaining that the court had certiorari jurisdiction to review violations of constitutional rights,” while arguing that makes

¹³ Though Vericker addresses his constitutional claim in two separate sections of his Brief (see Initial Brief at 25-30 and 37-39) the question is addressed primarily here in response.

the constitutional topic “pertinent to any certiorari analysis.” Initial Brief at 25.¹⁴ *Rodriguez*, however, did **not** permit review by certiorari simply because it involved a constitutional question.

Rodriguez involved the review of a prior restraint on speech via a gag order. To state the obvious, the purpose of a gag order is to control or limit communication during the progression of a case. An improperly broad gag order is not something that can be remedied on appeal after the case is over. *See Rodriguez*, 734 So. 2d at 1163 (concluding gag order “implicates the violation of a parties’ constitutional rights which cannot be remedied on plenary review”); *Delgado v. Miller*, 314 So. 3d 515, 518 (Fla. 3d DCA 2020) (citing *Rodriguez* and holding “inclusion of [various] paragraphs in the trial court’s order constitutes a departure from the essential requirements of law, causing material injury which will continue throughout the remainder of the proceedings, for which there is no adequate remedy on appeal.”).

Arguing that “[c]ertiorari review exists when a petitioner’s constitutional rights are implicated,” Vericker also spends several

¹⁴ Vericker also discusses *Rodriguez* at page 39 of his Brief. That discussion does not add to the overall analysis.

pages of his “constitutional” argument addressing the First District’s decision in *Williams v. Spears*, 719 So. 2d 1236 (Fla. 1st DCA 1998), affirmed by this Court in *Belair v. Drew*, 770 So. 2d 1164 (Fla. 2000). Initial Brief at 37-39. What is missing from that analysis, though, is the distinction this very Court drew in *Citizens Property* about why certiorari was appropriate in *Belair*, and why it is not appropriate in most cases, including those where the prevailing concern is associated with engaging in continued litigation:

A review of *Belair* and *Martin–Johnson* supports our conclusion that the situation presented in this case does not involve irreparable harm, as those cases illustrate the difference between a significant injury that cannot be later rectified and a situation where a party must await review of the circuit court's non-final order until the plenary appeal. While the argument could be made that an erroneous denial of a motion to dismiss always involves the harm of being subjected to continued litigation, there has never been a blanket rule permitting immediate review of denials of motions to dismiss. **Ordinarily, the expense of continued litigation does not constitute irreparable harm, and thus the district courts do not have jurisdiction to entertain petitions for certiorari based on a public entity’s claim that it is entitled to immunity based on the particular facts of the lawsuit brought against it. Our precedent does not dictate the expansion of the right to immediate review of all adverse interlocutory orders—and certainly not through certiorari.**

Citizens Property, 104 So. 3d at 354–55 (emphasis added). Simply

put, the reason certiorari jurisdiction was appropriate in *Williams/Belair* was **not because** the Court was looking at a constitutional question; it **was because** there existed a “significant injury that [could not] be later rectified.”

Vericker also cites *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) for the proposition “[t]he loss of First Amendment freedoms, **for even minimal periods of time**, unquestionably constitutes irreparable injury.” Initial Brief at 39-40 (emphasis supplied). While Vericker’s quote from *Cuomo* is technically an accurate one, the circumstances presented to the United States Supreme Court in *Cuomo* do not even exist in the same house as those presented here.

In *Cuomo*, the Supreme Court was assessing whether an Executive Order in New York that “impose[d] very severe restrictions on attendance at religious services” during the COVID-19 pandemic should be enjoined pending appeal. The Court concluded it should, and in discussing the concept of irreparable harm (which is an element of seeking injunctive relief) indicated:

If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred. And

while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance.

Cuomo, 141 S. Ct. at 67–68.

In another reach, Vericker relies on *Bd. of Cnty. Com'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996) for the quote “constitutional violations may arise from the deterrent, or chilling effect of governmental efforts that fall short of direct prohibition against the exercise of first amendment rights.” From this, he argues that a final appeal in this case “neither would (or could) cure the chilling effect associated with the lawsuit as to either Vericker or third parties, who may also have designs to criticize the government.” Initial Brief at 40. Vericker takes the Supreme Court’s statement completely out of context, and it does not support Vericker’s contention about the facts and circumstances here.

