# *BOARD OF TRUSTEES OF INTERNAL IMPROVEMENT TRUST FUND v. AMERICAN EDUCATIONAL ENTERPRISES*: THE DEVELOPMENT OF THE CERTIORARI STANDARD IN FLORIDA*

Monterey Campbell**
Kristie Hatcher-Bolin***

## *I. INTRODUCTION*

Florida courts have employed the same three-pronged standard for determining the propriety of certiorari relief, cultivated by the Florida Supreme Court and pruned by numerous district court decisions, since at least the middle of the last century.[1] Despite the use of the same formula, the standard of review for petitions for writs of certiorari has appeared to be in a state of flux over the years due to the inherently subjective nature of the elements that appellate courts are called on to apply when determining whether to grant such "extraordinary"[2] relief. This Article traces the history of the standard, including the Florida courts' early expansive take on the standard and the Florida Supreme Court's more recent efforts to curtail that expansion, culminating in its recent decision in *Board of Trustees of the*



** Monterey Campbell, Esquire. Of Counsel, Gray Robinson, P.A. LL.B., University of Florida, 1954; B.A., University of Florida, 1952. Chief Judge, Second District Court of Appeal, 1988–1990; Judge, Second District Court of Appeal, 1980–2001.

*** Kristie Hatcher-Bolin, Esquire. Of Counsel, Gray Robinson, P.A. J.D., Florida State University, 2001; B.A., Florida Southern College, 1996.

1. *Infra* pts. III–IV (providing the three-pronged standard and its application in Florida).

2. *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1098 (Fla. 1987), *superseded by statute on other grounds*, Fla. Stat. § 768.72 (1989).

*Internal Improvement Trust Fund v. American Educational Enterprises, LLC.*[3]

## *II. REVIEW OF NON-FINAL ORDERS IN FLORIDA*

Florida Rule of Appellate Procedure 9.130 provides limited grounds upon which a litigant may seek, by right of interlocutory appeal, review of trial courts' non-final orders. That leaves certiorari as the only *potential* avenue for review of non-final orders that do not fall within the categories set forth in Rule 9.130, which is sometimes a difficult needle to thread. As the Florida Supreme Court recently observed, "[a] non-final order for which no appeal is provided by [R]ule 9.130 may be reviewable by petition for a writ of certiorari, but only in very limited circumstances."[4] In the Committee Notes for the 1977 Amendment to Rule 9.130, the Florida Bar Appellate Rules Committee stated,

> The advisory committee was aware that the common law writ of certiorari is available at any time and did not intend to abolish that writ. However, because that writ 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.[5]

The standard for granting a writ of certiorari, an ostensibly discretionary relief, has evolved into a patently precise, three-part test in which the petitioner must demonstrate that the order of the trial court from which relief is sought (1) departed from the essential requirements of law and (2) the departure resulted in

3. 99 So. 3d 450 (Fla. 2012).

4. *Id.* at 454; *Gadsden Co. Times, Inc. v. Horne*, 382 So. 2d 347, 348 (Fla. 1st Dist. App. 1980) (noting that certiorari "is a remedy available in a restricted category of cases"); *see Garrison Ret. Home Corp. v. Hancock*, 484 So. 2d 1257, 1258 (Fla. 4th Dist. App. 1985) (taking pains to explain its exercise of discretion to entertain the petition for certiorari "so as not to create a precedent for reviewing orders denying motions for summary judgment" but denying the petition based on the existence of a dispute of material fact).

5. Fla. R. App. P. 9.130 advisory comm. nn. (providing notes for the 1977 amendment to the Rule).

material injury that is (3) irreparable or incapable of being remedied on post-judgment appeal.[6] But the courts have not precisely applied this three-part test. While the Florida courts reviewing petitions for certiorari have applied all three elements in one respect or another, the manner of their application has not been a model of clarity or consistency.

## *III. EARLY FLORIDA CASES*

As the Florida Supreme Court noted in a timeline it constructed of the certiorari standard's development in Florida,[7] the first Florida decision to address common law certiorari review, *Halliday v. Jacksonville & Alligator Plank Road Co.*,[8] loosely described such relief as being available "whenever an appropriate case may be presented[ ] or it shall become necessary for the attainment of justice."[9] Despite this loose language, the *Halliday* Court did explain, in dismissing the petition, that "[i]t is a sufficient answer to his application . . . that the statutes have provided an ample remedy for him, by granting to him an appeal to, or writ of certiorari from the Circuit Court."[10] Accordingly, even during the early history of certiorari review in Florida, the courts recognized the limited nature of such relief.

