IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

APPEAL NO. 5D2024-1034
LOWER CASE NO. 2019-CA-1190

IMPACT CHURCH OF JACKSONVILLE, INC.,

Petitioner,

v.

REGENCY MALL REALTY LLC, et al.

Respondents.

RESPONDENTS' ANSWER BRIEF

On Appeal from an Order of the Fourth Judicial Circuit Court,
in and for Duval County, Florida

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules

Statutes

I. STATEMENT OF THE CASE AND FACTS.[1]

The following correct or supplement the Statement of the Case and Facts in the Petition.

Respondents' Opposition

The Opposition did not seek dismissal of Counts II–VI of the Second Amended Complaint or the proposed Third Amended Complaint and, instead, "oppose[d]" the Amended Second Motion for Leave "with respect to Counts II through VI" (Pet. App. 586)[2] and requested the Lower Tribunal "enter an order denying the [Amended Second] Motion for Leave with respect to Counts II through VI of the Third Amended Complaint . . . ." (Pet. App. 602, para. 51).

Respondents asserted that leave should be denied as to Count VI for fraud in the inducement for three reasons. First, Count VI alleges that, "prior to executing the Declaration," representatives of Regency, "*including* Igal Namdar, Igal Nassim, Byron Hakimi, and Elliot Nassim[,]" fraudulently induced Impact to execute the Declaration by making false "verbal" statements "later

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[1] Unless stated otherwise, this Answer Brief adopts the definitions of capitalized terms used in the Petition.

[2] "Pet. App. ___" refers to Petitioner's Amended Appendix.

memorialized in the Declaration" that Regency intended to and was qualified to maintain Regency Square Mall. (Pet. App. 592, para. 14 (emphasis in original). Respondents argued that Petitioner did not plead Count VI with particularity, as required by Rule 1.120(b), Florida Rules of Civil Procedure, because Count VI did not identify (i) when the alleged misrepresentations were made, (ii) all the persons who purportedly made the misrepresentations, or (iii) which of the Regency entities each person made the misrepresentations on behalf of. (Pet. App. 592, para. 16).

Second, Respondents argued verbal statements made by a party to a contract before the execution of that contract cannot serve as the basis for a fraud claim if the contract covers the subject matter of those representations. (Pet. App. 592–93, para. 17 (citation omitted)). Consequently, Respondents asserted that Count VI was barred by the allegation in paragraph 85 of the Third Amended Complaint,[3] together with the binding deposition

[3] Paragraph 85 of the Third Amended Complaint states, "Prior to executing the Declaration, between January and August 2016, Regency made verbal representations and assurances to Impact that Regency would provide certain common area maintenance services that were later memorialized in the Declaration Page 6, Section 4, titled 'Maintenance Obligations.'" (Pet. App. 458–59).

testimony of Impact's corporate representative. (*Id.*; Resp. App. 5:2–8:24[4] (testifying that Regency's two purported fraudulent misrepresentations were covered in the Declaration)).

Third, Respondents contended that the allegations in Count VI of the Third Amended Complaint were irreconcilable with the binding deposition testimony of Impact's corporate representative. (Pet. App. 593, para. 18) (comparing Pet. App. 459, para. 86 ("[F]rom January to August 2016, Regency representatives including Igal Namdar, Igal Nassim, Byron Hakimi, and Elliot Nassim falsely represented to Impact representatives including E. Shawn Ashley and Randall Jordan that Regency would perform under the Declaration all Maintenance Obligations, and fraudulently misrepresented themselves as providing high quality property management services tailored to Impact's requests through their property manager, Namdar") with Resp. App. 5:7–13:17 (testifying that one individual whose name and relationship with each Respondent Mr. Jordan could not identify, at some unspecified time before the execution of the Declaration, either over the phone

[4] "Resp. App. ___" refers to Respondents' Appendix filed simultaneously with this Answer Brief.

or in person at Regency Square Mall, and with no other witnesses, represented that one or more unspecified Respondents would perform maintenance obligations well)).

Hearing on the Amended Second Motion for Leave

Neither Petitioner nor Respondents presented testimony, admitted documents into evidence, or requested the Lower Tribunal weigh evidence at the Hearing. (*See generally* Pet. App. 703–744). The Lower Tribunal only considered the documents attached to or referenced in the Opposition, including an excerpt from the transcript of the deposition of Petitioner's corporate representative. (*See, e.g.*, Pet. App. 714:1–716:18).[5] Petitioner stated the Hearing was "not an evidentiary hearing" (Pet. App. 705:1–11, 739:1) and "factual arguments are not appropriate for a motion for leave to amend, and they should be disregarded by this Court" (*id.* at 705:1–3). However, Petitioner's counsel (i) did not disagree with the Lower Tribunal's assertion that determining whether a motion for leave to amend a pleading is futile or unduly prejudicial is not confined to

[5] Respondents have included a copy of the deposition transcript excerpt submitted to the Lower Tribunal in connection with the Hearing at Resp. App. 3–19.

the proposed pleading; (ii) confirmed Petitioner was prepared to address the Opposition; and (iii) alleged facts outside the proposed Third Amended Complaint, including the process by which Petitioner discovered new claims, to justify the amendment:

> [MS. KUPCINSKAS:] If Your Honor is inclined, we are prepared to respond to the opposition. But, Your Honor, like I previously stated, the legal standard is not factual.
>
> Your Honor, as this Court is aware, the allegations must be construed as true. This is a simple motion for leave to amend. It's not an evidentiary hearing. And it's not a hearing about discovery abuse or violations or anything like that.
>
> THE COURT: So talk to me for a second, though. I mean, how would you ever do an analysis on futility if the sum and substance of this type of a hearing is -- let's say I assume what you've alleged in your amended complaint is true, and, therefore -- isn't that sort of the end of the analysis?
>
> I tend to think of it, at some point when someone is saying further amendment would be futile or unduly prejudicial, you are getting into a different analysis than the standard four corners.
>
> MS. KUPCINSKAS: Right, Your Honor. But I think futility goes to the -- to whether the counts that you're bringing are relevant or, rather –