In *Umbehr*, the Supreme Court granted certiorari to decide the question of “whether, and to what extent, the First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of the freedom

of speech.” *Umbehr*, 518 U.S. at 670. What the Court actually said was: “Recognizing that ‘constitutional violations may arise from the deterrent, or ‘chilling,’ effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights,’ our modern ‘unconstitutional conditions’ doctrine holds that the government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech’ even if he has no entitlement to that benefit.” *Umbehr*, 518 U.S. at 674 (internal citation omitted; ending citation omitted). From there, the Court concluded that, like government employees, there is a “right of independent contractors not to be terminated [i.e., not to have a benefit denied] for exercising their First Amendment rights.” *Umbehr*, 518 U.S. at 686. *Umbehr* has nothing to do with this case.

Applicable to this case is the reality that it has long been the law that **defamatory speech is not protected** under the First Amendment. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (recognizing “there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in ‘uninhibited, robust, and wide-open’ debate on public issues. They belong to that category of utterances

which ‘are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’”) (internal citation omitted; ending citation omitted); *see also Fox v. Hamptons at Metrowest Condo. Ass'n, Inc.*, 223 So. 3d 453, 457 (Fla. 5th DCA 2017) (“**Freedom of speech does not extend to** obscenity, **defamation**, fraud, incitement, true threats, and speech integral to criminal conduct.”) (emphasis added).

Vericker has **not** been denied access to a place of worship. Vericker has **not** been told by the Government that he cannot speak. Vericker has **not** been denied by the Government a right he may otherwise have because of engaging in constitutionally protected speech. Vericker **has** been sued by Powell for **espousing what is alleged to be defamatory, unprotected speech**, and under an **egregious set of facts**. The Trial Court has concluded, after filings and a duly conducted hearing, that genuine issues of material fact exist which are sufficient to present the questions posed in this case to a jury. [R. 1023-1025]. The Trial Court has also concluded, after filings and a duly conducted hearing, that Vericker failed to establish that Powell violated Fla. Stat. § 768.295. [R. 1023-1025].

Constitutional argument or not, certiorari is not appropriate absent “irreparable harm.” This Court itself made that point clear in the case of *Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214 (Fla. 1998). In *Jaye*, the Court confronted head-on an argument that “the denial of a constitutional right, i.e., the right to a jury trial, should be sufficient to invoke a district court’s certiorari jurisdiction.” *Jaye*, 720 So. 2d at 215. That argument was rejected:

Jaye does not state how the alleged denial of this constitutional right causes an irreparable injury. Jaye cites only to *Spring*, in which the Third District concluded that it had certiorari jurisdiction to review an order striking a demand for jury trial because ‘the denial of the right to jury trial is more than the denial of a constitutional right; it is the denial of a fundamental right recognized prior to the adoption of a written constitution.’ *Spring*, 421 So.2d at 47. We disagree. **Our disagreement is not because we fail to respect the fundamental right to a jury trial. Our disagreement is because we believe that an error in failing to provide a jury trial is an error which can be corrected on direct appeal without the type of irreparable harm necessary to support certiorari review.**

Jaye, 720 So. 2d at 215 (emphasis added); see also *Hurley v. State*, 112 So. 3d 114, 116 (Fla. 1st DCA 2013) (“Although petitioner argues that certiorari review by the circuit court was warranted because the county court’s ruling will abridge her rights under the Confrontation

Clause, even the alleged violation of a constitutional right does not, absent some showing of irreparable harm, justify certiorari review.”).

None of the “constitutional” cases Vericker cites support the argument that there should be some sort of different test applied to the immediate facts and circumstances because a constitutional right to speech defense may be raised in response to a defamation lawsuit that is alleged to be (but thus far found by the Trial Court not to be) a SLAPP suit. None of the “constitutional” cases Vericker cites, or the arguments he makes for that matter, support his position regarding what is really the pertinent question: Whether a trial court’s denial of a motion for summary judgment, which motion argued a violation of § 768.295, should be reviewable by way of certiorari?

Whether Powell’s suit is a SLAPP suit – which it is not – can be reviewed on plenary appeal. Given the absence of irreparable harm, the answer to the pertinent question is: “No.”

b. This Court’s Existing Jurisprudence Does Not Support Certiorari Review of an Order denying a Motion under F.S. § 768.295.