Subsequent courts continued to recognize the limitation imposed by the Court in *Halliday*. For example, in *Coslick v. Finney*[11] the Florida Supreme Court explained that "[t]he rule is well settled . . . that certiorari will not lie to an inferior court from this Court if the petitioner has an adequate remedy by appeal or writ of error."[12] Thus, the Court recognized at least part of the jurisdictional limitation that has been punctuated throughout recent

6. *E.g. Am. Educ. Enters., LLC*, 99 So. 3d at 454; *Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011); *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995); *Martin-Johnson, Inc.*, 509 So. 2d at 1099; *McDonald v. Johnson*, 83 So. 3d 889, 891 (Fla. 2d Dist. App. 2012); *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 648 (Fla. 2d Dist. App. 1995); *Rare Coin-It, Inc. v. I.J.E., Inc.*, 625 So. 2d 1277, 1279 (Fla. 3d Dist. App. 1993); *Smith v. St. Vil*, 765 So. 2d 60, 61 (Fla. 4th Dist. App. 2000); *Shoemaker v. State Farm Mut. Automobile Ins. Co.*, 890 So. 2d 1195, 1197 (Fla. 5th Dist. App. 2005).

7. *Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 525–529 (Fla. 1995).

8. 6 Fla. 304 (Fla. 1855).

9. *Id.* at 305.

10. *Id.* (typeface altered).

11. 140 So. 216 (Fla. 1932).

12. *Id.* at 217.

Florida district court and Supreme Court cases.[13] Nevertheless, for some time after these early decisions, Florida courts appeared to place less emphasis on the availability of post-judgment remedies and, instead, increasingly focused on whether the subject order departed from the essential requirements of law.[14] But, as noted by commentators, Florida courts loosely defined and applied that element.[15] In fact, in the first half of the 1900s, although many cases were before the Florida Supreme Court on petitions for certiorari, they were "treated exactly as if there for review by appeal," with the Court "consider[ing] matters beyond the scope of review on common law certiorari, that is, matters having nothing to do with either jurisdiction or regularity of procedure in the lower court."[16]

The inconsistent application of these elements, including the apparent placing of the non-jurisdictional cart before the jurisdictional horse, is simply a product of the courts' imprecise definition and application of the standard for certiorari relief over the years. For instance, in *Brooks v. Owens*,[17] the Florida Supreme Court explained that certiorari relief is available only

> [w]here it clearly appears that there is no full, adequate[,] and complete remedy by appeal after final judgment . . . [and] where the lower court acts without and in excess of its jurisdiction, or the order does not conform to essential require-

13. *Id.*; *see also Postal Telegraph-Cable Co. v. Broome*, 126 So. 149, 150–151 (Fla. 1930) (declining to issue a writ of certiorari because an applicable statute provided an "ample remedy" by granting the petitioner the right to appeal to the circuit court); *S.H. v. Dep't of Children & Fams.*, 769 So. 2d 452, 452 (Fla. 5th Dist. App. 2000) (observing in its denial of certiorari that the lower court provided adequate remedies to the petitioner).

14. *E.g. Brooks v. Owens*, 97 So. 2d 693, 695 (Fla. 1957).

15. *E.g.* William A. Haddad, *The Common Law Writ of Certiorari in Florida*, 29 U. Fla. L. Rev. 207, 220 (1977) (observing that the "generality" of the criteria that courts used to determine whether to grant certiorari and explaining that the type of errors "grave enough" to constitute a departure from the essential requirements of law could "only be determined by examining each case"); William H. Rogers & Louis Rhea Baxter, *Certiorari in Florida*, 4 U. Fla. L. Rev. 477, 502–503 (1951) (criticizing courts' certiorari-review consideration of involving irregularities that do not concern jurisdiction or procedure and noting that the Florida Supreme Court's holding in *American National Bank of Jacksonville v. Marks Lumber and Hardware Co.*, 45 So. 2d 336 (Fla. 1950), "if adhered to, [would] at long last result in getting back to the basic principles of common law certiorari").

16. Rogers & Baxter, *supra* n. 15, at 500–501, 500 n. 90 (cataloging cases from 1915 to 1948 in which the Florida Supreme Court quashed the order or judgment of the trial court and noting that cases in which the petition was denied were illustrative of "the aberration").

17. 97 So. 2d 693.

> ments of law and may cause material injury throughout subsequent proceedings for which the remedy by appeal will be inadequate.[18]

By stating that such certiorari relief is contingent upon demonstrating the irreparable nature of the remedy, the *Brooks* Court appeared to set forth this element as a condition precedent; but its application of this element did not seem to match its clear statement of the standard. Specifically, after providing the basic framework for certiorari relief and discussing the order at issue, the Court first stated it was convinced that if the defendant were forced "to wait for remedy by appeal[,] irreparable harm would have already resulted."[19] Nevertheless, the Court went on to explain "that if there was a violation of essential requirements of controlling laws, the reasonable result would be an injury to the defendant not subject to remedy by appeal."[20] By this explanation, if the trial court violates an essential requirement of law—the condition precedent—then material, irreparable injury follows by necessity.

Years later, the Third District Court of Appeal, citing both *Brooks* and *Kilgore v. Bird*,[21] among others, similarly explained the application of certiorari relief as follows:

> Where it clearly appears that there is no full, adequate[,] and complete remedy by appeal after judgment, then the appellate court will consider granting the writ—such as where a court acts without or in excess of its jurisdiction, does not conform to the essential requirements of the law, *or* enters such order as may cause material and irreparable injury in the subsequent proceedings in the cause.[22]

The Third District essentially split the two jurisdictional inquiries into: (1) whether the injury is material; and (2) whether it is capable of being remedied post-judgment or is irreparable. The court then made the materiality inquiry an alternative require-

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18. *Id.* at 695. The Court quashed an order that concluded that liability limits were not proper matters to subject to discovery. *Id.* at 700.