> THE COURT: Well, relevant sounds like I'm making some factual analysis as well.
>
> MS. KUPCINSKAS: And, Your Honor, I may have not said that properly.
>
> But I do have a case, Your Honor, actually to futility. And if I could just get to that one. One second. Your Honor, this case is *RV-7 Property, Inc. versus Stefani De La O, Inc.*, 187 So.3d 915. And I provided that to Your Honor. Any doubt with respect to futility should be resolved in favor of allowing amendment, especially when leave to amend is sought at or before the summary judgment hearing.
>
> THE COURT: Okay.
>
> MS. KUPCINSKAS: So, Your Honor, we would argue that the amendments were a direct result of defendants' discovery production, discovery of new facts, which led to additional breaches of the declaration, as well as additional affirmative defenses to defendants' counterclaim.
>
> (*Id.* at 705:4–706:22).

Petitioner admitted at the Hearing that Petitioner is bound by the deposition testimony of Petitioner's corporate representative:

> THE COURT: Randall Jordan wasn't deposed. Randall Jordan was deposed as the corporate representative of plaintiff, so it's plaintiff being deposed and they're bound by his answers; correct?

> MS. KUPCINSKAS: They are bound by his answers, Your Honor. . . .
>
> (Pet. App. 737:22–38:3).

Petitioner mistakenly represented to the Lower Tribunal that, in response to the question "What other individuals may have knowledge of these statements [the two alleged misrepresentations that were the basis of Petitioner's fraudulent inducement claim]?", Petitioner's corporate representative testified that "[t]he executive team, Bruce Robbins, and the contractors" may have heard or have knowledge of the two alleged fraudulent misrepresentations. (Pet. App. 738:5–22). In fact, however, Petitioner's corporate representative identified those people as participating in pre-purchase inspections of the property in response to the question "Who were involved in those inspections?"—not as people having heard or having knowledge of the two alleged fraudulent misrepresentations. (Resp. App. 9:3–15). Indeed, after providing the testimony referenced by Petitioner's counsel, Petitioner's corporate representative testified that he could not recall anyone else being present when he heard the alleged misrepresentations (Resp. App 11:13–12:4).

Petitioner never filed an errata sheet for the transcript from the June 2023 deposition of Impact's corporate representative. (Pet. App. 838, Doc. 143; Pet. App. 838–43).[6]

Consistent with the requested relief in their Opposition, Respondents requested at the Hearing that the Lower Tribunal deny Petitioner's Amended Second Motion for Leave with respect to Counts II–VI. (Pet. App. 726:1–4).

Petitioner was put on notice that the Lower Tribunal might deny the Amended Second Motion for Leave with respect to Counts II–VI before and during the Hearing. (Pet. App. 602, para. 51; *id.* at 726:1–4). The Lower Tribunal's questioning at the Hearing also put Petitioner on notice of that potential result. (*See, e.g.*, Pet. App. 705:14–24, 706:3–4, 707:2–8, 707:15–08:7).

Petitioner did not withdraw the Amended Second Motion for Leave before the Lower Tribunal entered the Order. (Pet. App. 842–43).

[6] "Doc. ___" and "Docs. ___" refer to the document numbers on the Lower Tribunal's online docket.

The Order

The Lower Tribunal unambiguously denied without prejudice leave to amend for Counts II–VI based on the legal conclusion that those claims were futile because they failed to state causes of action. (Pet. App. 4–10, paras. 6–10(a)–(b)). The Lower Tribunal relied on documents produced by Petitioner in discovery and attached to the Opposition to "bolster" its conclusion with respect to Count V (unjust enrichment against Namdar), and an excerpt from the deposition transcript of Petitioner's corporate representative to support two of the three grounds to deny leave for Count VI (fraudulent inducement against Regency). (Pet. App. 8–9, paras. 9–10(b)–(c)).

The Order granted the Amended Second Motion for Leave with respect to Count I, but denied the Amended Second Motion for Leave with respect to Counts II–VI:

> 1. At the March 6, 2024, hearing on the Amended Motion for Leave, Defendants did not oppose the Amended Motion for Leave with respect to Count I of the Third Amended Complaint. The Amended Motion for Leave is therefore GRANTED with respect to Count I of the Third Amended Complaint. The remainder

> of the Amended Motion for Leave is DENIED for the reasons stated below and on the record.
>
> * * *
>
> 11. For the foregoing reasons, the Third Amended Complaint is deemed filed as of the date of the entry of this order with respect to Count I . . . .
>
> (Pet. App. 4, para. 1; *id.* at 9, para. 11).

Petitioner has made no effort to schedule a hearing on its April 12, 2024, Motion for Clarification Regarding the Order. (*See* Pet. App. 843).

II. SUMMARY OF ARGUMENT.

Petitioner has not demonstrated that it has suffered irreparable harm as a result of the alleged due process violations arising out of the entry of the Order.

First, Petitioner's claim that the Lower Tribunal could not, as a matter of law, consider matters outside the four-corners of the proposed pleading is wrong and overlooks binding authority from this Court which makes clear that an amendment is futile if it is directly contradicted by binding sworn testimony. *See, e.g., Grazette v. Magical Cruise Co. Ltd.*, 280 So.3d 1120, 1123 n.1 (Fla. 5th DCA

2019) ("[A]n amendment would have been futile because the amendment would have directly contradicted Grazette's sworn testimony that the back pain was caused by a specific incident relating to luggage in 2011.").

Second, Petitioner had reasonable notice and an opportunity to address Respondents' Opposition and the documents it relied upon, including documents produced by Petitioner, filed 48-days before the Hearing.