Over a decade ago, Justice Lewis indicated “that the proper mechanism for the expansion of the scope of interlocutory review is

not to eviscerate one hundred years of well-grounded, common law jurisprudence regarding certiorari review. Rather the scope of certiorari review must be carefully restricted to the parameters placed on it by the common law.” *Citizens Property*, 104 So. 3d at 358 (Lewis, J, specially concurring) (emphasis added). Ignoring such a call to action is, respectfully, the mistake the Second District appears to be making with *Gundel* and its progeny, and it is what Vericker is asking this Court to do now.

Yet, this Court has made clear that, even in cases involving immunity – which is not present here – that may necessitate interlocutory appellate review, certiorari is **not** the appropriate vehicle to accomplish it. *See e.g., Citizens Property*, 104 So. 3d 344 (Fla. 2012). While Vericker spends a considerable amount of time discussing *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994), *Keck v. Eminisor*, 104 So. 3d 359 (Fla. 2012), *Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344, 355 (Fla. 2012), and *Rodriguez v. Miami-Dade Cnty.*, 117 So. 3d 400, 408 (Fla. 2013), one thing is for certain – **none of those cases concluded certiorari was an appropriate mechanism of interlocutory review** under the circumstances.

Moreover, a comparison of the statute at issue in cases such as *Keck*, or *Citizens Property*, as compared to § 768.295, demonstrates the differences, not the similarities.

In *Keck*, as Vericker contends out, this Court concluded:

[I]f a defendant who is entitled to the immunity granted in section 768.28(9)(a) is erroneously named as a party defendant and is required to stand trial, that individual has effectively lost the right bestowed by statute to be protected **from even being named as a defendant**. . . . [Absent interlocutory review], that statutory protection becomes **essentially meaningless for the individual defendant**.

Initial Brief at 43-44 (emphasis supplied). While that is what the Court said, when you look at the statute at issue in *Keck*, that conclusion makes perfect sense, as the statutory language itself states: “An officer, employee, or agent of the state or of any of its subdivisions **may not be held personally liable in tort or named as a party defendant in any action** for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.” Fla. Stat. § 768.28(9)(a) (emphasis added). **No**

such comparable statutory language declaring that a person “may not be held liable in tort” or cannot even be “named as a party defendant in any action” is present in Fla. Stat. § 768.295.

In *Citizens Property*, the question presented was whether a non-final order denying a claim of immunity by Citizens was reviewable prior to the conclusion of the case. Ultimately, this Court determined it was **not reviewable** by way of a writ of certiorari or a writ of prohibition. As important for the immediate question, though, is the actual statutory immunity language that applies to Citizens. Specifically:

There shall be no liability on the part of, and no cause of action of any nature shall arise against, any member insurer or its agents or employees, agents or employees of the association, members of the board of directors of the association, or the department or its representatives, for any action taken by them in the performance of their duties or responsibilities under this subsection. **Such immunity does not apply to** actions for breach of any contract or agreement pertaining to insurance, or any willful tort.

Fla. Stat. § 627.351(6) (emphasis added). Again, **no similar language** exists in Fla. Stat. § 768.295. Another interesting point from *Citizens Property* is the following dictate from this Court:

“In attempting to fit this situation into the categories of cases where certiorari has been entertained, Citizens

asserts that it is entitled to a writ of certiorari because it will suffer harm if it must continue to defend a lawsuit when the Legislature intended to immunize it from section 624.155 actions, which would frustrate the legislative intent behind the statute. In support of its argument, Citizens cites to this Court's decisions in *Belair v. Drew*, 770 So.2d 1164 (Fla.2000), and *Martin-Johnson, Inc.*, 509 So.2d 1097. However, neither of those cases involved a situation where the only harm asserted was that the litigant would simply be required to defend a lawsuit for a longer period of time."

Citizens Property, 104 So. 3d at 354. Being required to defend for "a longer period of time" is the only real consequence existing for Vericker in this case.

Similar to *Keck*, *Tucker* also involved the immunity of government officials. The immunity at issue in *Tucker*, though, did not arise out of statutory language, but instead involved U.S. Supreme Court precedent: "The United States Supreme Court has consistently recognized that government officials are entitled to some form of immunity from suits for civil damages." *Tucker*, 648 So. 2d at 1189. The holding in *Tucker* was simply that "an order denying summary judgment based upon a claim of qualified immunity is subject to interlocutory review to the extent that the order turns on an issue of law" and that a rule amendment was necessary to effectuate this determination. *Tucker*, 648 So. 2d at 1190. *Tucker* is

inapplicable to this case.

Finally, *Rodriguez* did not deal with a statutory question either, but instead dealt with the “proper use of the writ of certiorari when a governmental entity raises sovereign immunity as a basis for a motion for summary judgment, which the trial court denied.” *Rodriguez*, 117 So. 3d at 401–02. Concluding **certiorari was improper**, this Court “reiterate[d] that the continuation of litigation and any ensuing costs, time, and effort in defending such litigation does not constitute irreparable harm.” *Rodriguez*, 117 So. 3d 400, 405 (Fla. 2013). This Court’s reiteration of that long-standing doctrine certainly drives the point home here.

The current state of the law is as has been expressed within the majority decisions in cases such as *Citizens Property*, *Tucker*, *Keck*, and *Rodriguez*. The end result is **certiorari is not available to review an order** denying a motion under Fla. Stat. § 768.295.¹⁵

¹⁵ Vericker argues that Justice Canady presents a “dissenting view” that should be followed. Initial Brief at 46. The state of the law is clear under the circumstances present. That said, and while Powell would not purport to speak for Justice Canady, it is interesting to note that Justice Canady joined this Court’s opinion in *Carmody*, wherein this Court again affirmed the distinction between reviewing process failures (permissible) and reviewing trial court “discretionary” determinations (impermissible). *Carmody*, 2023 WL

c. There is No Irreparable Harm in this Case.

The Anti-SLAPP statute provides:

A person or entity sued by a governmental entity or another person in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section. A person or entity may move the court for an order dismissing the action or granting final judgment in favor of that person or entity. The person or entity may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the claimant's or governmental entity's lawsuit has been brought in violation of this section. The claimant or governmental entity shall thereafter file a response and any supplemental affidavits. As soon as practicable, the court shall set a hearing on the motion, which shall be held at the earliest possible time after the filing of the claimant's or governmental entity's response.

That is what the Trial Court did here. Vericker does not, and **could not**, claim to the contrary. Instead, he invited the Third District Court of Appeal, and now invites this Court, to look behind a curtain that was properly closed and to reevaluate the Trial Court's decision

4359498, at *7 (“Because trial courts must continue to exercise discretion in making some of these presuit qualification determinations, not all of their findings qualify as “process-related deficienc[ies]” subject to certiorari review.”).

When you look at what happened here, there was no process failure. There was a trial court looking at the evidence submitted, hearing argument from the parties, and ultimately determining there was sufficient evidence to go to a jury and, resultingly, denying a summary judgment motion. No more, and no less.

or order. Vericker's invitation should be rejected. *Carmody, supra*; see also *Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011) ("Dr. Oken was afforded the process guaranteed by statute because he received advance notice and an opportunity to examine Williams' claim before the filing of the lawsuit. Thus, **a deprivation of the process did not occur. Under these cases, certiorari would be inappropriate because the "justification for issuing a writ of certiorari is diminished greatly if the parties have been afforded the essential process guaranteed by law and the judge has merely made a mistake in an order or ruling entered in the course of the proceeding. In that event, the relief afforded by an appeal from the final judgment will be adequate**, and certiorari will not lie even if the error is one that amounts to a departure from the essential requirements of the law....") (emphasis added).¹⁶

¹⁶ As Powell argued before the Third District, not even *Gundel* did what Vericker wanted the Third District to do, and now wants this Court to do. Instead, the *Gundel* Court concluded (a) the trial court was wrong in refusing to even rule on a summary judgment motion filed under the Anti-SLAPP statute (see *Gundel*, 264 So. 3d at 313) and (b) the trial court utilized the wrong dismissal standard in evaluating a motion to dismiss filed under the Anti-SLAPP statute. (See *Gundel*, 264 So. 3d at 314-15).