Third, contrary to the assertions in the Petition, the Lower Tribunal did ***not*** (i) expand the non-evidentiary Hearing into an evidentiary hearing; (ii) deprive Petitioner of reasonable notice or reasonable opportunity to respond to the documents attached to or referenced in the Opposition; (iii) weigh evidence, resolve genuine doubt in favor of Respondents, or make findings of fact; (iv) dismiss sua sponte Counts II–VI; (v) dismiss Namdar as a party to the Lawsuit; or (vi) dismiss or grant summary judgment with respect to Count VI.

And fourth, Petitioner's speculative and factually unsupported claims (raised for the first time in this appeal and never addressed with the Lower Tribunal) that Respondents will spoliate evidence

fails to even allege what evidence Respondents will spoliate, explain why that evidence is material, or explain the basis for Petitioner's belief that Respondents will spoliate evidence.

For the reasons described above, Petitioner has also failed to demonstrate that the Order departs from the essential requirements of law.

Moreover, the Lower Tribunal correctly concluded that Petitioner abused its privilege to amend with respect to Counts III–VI of the proposed Third Amended Complaint because Petitioner knowingly sought to prosecute claims that are either clearly barred as a matter of law or barred as a matter of undisputed and binding fact.

Finally, Petitioner offered no argument or analysis to explain how the Lower Tribunal erred in concluding that leave to amend Counts II–VI of the proposed Third Amended Complaint should be denied as futile.

III. STANDARD OF REVIEW.

A trial court's denial of a motion for leave to file an amended complaint is reviewed for abuse of discretion. *Glen Garron, LLC v.*

Buchwald, 210 So.3d 229, 235 (Fla. 5th DCA 2017) (citation omitted).

In addition to the authority cited in Petitioner's standard of review section (Petition, Section IV, p. 26), Respondents note that irreparable harm (material injury for the remainder of the case that cannot be corrected on post-judgment appeal) is a threshold jurisdictional issue for a petition for writ of certiorari. *Amerisure Ins. Co. v. Rodriguez*, 242 So.3d 481, 483 (Fla. 3d DCA 2018). "Given the *paramount* jurisdictional importance of irreparable harm, a certiorari petition must *clearly* reflect how the purported harm to the petitioner is incurable by a final appeal." *Scott v. Scott*, 375 So.3d 331, 334 (Fla. 5th DCA 2023) (emphasis in original; internal quotation marks and citation omitted). Further, a petition for writ of certiorari must "identify harm that is real and ascertainable rather than speculative." *Id.* (internal quotation marks and citation omitted).

"It is well established that "a district court should exercise its discretion to grant review only when the lower tribunal has violated a clearly established principle of law resulting in a miscarriage of justice." *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So.3d 1086,

1092 (Fla. 2010) (citation omitted). "A circuit court's decision departs from the essential requirements of the law where the circuit court fails to afford procedural due process or fails to apply the correct law." *City of Miami v. Miami-Dade Cty.*, 346 So.3d 1210, 1212 (Fla. 3d DCA 2022) (citation omitted).

IV. **ARGUMENT.**

The Petition makes no effort to demonstrate irreparable harm or a departure from the essential requirements of law with respect to the Lower Tribunal's decision to deny the Amended Second Motion for Leave *without prejudice* regarding the following:

(i) Count II for breach of the implied covenant of good faith and fair dealing (Pet. App. 352–53) on the *legal conclusions* that the proposed claim was duplicative of Count I for breach of contract (the Declaration) and failed to state a cause of action because the Declaration defines the standards for Regency's common area maintenance obligations, thereby rendering the implied covenant inapplicable (Pet. App. 5–6, para. 6);

(ii) Count III for unjust enrichment (Pet. App. 353–54) on the *legal conclusion* that Petitioner incorporates the Declaration between Petitioner and Regency into Count III and black-letter Florida law prevents a plaintiff from pursuing a quasi-contract claim for unjust enrichment if an express contract exists concerning the same subject matter (Pet. App. 6–7, para. 7);

(iii) Count IV for tortious interference with a contractual relationship against Namdar (Pet. App. 354–55) on the *legal conclusion* that, based on the allegations incorporated into Count IV or exhibits attached to the proposed Third Amended Complaint showing that Namdar supervised the Regency Owners' maintenance obligations under the Declaration, Namdar was not alleged to be a stranger to the contractual relationship established by the Declaration between Petitioner and Regency and, therefore, Count IV failed to state a cause of action (Pet. App. 7, para. 8);

(iv) Count V for unjust enrichment against Namdar (Pet. App. 356–57) on the *legal conclusion* that the count fails to state a cause of action because Exhibit C to the proposed Third Amended Complaint demonstrates that Petitioner paid "CAM

Fees" to defendant Regency Mall Realty, LLC—not Namdar—through www.clickpay.com (Pet. App. 8, para. 9); and

(v) Count VI for fraud in the inducement against Regency (Pet. App. 357–59) on the *legal conclusions* that Count VI fails to plead fraud with particularity and, based on the allegations of paragraph 85 of the proposed Third Amended Complaint, the claim as pled is futile because verbal statements made by a party to a contract before the execution of that contract cannot serve as the basis for a fraud claim if the contract covers the subject matter of those representations (Pet. App. 8–9, para. 10(b) (citations omitted); id. at 458–59, para. 85).