For all the reasons discussed herein, § 768.295 does **not** create immunity. For all the reasons discussed herein, Vericker can make his arguments on direct appeal following the entry of a final judgment should a jury decide the case in favor of Powell at trial. The facts and circumstances present here are the **opposite** set of facts and circumstances from those required to demonstrate irreparable harm. Because Vericker has **not suffered irreparable harm**, the relief he seeks should be rejected, and the decision of the Third District should be approved.

IV. The Trial Court’s Order Did Not Depart from the Essential Requirements of Law.

Powell agrees with Vericker that this Court has the right to limit its review to the question of whether certiorari jurisdiction exists. Initial Brief at 48. Should this Court appropriately resolve the District

The Third District also disagreed with *Gundel* on the burden-shifting question. See *Lam v. Univision Communications, Inc.*, 329 So.3d 190, 197 (Fla. 3d DCA 2021) (“In short, because the plain language of Florida’s Anti-SLAPP statute does not shift the burden to Plaintiffs to establish that their claims have merit, we decline to follow the approach in *Gundel* and add to the statute that which is not in its text.”). Given the history of the statute and the fact that burden-shifting is nowhere to be found in the statutory language (see discussion *supra*), *Gundel* erred on that question as well, and the Third District got it right in *Lam*.

Court conflict with a determination that certiorari jurisdiction does not exist, there is **absolutely no reason** for this Court to then address the topic of whether there was a departure from the essential requirements of law. In fact, to do so under those circumstances would be non-binding *dicta*, which should be avoided. *Coastal Petroleum Co. v. Am. Cyanamid Co.*, 492 So. 2d 339, 344 (Fla. 1986) (noting that “statements concerning the effect of MRTA on navigable waterbeds were dicta and are non-binding in the instant case”); *McGibney v. Smith*, 511 So. 2d 1083, 1084 (Fla. 5th DCA 1987) (“this court should not, by way of *dicta*, express an opinion as to the merits of the motion”) (Cowart, J., Concurring in Part). This Court should instead approve the decision of the Third District and remand this case for further proceedings. That is the correct outcome.

Nevertheless, if the Court somehow determines that certiorari jurisdiction exists, Powell points out why the Trial Court’s Order did not depart from the essential requirements of law.

A departure from the essential requirements of law requires the “violation of a clearly established principle of law resulting in a miscarriage of justice.” *Combs*, 436 So. 2d at 96. The “essence of the standard” has been summed up as:

The required “departure from the essential requirements of law” means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.

Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 527–28 (Fla. 1995)

(quoting Chief Justice Boyd’s special concurrence in *Jones v. State*, 477 So.2d 566, 569 (Fla.1985)).

Though not on the same topic, the Third District’s discussion in the case of *Levin v. Pritchard* is informative on the approach to determining whether there has been a departure from the essential requirements of law:

In determining whether the trial court departed from the essential requirements of the law when it granted Pritchard’s motion to amend, we must limit our review to whether the court complied with the procedural requirements of section 768.72. Moreover, we are not permitted “to review the sufficiency of the evidence considered by the trial court in granting leave to amend the complaint to add a claim for punitive damages.” Finally, certiorari relief is only appropriate “when the record establishes that a trial court applied the incorrect law; certiorari relief is not available to remedy an incorrect application of the correct law.”

Levin v. Pritchard, 258 So. 3d 545, 547 (Fla. 3d DCA 2018) (internal citations omitted; ending citation omitted). Again, procedure vs. substantive is a dividing line. *See* discussion *supra*.

Here, Vericker attacks the Trial Court's Order, alleging a failure to comply with Fla. R. Civ. P. 1.510(a) and argues the Trial Court misapplied the "actual malice" standard and made the wrong ruling on Summary Judgment.

With regard to Vericker's attack of the Trial Court's Order under Fla. R. Civ. P. 1.510(a), it merits mention that Vericker **did not raise** the specific issue he raises before this Court in his Petition for Writ of Certiorari before the Third District. Instead, Vericker focused on his incorrect argument – again asserted here – that the Trial Court used the wrong standard. Vericker should not be able to raise before this Court for the first time on conflict review an issue which is not jurisdictional and which he did not raise below.

Even if the Court looks beyond that problem, Vericker focuses only on a small statement from the hearing (Initial Brief at 8) and from there argues that the Trial Court did not comply with the summary judgment rule. First, the "[t]rial court can satisfy the requirement of proving on the record the reasons for granting or denying a motion for summary judgment by stating its reasons in its written order or by oral pronouncement at the hearing on the

motion.” *Tucker v. LNV Corp.*, 363 So. 3d 1095, 1097–98 (Fla. 4th DCA 2023). It is not one or the other.

A review of the Order demonstrates the Trial Court considered the issues and concluded: (a) there was “substantial evidence in the record demonstrating that there are genuine issues of material fact in dispute regarding the falsity of the alleged defamatory statements made by Defendant,” (b) there was “substantial evidence in the record demonstrating that there are genuine issues of material fact in dispute regarding whether Defendant acted with Malice in publishing the alleged defamatory statements that are at issue in this case,” (c) “that the evidence produced by Plaintiff on these issues is sufficient for a jury to determine that the alleged defamatory statements were false and that Defendant acted with Malice in publishing these statements,” and (d) “the evidence produced by Plaintiff on these issues is sufficient for a jury to find that Plaintiff has produced clear and convincing evidence of Malice as required by the appropriate legal standard.” [R. 1023-1025]. Frankly, nothing more is needed, and Vericker’s argument based solely on a single statement from the

hearing transcript is incorrect.¹⁷

In terms of Vericker’s “actual malice” / “malice” argument, that should be a non-starter. As Powell mentioned in his briefing before the Third District: “the record is replete with references to “actual malice” from all parties: See Vericker’s Motion for Summary Judgment and Anti-SLAPP Motion, mentioning “actual malice” 31 times [R. 224-235]; Powell’s Response to Motion for Summary Judgment, mentioning “actual malice” 36 times [R. 433-450]; Hearing Transcript, mentioning “actual malice” 10 times [R. 972-991]. From this, the Trial Court even mentioned that it considered the “appropriate legal standard.” [R. 1023-1025]. To conclude from

¹⁷ Even if the Order was not technically compliant with Fla. R. Civ. P. 1.510, which it was, that would not support Vericker’s argument that he was denied “the process he was due.” See Initial Brief at 49. A Motion and Response was filed, notice was given, and a hearing was conducted with counsel present. Any process requirements were complied with, and improper summary judgment orders are correctable on plenary appeal. See *e.g.*, *Miami-Dade County v. Perez*, 988 So. 2d 40, 41 (Fla. 3d DCA 2008) (the “denial of a motion for summary judgment is not one of the enumerated categories of non-final orders that may be appealed” and “such orders do not meet [the Court’s] criteria for review via certiorari”); *City of Hialeah v. Fernandez*, 661 So. 2d 335, 343 (Fla. 3d DCA 1995) (“Assuming arguendo that the City’s motion for summary judgment should have been granted, the City will have an adequate remedy by appeal at the end of the case. Certiorari therefore does not lie.”).

this record that there is a departure from the essential requirements of law sufficient to grant certiorari relief merely because the Trial Court used the term “malice” requires a leap this Court should not make.

Regarding the merits of the Trial Court’s ruling, Vericker effectively argues that, even though he got his day in Court, he lost when he thinks he should have won. That is not properly reviewable on certiorari. *TRG Desert Inn Venture, Ltd. v. Berezovsky*, 194 So. 3d 516, 520 (Fla. 3d DCA 2016) (“Simply put, a trial court’s application of the correct law is not reviewable by certiorari, even if the appellate court were to disagree with the conclusion reached by the trial court.”).

Nevertheless, the Trial Court was presented with evidence that Vericker, without a legitimate basis in fact, published statements that: (1) Powell had illegally copied Homeland Security Information (a Federal Crime); (2) Powell fabricated a Police report (a state crime); (3) Powell demanded an illegal severance payment (a state crime); (4) Powell “hustled” North Bay Village by engaging in “side development deals” (a state crime); and (5) Powell was illegally serving as a Magistrate judge (an offense that would subject him to disbarment).