A trial court's decision to deny leave to amend without prejudice because the proposed pleading does not state a cause of action is typically not subject to interlocutory review.[7] Accordingly,

[7] *See Delgado v. Morejon*, 295 So.3d 1214, 1217 (Fla. 5th DCA 2020) (this Court did not have jurisdiction to review a trial court's non-final order dismissing a petition for modification of child support for failure to state a claim where the order did not specify it was with prejudice) (gathering authority); *Traveler v. Steiner Transocean Ltd.*, 895 So.2d 1191, 1192–93 (Fla. 3d DCA 2005) ("[T]his court has previously held that an order denying leave to amend is a non-final and non-appealable order . . . . Moreover, even if Traveler had filed a petition for writ of certiorari, this court would

the Petitioner's claim for certiorari jurisdiction is limited to the Lower Tribunal's reliance on the deposition testimony of Petitioner's corporate representative and documents *produced by Petitioner* in discovery to: (i) "bolster" the legal conclusion that Exhibit C to Count V for unjust enrichment against Namdar renders the claim as pled futile (Pet. App. 8, para. 9); (ii) bolster the legal conclusion that paragraph 85 renders Count VI for fraud in the inducement futile (Pet. App. 9, para. 10(b)); and (iii) conclude that the misrepresentations alleged in Count VI are irreconcilable with the binding deposition testimony of Petitioner's corporate representative (Pet. App. 9, para. 10(c)).

As discussed below, the Petition fails to demonstrate the Order caused Petitioner to suffer irreparable harm or that the Order departs from the essential requirements of Florida law.

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still be without jurisdiction.") (citing among other cases *Hawaiian Inn of Daytona Beach Inc. v. Snead Constr. Corp.*, 393 So.2d 1201, 1202 (Fla. 5th DCA 1981) (denying a petition for writ of certiorari seeking to reverse an order denying leave to file an amended complaint because "[a]n appeal after judgment is an adequate remedy for ordinary reversible error for which no appeal is provided [in Florida Rue of Appellate Procedure 9.130(a)(3)")].

A. **Petitioner has not suffered irreparable harm.**

Irreparable harm (material injury for the remainder of the case that cannot be corrected on post-judgment appeal) is a threshold jurisdictional issue for a petition for writ of certiorari. *Amerisure*, 242 So.3d at 483. "Given the *paramount* jurisdictional importance of irreparable harm, a certiorari petition must *clearly* reflect how the purported harm to the petitioner is incurable by a final appeal." *Scott*, 375 So.3d at 334 (emphasis in original; internal quotation marks and citation omitted). Further, a petition for writ of certiorari must "identify harm that is real and ascertainable rather than speculative." *Id.* (internal quotation marks and citation omitted).

Contrary to the assertions in the Petition that Petitioner suffered irreparable harm (*id.* at Section V(A), pp. 29–37), the Lower Tribunal did *not* (i) expand the non-evidentiary Hearing into an evidentiary hearing; (ii) deprive Petitioner of reasonable notice or reasonable opportunity to respond by interpreting documents attached to or referenced in the Opposition; (iii) weigh evidence, resolve genuine doubt in favor of Respondents, or make findings of fact; (iv) dismiss sua sponte or otherwise Counts II–VI; (v) dismiss Namdar as a party to the Lawsuit; or (vi) dismiss or grant summary

judgment with respect to Count VI. Further, Petitioner's conclusory spoliation concerns (raised for the first time in this appeal and never addressed with the Lower Tribunal) are speculative and do not establish the required *clear* irreparable harm.

1. The Lower Tribunal did not violate Petitioner's due process rights at the non-evidentiary Hearing by considering documents attached to or referenced in the Opposition.

Petitioner's due process argument is fundamentally flawed because it incorrectly asserts that because "consideration of the motion for leave to amend *should* be limited to the content of the pleading and the proposed amendment," consideration of matters beyond the proposed pleading "expand[s] the scope of [the] hearing without proper notice." Petition, pp. 29–32 (quoting *Bocchino v. Fischer*, 645 So.2d 1096, 1097 (Fla. 4th DCA 1994) (emphasis added)). *Bocchino*, which has not been cited as authority by any appellate court, did not address matters noticed for hearing. More importantly, Petitioner overlooks Fourth District authority since *Bocchino* and precedent from this Court holding that a trial court's review of a motion for leave to amend is not limited to the four-

corners of the motion or its proposed pleading.[8] From this misapprehension of the law, Petitioner claims that the Order causes irreparable harm because the Lower Tribunal expanded the scope of the hearing, heard and weighed evidence, and "functionally" dismissed Counts II–VI sua sponte, and therefore, "functionally" dismissed Namdar as a party to the Lawsuit. This Court should apply the correct legal standard and reject Petitioner's first irreparable harm theory for the following reasons:

a. *The Lower Tribunal did not violate Petitioner's due process rights because Petitioner had notice and an opportunity to rebut the documents attached to or referenced in the Opposition.*

"The essence of due process is *reasonable* notice and a *reasonable opportunity* to be heard." *State v. Victorino*, 372 So.3d

[8] *See, e.g., Grazette*, 280 So.3d at 1123 n.1 ("[A]n amendment would have been futile because the amendment would have directly contradicted Grazette's sworn testimony that the back pain was caused by a specific incident relating to luggage in 2011."); *Spatz v. Embassy Home Care, Inc.,* 9 So.3d 697, 698–99 (Fla. 4th DCA 2009) (affirming the denial of a motion for leave to amend because "any amendment of the complaint to allege" a new version of events "would be futile because the plaintiff would be confronted with her own deposition testimony, wherein she plainly asserted" a contradictory version of events).

772, 780 (Fla. 5th DCA 2023), *reh'g denied* (Oct. 17, 2023) (emphasis added; internal quotation marks and citation omitted).

Contrary to Petitioner's allegations (Petition, p. 32), no "litigation by ambush" occurred at the Hearing "without proper notice." All the arguments and documents Respondents relied upon at the Hearing were included in Respondents' Opposition filed on January 18, 2024 (Pet. App. 586–698), *48 days* prior to the Hearing on March 6, 2024 (Pet. App. 841; *id.* at 4, para. 1). Petitioner confirmed at the Hearing it was "prepared to respond to the [O]pposition." (Pet. App. 705:4–5). Thus, Petitioner received adequate notice and opportunity to rebut Respondents' arguments and documents at the Hearing.

b. *The Lower Tribunal did not conduct an evidentiary hearing by interpreting documents attached to or referenced in the Opposition.*

The Hearing, which Petitioner noticed as a non-evidentiary hearing, was not expanded in scope to become an evidentiary hearing because neither Petitioner nor Respondents presented testimony, admitted documents into evidence, or requested the Lower Tribunal weigh evidence or make findings of fact. (*See*

generally Pet. App. 703–744)); *see also Villasenor v. Martinez*, 991 So.2d 433, 436 (Fla. 5th DCA 2008) (finding that the trial court that considered deposition transcripts and documents never introduced as evidence had "conducted a non-evidentiary hearing"). The Lower Tribunal only considered the documents attached to or referenced in Respondents' Opposition, including the transcript of the deposition of Petitioner's corporate representative and documents produced or used by Petitioner in the Lawsuit. (*See* Pet. App. 714:1–716:18, 719:3–722:24).[9] Petitioner also acknowledged that Petitioner is bound by the testimony of its corporate representative (Pet. App. 737:22–38:3). *Cf. Edwards v. Codrington*, 325 So.3d 993, 995–96 (Fla. 5th DCA 2021) (noting the Fifth District has "decline[d] to announce a rule that every evidentiary hearing be specifically noticed as such" and then finding that the trial court did *not* violate the appellant's due process rights by taking evidence at a hearing noticed as non-evidentiary because the evidence pertained to an issue raised in a motion by appellee filed before the hearing).

[9] The documents attached to the Opposition and discussed during the Hearing with Bates labels "Pl.Impact___" were produced by Petitioner, the plaintiff Impact, to Respondents in discovery in the Lawsuit. (*See* Pet. App. 591–92, para. 12).

c. *The Lower Tribunal did not dismiss Counts II–VI sua sponte or otherwise.*

Contrary to Petitioner's claim otherwise (Petition, pp. 30–33), the Lower Tribunal did not dismiss Counts II–VI of the Third Amended Complaint. The Opposition filed 48 days before the Hearing requested the Lower Tribunal "enter an order denying the [Amended Second] Motion for Leave with respect to Counts II through VI of the Third Amended Complaint . . . ." (Pet. App. 586 and 602, para. 51). Respondents reiterated that request at the Hearing (Pet. App. 701, 726:1–4) *before* the Lower Tribunal's rulings (Pet. App. 9–10). The Lower Tribunal then entered the Order, which granted the Amended Second Motion for Leave with respect to Count I and denied the motion with respect to Counts II–VI (Pet. App. 4–5, para. 1), consistent with Respondents' requests in the Opposition and at the Hearing. Such orders are not novel. *See, e.g.*, *Wilcox v. R.J. Reynolds Tobacco Co.*, 2014 WL 5795750, No. 10-45462-ca-30, at *1 (Fla. 11th Jud. Cir. Ct. 2001); *Schumacher v. Small*, 2012 WL 5305253, No. 11-02455-CA-42 (Fla. 11th Jud. Cir. Ct. 2012).

Likewise, the Order did not dismiss Counts II–VI in the SAC (the "Second Amended Complaint"). The Order is limited to the proposed Third Amended Complaint. (Pet. App. 4, para. 1; *id.* at 6, para. 11). Petitioner abandoned the Second Amended Complaint by filing the Third Amended Complaint.[10] Petitioner was put on notice that the Lower Tribunal might deny the Amended Second Motion for Leave with respect to Counts II–VI before and during the Hearing. (Pet. App. 602, para. 51; *id.* at 701, 726:1–4). The Lower Tribunal's questioning at the Hearing also put Petitioner on notice of that potential result. (*See, e.g.*, Pet. App. 705:14–24, 706:3–4, 707:2–8, 707:15–08:7). Petitioner nevertheless did not withdraw or attempt to withdraw the Amended Second Motion for Leave. (Pet. App. 842–43).

[10] *Oceanside Plaza Condo. Ass'n, Inc. v. Foam King Indus., Inc.*, 206 So.3d 785, 787 (Fla. 3d DCA 2016) ("Long-standing Florida case law makes clear that the filing of an amended complaint constitutes an abandonment of the original complaint which was superseded, and it ceased to be part of the record and could no longer be viewed as a pleading.") (internal quotation marks, brackets, and citations omitted); *E.P. v. Hogreve*, 259 So.3d 1007, 1010 n.2 (Fla. 5th DCA 2018) (similar).

d. *The Lower Tribunal ruled as a matter of law based on Petitioner's binding testimony and Petitioner's unrebutted documents.*

The Lower Tribunal did not weigh evidence, resolve doubt in favor of Respondents, or make findings of fact. The Lower Tribunal first—correctly—denied Petitioner's Amended Second Motion for Leave with respect to Counts II–VI as futile because they were insufficiently pled or insufficient as a matter of law. (Pet. App. 5–9, paras. 6–10). *See also Quality Roof Servs. v. Intervest Nat'l Bank*, 21 So.3d 883, 885 (Fla. 4th DCA 2009) ("A proposed amendment is futile if it is insufficiently pled . . . or is insufficient as a matter of law . . . ."). For example, the Lower Tribunal correctly determined Petitioner's fraudulent inducement claim (Count VI) was not pled with the particularity required by Florida Rule of Civil Procedure 1.120(b).[11] The Lower Tribunal then bolstered those legal conclusions with respect to Counts V and VI by analyzing the binding testimony in the transcript from the deposition of

[11] (Pet. App. 8, para. 10(a)); *Morgan v. Bank of New York Mellon*, 200 So.3d 792, 796 (Fla. 1st DCA 2016) ("Courts have held that proposed amendments are futile when they are not pled with sufficient particularity . . . .") (citing *Thompson v. Bank of N.Y.,* 862 So.2d 768, 770 (Fla. 4th DCA 2003) (affirming the denial of a motion for leave to amend a pleading to include conclusory fraud allegations not pled with particularity)).