[R. at pp. 435-441]. The Trial Court was presented with evidence that the statements in question were false and Vericker's purported justifications did not provide any legitimate basis for the defamatory statements. [R. at pp. 435-441]. The Trial Court was also informed that Vericker, in his deposition, could not point to any language from his cited documents that supported his defamatory statements or that provided him with a legitimate basis for making such statements. [R. at pp. 435-441]. In fact, with regard to Vericker's defamatory statement that Powell illegally copied Homeland Security Information, though Vericker stated under oath that he relied upon a complaint filed in Federal Court for making this defamatory statement [R. 241], it was demonstrated below that the complaint on which Vericker allegedly relied was not even filed in the Federal Court until nearly one month after publication of the defamatory statement. [R. 436]. Simply put, the Trial Court was presented with sufficient evidence that Vericker did not have a legitimate or good faith basis for making the alleged defamatory statements and Vericker had displayed substantial ill will towards Powell and a motive to engage in a vehement smear campaign against Powell. Simply put, the Trial

was presented with sufficient evidence that Vericker acted with actual malice.

There was no departure from the essential requirements of law, and certiorari is inappropriate.

In addition, Vericker waited over three (3) years to raise any issues related to Fla. Stat. § 768.295(4). As the case docket indicates, during this three (3) year period a motion to dismiss had been filed and the complaint amended, written discovery had been served and responded to, depositions had been noticed and taken, discovery motions had been filed and heard, and the case had been twice set for trial. [R. 30-35]. Vericker's delay in seeking an Anti-SLAPP remedy is another layer added to the reasons why there has been no miscarriage of justice here sufficient to warrant certiorari review.

V. This Court Should Not Amend Fla. R. App. P. 9.130.

No one questions this Court's authority to amend the Florida Rules of Appellate Procedure. Whether the Court should do it, though, is a completely different question.

As the Third District noted in its decision below:

With our certification of conflict with the contrary cases from the Second District, coupled with our referral of the issue to the Florida Bar’s appellate rules committee, we are confident of invoking a more deliberative approach to the issue of whether such non-final orders – denying motions premised on Florida’s Anti-SLAPP statute – should be immediately appealable.

Vericker, 343 So. 3d at 1281. It appears that the Third District was not aware at the time that the process it contemplated was already underway. Then, in a unanimous decision 5 months ago, **after undertaking the clearly “more deliberative approach”** contemplated by the Third District, this **Court declined to amend** Rule 9.130 to permit interlocutory review of orders disposing of motions brought under Fla. Stat. § 768.295. *In re Amendments to Florida Rule of Appellate Procedure 9.130*, SC2022-1084, 2023 WL 3151092, at *1 (Fla. Apr. 28, 2023) (“Having considered the Committee’s report, the comments filed, and the Committee’s response to the comments, and after having had the benefit of oral argument, the Court declines to adopt the proposed amendments at this time.”).¹⁸ Despite that reality, *Vericker* now asks the Court to

¹⁸ This decision is hereafter referred to as the “Rule Amendment Case.”

amend Rule 9.130 retroactively to permit interlocutory review under the premise that his “proposed rule change differs materially from the rule change the Appellate Courts Rule Committee proposed.” Initial Brief at 56.

First off, Vericker’s argument and proposed amendment imply that this Court did not fully consider the issues when it was deciding the Rule Amendment Case. Clearly, that is not so. In addition, this Court could have amended the Rule with any language it deemed appropriate, had it thought such a change was necessary, and Vericker does not present a new, novel approach to the question.¹⁹

Next, Vericker’s initially proposed amendment (*see* Initial Brief at 55) assumes the statute creates immunity. For all the reasons discussed above, Fla. Stat. § 768.295 **creates potential attorneys’**

¹⁹ In Footnote 18 of his Brief, Vericker claims: “Moreover, the medical malpractice statutory language at issue in *Carmody* mirrors the anti-SLAPP statute’s language,” referring then to the following language in Fla. Stat. § 766.104 and which was noted in the *Carmody* decision: “No action shall be filed . . . unless.” From that, Vericker argues “Just as the Legislature may restrict tort suits that could be brought in Florida state courts asserting medical malpractice, it can limit tort suits infringing on constitutional rights.” Yet, despite Vericker’s implication – if not a point-blank statement – to the contrary, the statutory language “No action shall be filed . . . unless” is **nowhere to be found** in Fla. Stat. § 768.295. The Legislature knew how to say it if it wanted to. It didn’t say it in § 768.295.