Petitioner's corporate representative and the unrebutted documents that Petitioner produced or used in the Lawsuit. (Pet. App. 8–9, paras. 9, 10(b)–(c)). Petitioner has not filed an errata sheet for the transcript from the June 2023 deposition of Petitioner's corporate representative. (Pet. App. 838, Doc. 143; *id.* at 838–43). The Lower Tribunal correctly interpreted those documents as a matter of law. *See Jahangiri v. 1830 N. Bayshore, LLC*, 253 So.3d 699, 701 (Fla. 3d DCA 2018) ("Generally, interpretation of a document is a question of law rather than of fact.") (citation omitted); *Spatz*, 9 So.3d at 698–99 (a party's proposed amendment is futile if it contradicts the party's deposition testimony); *Grazette*, 280 So.3d at 1123 n.1 (same).

e. *Petitioner's cases do not show the Lower Tribunal violated Petitioner's due process rights.*

Unlike the trial courts in the due process cases cited by Petitioner, the Lower Tribunal did not (i) terminate an evidentiary hearing before a party or its expert had concluded its testimony (*Kilnapp v. Kilnapp*, 140 So.3d 1051, 1054 (Fla. 4th DCA 2014) and *K.G. v. Florida Dept. of Children and Families*, 66 So.3d 366, 368–69

(Fla. 1st DCA 2011)),[12] (ii) consider two motions at a hearing when another motion was noticed for hearing and the aggrieved party did not attend the hearing (*Haeberli v. Haeberli*, 157 So.3d 489, 490 (Fla. 5th DCA 2015)), (iii) conduct a final evidentiary hearing when only a case management conference had been noticed for hearing (*Rodriguez v. Santana*, 76 So.3d 1035, 1036–37 (Fla. 4th DCA 2011)), or (iv) deny a motion without considering its merits and order that any future pleading be treated as a nullity because a party failed to appear for a deposition (*S.W. Florida Paradise Prop., Inc. v. Segelke*, 111 So.3d 268, 271 (Fla. 2d DCA 2013)).

2. The Lower Tribunal has not dismissed Namdar, and Petitioner's speculative spoliation concerns made without any factual basis do not demonstrate irreparable harm.

Petitioner alleges the Lower Tribunal "functional[ly] dismissed Namdar as a party" (Petition, p. 33) by "functionally dismissing" the claims Petitioner asserted against Namdar (Petition, p. 32), which created a "severe risk for spoliation of relevant evidence without any

[12] Petitioner cites *Kilnapp* to show "[v]iolations of due process rights are fundamental error." *Kilnapp* has no such holding, did not involve a petition for writ of certiorari, and did not discuss the meaning of "fundamental error" in the context of a petition for writ of certiorari.

recourse for Impact" (*id.* at p. 35) because "Namdar is no longer under any litigation document preservation obligations" (*id.* at p. 34).

This Court should reject this irreparable harm theory because the Order did not dismiss Namdar. *See* Section IV(A)(1)(c), *supra*. Namdar remains a party to the Lawsuit with a corresponding duty to preserve evidence until the Lower Tribunal enters a final order dropping Namdar from the Lawsuit. *See Allen v. Florida Dept. of Military Affairs*, 576 So.2d 971, 971–72 (Fla. 5th DCA 1991) (explaining that the Florida Supreme Court and the Fifth District have adopted *Gries Inv. Co. v. Chelton*, 388 So.2d 1281, 1282 (Fla. 3d DCA 1980) (an order granting a motion for summary judgment and motion to dismiss with prejudice are non-final orders until the trial court enters a judgment)).

Moreover, Petitioner cannot establish material injury for the remainder of the Lawsuit because the Order does not specify it was with prejudice and does not prohibit Petitioner from seeking to file a fourth amended complaint including Namdar as a defendant. *Delgado,* 295 So.3d at 1217 (dismissing the appeal of a trial court's sua sponte dismissal of an entire complaint that lacked finality

language). Petitioner has declined to file a motion for reconsideration or request leave to file a fourth amended complaint. (Pet. App. 842–43); *see also Armiger v. Associated Outdoor Clubs, Inc.*, 48 So.3d 864, 870 (Fla. 2d DCA 2010) (absent prejudice, abuse of privilege, or futility, leave to amend may be granted even after hearing and ruling on summary judgment).

In any event, Petitioner's speculative spoliation concerns do not demonstrate irreparable harm. The Petition does not identify the evidence Namdar will spoliate, explain why that evidence is material to the Lawsuit, or explain why Petitioner believes Namdar will spoliate the evidence.

And if the Lower Tribunal drops Namdar as a party to the Lawsuit, Petitioner can create a duty to preserve evidence by issuing subpoenas to Namdar or obtaining an order from the Lower Tribunal requiring Namdar as a nonparty to preserve relevant evidence. *See, e.g.*, *Shamrock-Shamrock, Inc. v. Remark*, 271 So.3d 1200, 1203 (Fla. 5th DCA 2019) (a third-party duty to preserve evidence may arise with a properly served discovery request); *Swearingen v. Pretzer*, 310 So.3d 1084, 1085 (Fla. 1st DCA 2020) (describing preservation orders as "a common and accepted exercise

of judicial power that safeguard[s] the integrity of the judicial process"). Petitioner has not pursued that relief. (Pet. App. 842–43).

3. The Lower Tribunal did not dismiss Count VI of the Second Amended Complaint or the proposed Third Amended Complaint, and Petitioner's speculative spoliation concerns do not demonstrate irreparable harm.

Petitioner alleges the Lower Tribunal's "dismissal of Count VI of the SAC [the Second Amended Complaint] and proposed Third Amended Complaint causes irreparable harm to Impact" (*id.* at p. 35) because Regency "is under no ongoing obligation to maintain" documents pertaining to Regency's alleged fraudulent inducement (*id.* at pp. 36–37).

This Court should reject this irreparable harm theory because the Order did not dismiss Count VI of the Second Amended Complaint or the proposed Third Amended Complaint. *See* Section IV(A)(1)(c), *supra*. The Regency defendants remain parties to the Lawsuit with a corresponding duty to preserve evidence. *See Allen*, 576 So.2d at 971–72 (explaining that the Florida Supreme Court and Fifth District have adopted *Gries*).

Moreover, Petitioner cannot establish material injury for the remainder of the Lawsuit because the Order does not specify it was with prejudice and does not prohibit Petitioner from seeking to file a fourth amended complaint that includes a non-frivolous fraudulent inducement claim. *See Delgado*, 295 So.3d at 1217. Petitioner has declined to file a motion for reconsideration or request leave to file a fourth amended complaint. (Pet. App. 842–43); *see also Armiger*, 48 So.3d at 870.

In any event, Petitioner's speculative spoliation concerns do not demonstrate irreparable harm. The Petition does not identify the evidence Regency will spoliate, explain why that evidence is material to the Lawsuit, or explain why Petitioner believes Regency will spoliate the evidence. And if the Lower Tribunal enters a final order dismissing Counts II–VI with prejudice, Petitioner can obtain an order from the Lower Tribunal requiring Regency to preserve relevant evidence. *See, e.g.*, *Swearingen*, 310 So.3d at 1085. Petitioner has made no effort to obtain a preservation order from the Lower Tribunal. (Pet. App. 842–43).

B. The Lower Tribunal did not depart from the essential requirements of law.

"It is well established that a district court should exercise its discretion to grant review only when the lower tribunal has violated a clearly established principle of law resulting in a miscarriage of justice." *Custer Med. Ctr.*, 62 So.3d at 1092 (internal quotation marks and citation omitted). "A circuit court's decision departs from the essential requirements of the law where the circuit court fails to afford procedural due process or fails to apply the correct law." *City of Miami*, 346 So.3d at 1212 (citation omitted).

For the same reasons discussed above in Section IV(A), *supra*, the Petition makes no effort to demonstrate a departure from the essential requirements of law with respect to the Lower Tribunal's decision to deny the Amended Second Motion for Leave *without prejudice* based on *legal conclusions* regarding Counts II–VI. The Lower Tribunal's decision did not violate Petitioner's procedural due process rights or fail to apply the correct law.

1. The Lower Tribunal did not violate Petitioner's due process rights.

For the reasons set forth in Section IV(A)(1), *supra*, Petitioner's due process rights were not violated during the Hearing or as a result of the entry of the Order. Contrary to Petitioner's contentions, the Lower Tribunal did not consider "matters not noticed to be heard" and did not dismiss Counts II–VI of the Second Amended Complaint or proposed Third Amended Complaint. Petition, p. 39. Moreover, Regency did not "present arguments relating to dismissal of the SAC and proposed Third Amended Complaint" or "present evidence in a manner akin to an evidentiary hearing or a motion for summary judgment hearing." *Id.* p. 40.

Accordingly, the Order did not depart from the essential requirements of law.

2. The Lower Tribunal did not improperly consider matters beyond the four-corners of the proposed pleading and did not make findings of fact in the Order.

The Lower Tribunal did not weigh evidence, resolve doubt in favor of Respondents, or make factual findings. Moreover, Petitioner incorrectly claims that the Lower Tribunal improperly considered the binding deposition testimony of Petitioner's corporate

representative to deny leave to amend with respect to Count VI of the proposed Third Amended Complaint for fraud in the inducement. Petition, pp. 40–1. As discussed in Section IV(A)(1), *supra*, Petitioner's assertion that *Bocchino* prevented the Lower Tribunal from considering anything beyond the Amended Second Motion for Leave or proposed Third Amended Complaint is simply wrong. The Lower Tribunal properly considered the binding deposition testimony of Petitioner's corporate representative to conclude that Count VI of the proposed Third Amended Complaint directly contradicted such testimony. *See, e.g., Grazette*, 280 So.3d at 1123 n.1 ("[A]n amendment would have been futile because the amendment would have directly contradicted Grazette's sworn testimony that the back pain was caused by a specific incident relating to luggage in 2011."); *Spatz*, 9 So.3d at 698–99 (Fla. 4th DCA 2009) (affirming the denial of a motion for leave to amend because "any amendment to the complaint to allege" a new version of events "would be futile because the plaintiff would be confronted with her own deposition testimony, wherein she plainly asserted" a contradictory version of events).

3. The Lower Tribunal applied the correct legal analysis in denying leave to amend Counts II–VI of the proposed Third Amended Complaint.

a. *The Lower Tribunal did not rely on prejudice to Respondents as a ground to deny leave to amend.*

The Lower Tribunal did not rely on prejudice to Respondents to deny leave to amend Counts II–VI and, therefore, Petitioner cannot demonstrate a departure of the essential requirements of law with respect to such prejudice.

b. *The Lower Tribunal correctly concluded that Petitioner abused its privilege to amend with respect to Counts III–VI.*

"Leave of court [to amend pleadings] shall be given freely *when justice so requires*." Fla. R. Civ. P. 1.190(a) (emphasis added). Rule 1.190(a) reflects a liberal amendment policy that "exists so that cases will be tried on their merits." *Morgan*, 200 So.3d at 795 (citing, among other authority, Rule 1.190(a)). The "justice" required by Rule 1.190(a), however, precludes proposed amended pleadings that lack a good faith basis in law or fact and which do not promote the resolution of cases "on their merits." Only well-pled pleadings with a good faith basis in fact and law do so. *See, e.g., Quality Roof*,

21 So.3d at 885 ("A proposed amendment is futile if it is insufficiently pled . . . or is insufficient as a matter of law . . . .") (internal quotes and citations omitted); *Grazette*, 280 So.3d at 1123 n.1 ("[A]n amendment would have been futile because the amendment would have directly contradicted Grazette's sworn testimony that the back pain was caused by a specific incident relating to luggage in 2011."); *Morgan*, 200 So.3d at 796 ("Courts have held that proposed amendments are futile when they are not pled with sufficient particularity . . . .") (citation omitted); § 57.105(1), Fla. Stat.