fee liability; the statute does **not create immunity**. Moreover, the “immunity” idea was a part of the written filings in the Rule Amendment Case [see Report of Appellate Rules Committee (discussing immunity), and Comments of Law Firm Harder LLP (California), and Beverly A. Pohl, Esq., in Opposition to the Proposed Amendment (discussing immunity)] and a topic of discussion at oral argument in the Rule Amendment Case. Powell does not purport to speak for this Court beyond language in its opinions; however, it is reasonable to assume, at a minimum, that this Court considers what is put before it by the participants in a case. In the Rule Amendment Case, that included the question of whether § 768.295 created immunity that required immediate interlocutory review. In response to the filings and arguments submitted, this Court decided **not** to amend Fla. R. App. P. 9.130 to permit interlocutory review.²⁰ There is **nothing new under the sun** here.

²⁰ The fact that this Court just rejected a proposed Rule 9.130 amendment, after full briefing and oral argument focused solely on that question, separates Fla. Stat. § 768.295 from all the interlocutory review cases Vericker cites in the chart on page 54 of his Brief.

Despite that, Vericker tries to bootstrap the concept of a “constitutional defense” into his proposed amendment(s) to Rule 9.130. This Court should **not** take the bait.

First off, multiple defenses or arguments that are raised in litigation every day are constitutional in nature. That cannot be the trigger for interlocutory appellate review – lest the Court open the floodgates to an innumerable number of possibilities and an innumerable number of potential future requests for Rule 9.130 amendments under the umbrella of a constitutional connection. Next, the argument that a lawsuit is a SLAPP suit, by definition, touches on constitutional defenses, since it addresses “the constitutional right to free speech in connection with a public issue, or right to peacefully assemble, to instruct representatives of government, or to petition for redress of grievances before various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. I, of the State Constitution”. Fla. Stat. § 768.295(3).

What’s apparent here is that Vericker has not narrowed the

issue at all.²¹ He is instead trying to get a **second bite at the apple** under the guise of this being a new case where the Court has accepted jurisdiction, presumably to resolve a certiorari conflict.

This Court was aware of the existence of this case when it was considering the Rule Amendment Case, and it even stayed these proceedings pending the outcome of that case. The Court should reject Vericker's request to amend Rule 9.130, should approve the Third District's decision below, and should remand this case for further proceedings.

Conclusion

For the reasons stated herein, it is respectfully requested that this Honorable Court (a) approve the decision of the Third District Court of Appeal in *Vericker v. Powell*, 343 So. 3d 1278 (Fla. 3d DCA 2022), (b) disapprove contrary decisions out of the Second District Court of Appeal to the extent they are inconsistent with the reasoning

²¹ Vericker's use of the term "solely" does nothing to change this reality. While there could be other defenses raised in response to, for example, a defamation lawsuit, Fla. Stat. § 768.295 does not deal with those. It deals with the SLAPP question. To allude to other possible defenses here, as if that narrows the scope of the request being made, is little more than a distraction from the obvious.

of this Court, (c) lift the stay of lower court proceedings currently in place, (d) remand this case for further proceedings, and (e) grant to Powell such other relief as this Honorable Court deems just and proper.

Dated: September 22, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on the Merits has been furnished this 22nd day of September, 2023, via the Court's E-Filing Portal, which will send a Notice of Service of Court Document to: Faudlin Pierre, Esq., PIERRE SIMON, *Attorney for Petitioner* (fplaw08@yahoo.com); Dwayne A. Robinson, Esq., KOZYAK TROPIN & THROCKMORTON LLP, *Attorney for Petitioner* (drobinson@kttlaw.com); SHULLMAN FUGATE PLLC, *Counsel for Amici Curiae in Support of Petitioner*, through Rachel E. Fugate (rfugate@shullmanfugate.com); NELSON MULLINS, *Counsel for Amici Curiae in Support of Respondent*, through Beverly A. Pohl (beverly.pohl@nelsonmullins.com); and to HARDER STONEROCK LLP, *Counsel for Amici Curiae in Support of Respondent*, through Dilan A. Esper (desper@harderllp.com).

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief on the Merits was prepared in Bookman Old Style, 14-point font, and contains 12,640 words, in compliance with Rules 9.045(b) and 9.120(d) of the Florida Rules of Appellate Procedure.

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