The Lower Tribunal denied leave to amend with respect to Counts III–VI in part because it found that Petitioner abused its privilege of amendment (Pet. App. 6–9). Petitioner knowingly sought to prosecute claims that are either (i) clearly barred as a matter of law (Count III for unjust enrichment by which Petitioner sought recovery of "CAM Fees" paid pursuant to the Declaration between the parties and Count VI for fraud in the inducement where the proposed pleading directly contradicted the binding testimony of Petitioner's corporate representative) or (ii) clearly barred as a matter of undisputed or binding fact (Count IV for tortious

interference against Namdar even though Namdar is indisputably not a stranger to the Declaration and Count V for unjust enrichment against Namdar even though the documents, including an exhibit attached to the proposed pleading, established that Namdar had not received the CAM Fees paid by Petitioner). It is an abuse of the privilege to amend to prosecute claims without a good faith basis in law or fact.

In an effort to legitimize Counts III–VI, Petitioner incorrectly claims that it "previously effectively stated a cause of action" because Respondents did not move to dismiss those same claims raised in the Second Amended Complaint. Petition, p. 46. Petitioner overlooks the fact that Respondents could challenge whether those counts stated a cause of action by motion for judgment on the pleadings or at the trial on the merits (Fla. R. Civ. P. 1.140(h)(2)) and, therefore, the decision to not seek dismissal of those counts does not mean those counts "effectively stated a cause of action."

c. *Counts II–VI of the proposed Third Amended Complaint were futile.*

Petitioner offers no argument or analysis to explain why the Lower Tribunal incorrectly concluded that Counts II–VI of the

proposed Third Amended Complaint did not state a cause of action and, therefore, were futile. Instead, Petitioner claims that the proposed pleading "set forth factual allegations to support the necessary elements of each cause of action." Petition, p. 47 (citing (App. 437–584)). Citing the nearly 150-page Amended Second Motion for Leave violates Rule 9.210(b)(5), Florida Rules of Appellate Procedure. *See Williams v. Winn-Dixie Stores, Inc.*, 548 So.2d 829, 829–30 (Fla. 1st DCA 1989) (citing 66 pages of testimony violated Rule 9.210(b)(5)).

Instead, Petitioner cites *Glen Garron v. Buchwald*, 210 So.3d 229 (Fla. 5th DCA 2017) for the proposition that "[u]nder Florida law, the futility analysis for motions for leave to amend is whether the proposed amendment of the operative pleading, *or any subsequent amended pleading*, can state a cause of action *against any of the named defendants*." Petition, p. 47 (emphasis added); *see also id.* at p. 32 n.10 (suggesting that the Lower Tribunal is required to grant leave to amend a complaint even if the complaint is insufficiently pled). *Glen Garron* has no such holding. Impact's assertion of the law is wrong. *See, e.g.*, *Quality Roof Servs.*, 21 So.3d at 885 ("A proposed amendment is futile if it is insufficiently

pled . . . or is insufficient as a matter of law . . . .") (internal quotes and citations omitted); *Grazette*, 280 So.3d at 1123 n.1. Petitioner's proposed standard would require courts to grant leave to amend clearly futile pleadings so long as a *later* amendment could *theoretically* state a claim. In any event, *Glen Garron* is inapposite because it involved a trial court entering an amended order (i) granting a motion for judgment on the pleadings that dismissed the entire case because the plaintiff failed to attach a promissory note to the complaint and (ii) denying plaintiff leave to amend the complaint to attach the promissory note. *Glen Garon*, 210 So.3d at 231–33, 235.

V. CONCLUSION.

Petitioner's claims of irreparable harm and a departure from the essential requirements of law are centered on (i) its erroneous belief that the Lower Tribunal was not authorized to consider anything other than the Second Amended Motion for Leave; (ii) its erroneous claim that the Lower Tribunal conducted an evidentiary hearing and dismissed the Second Amended Complaint, "functionally" dismissed Counts II–VI of the proposed Third

Amended Complaint, and "functionally" dismissed Namdar as a party; and (iii) its speculative and uncorroborated claim that Respondents will spoliate evidence.

Instead, the Lower Tribunal, consistent with the request in Respondents' Opposition filed 48-days before the Hearing, denied *without prejudice* leave to amend with respect to Counts II–VI of the proposed Third Amended Complaint based on legal conclusions and, with respect to Count VI for fraud in the inducement, the conclusion that binding deposition testimony of Petitioner's corporate representative could not be reconciled with the proposed pleading.

Having failed to demonstrate irreparable harm that cannot be corrected on plenary appeal or a departure from the essential requirements of law, Respondents respectfully request the Court deny the Petition for writ of certiorari quashing the Order.

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CERTIFICATE OF SERVICE

I certify that:

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(ii) on June 3, 2024, the filing was rejected by the Clerk's office due to "no bookmarks in appendix [filed simultaneously herewith]," and (iii) on June 3, 2024, this document was re-filed, as a result of the Clerk's rejection of the accompanying appendix, through the Florida Courts E-Filing Portal which will serve a copy by email to the counsel of record named above.

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CERTIFICATE OF COMPLIANCE

I certify that this answer brief complies with the font and formatting requirements of Florida Rule of Appellate Procedure 9.045 and the word count/page limit set forth in Florida Rule of Appellate Procedure 9.100(j).

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