19. *Id.* at 695–696.

20. *Id.* at 696 (citing *Kilgore v. Bird*, 6 So. 2d 541, 544–545 (Fla. 1942)).

21. 6 So. 2d 541.

22. *Collier v. McKesson*, 121 So. 2d 673, 673–674 (Fla. 3d Dist. App. 1960) (emphasis added).

ment for certiorari review after a finding that the petitioner is without an adequate remedy post-appeal. The Third District granted the petition, finding that requiring "production of an admitted work product of a party at pretrial would destroy the possible protection afforded such party," but did not further discuss the application of the certiorari standard to the facts before it.[23] The *Collier* court used inconsistent and consequently confusing language. If the reviewing court finds that the petitioner has "no full, adequate[,] and complete remedy by appeal after judgment"[24] on a material issue, why must it again consider as alternatives whether the order fails to conform to the essential requirements of law *or* whether the order causes irreparable injury? Hasn't the court already reached and completed that threshold inquiry regarding irreparable harm? Doesn't the absence of a "full, adequate[,] and complete remedy" equate to irreparable harm?[25]

## *IV. CERTIORARI REVIEW IN THE 1960s, 1970s, AND 1980s*

Despite inconsistent precedent, as noted by the Florida Supreme Court in *Haines City Community Development v. Heggs*,[26] during the 1960s, "a more consistent practice seemed to emerge of 'restricting the scope of review so that the reality of the extent of review on certiorari was to a large degree commensurate with the rhetoric of limited review.'"[27] Perhaps the Florida Supreme Court's opinion in *Bartow Growers Processing Corp. v. Florida Growers Processing Cooperative*[28] may be viewed as an early impetus for the Florida courts' renewed efforts to rein in what had seemingly become an expanding basis for appellate review.[29] There, the Court dismissed a petition for writ of certiorari to review an order that dismissed a complaint against all but

23. *Id.* at 675.

24. *Id.* at 673.

25. The standard's grammatical-structure problem has not gone without comment. *See e.g. Parkway Bank*, 658 So. 2d at 648 (noting that "[w]hile this traditional [three-part] test is correct, the grammar of the test places the description of the appellate court's standard of review on the merits before the two threshold tests used to determine jurisdiction").

26. 658 So. 2d at 526–527.

27. *Id.* at 527 (quoting Haddad, *supra* n. 15, at 221).

28. 71 So. 2d 165 (Fla. 1954).

29. *Id.* at 165–166.

one defendant.[30] Without discussing whether the appeal would have been timely filed if the petition could be treated as an appeal, the Court explained that the "order sought to be reviewed was a final order reviewable only by appeal."[31] The Court further commented that while the 1951 version of Florida Statutes, Section 59.45 "provide[d] that an *appeal* improvidently taken may 'be regarded and acted on as a petition for certiorari duly presented,'" the opposite is not true.[32] A court could not treat an improperly filed petition for certiorari as a notice of appeal "where appeal is the proper remedy," and therefore the Court concluded it had "no power to treat the petition for certiorari[ ] filed in this cause as an appeal."[33]

The Court's decision in *Bartow Growers* and its progeny appeared to take a step in the direction of limiting or even eliminating appellate review of improvidently filed petitions for writs of certiorari. Even so, Florida Constitution, Article V, Section 2(a)'s adoption in 1972 appeared to have stymied efforts to limit "appeal" by certiorari in certain circumstances—at least temporarily. As William Haddad noted,[34] the Court relied upon this newly adopted constitutional provision in its opinion in *State v. Johnson*,[35] where the Court quashed a motion to dismiss the Third District Court of Appeal's certiorari petition because notice of appeal was the proper means of reviewing the speedy-trial order.[36] Citing Article V, Section 2(a), the Florida Supreme Court explained that even though the State misconceived its remedy by filing the petition, the constitutional provision's very purpose "is to [e]nsure that improper or misconceived remedies which have been sought will not justify dismissal of causes or reviews where a proper remedy or review procedure is available, provided the relief sought was timely brought."[37]

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30. *Id.*

31. *Id.* at 165.

32. *Id.* at 165–166 (emphasis added) (quoting Fla. Stat. § 59.45 (1951)).

33. *Id.* at 166; *see Norman v. Pinellas Co.*, 250 So. 2d 279, 280 (Fla. 2d Dist. App. 1971) (holding that "an improvident petition for certiorari may not be treated as an appeal"); *Knight v. Edwards*, 276 So. 2d 499 (Fla. 4th Dist. App. 1973) (explaining that where the petitioner misconceived his appellate remedy and the proper remedy was an interlocutory appeal under the appellate rules, the court was "not permitted to transpose and treat his petition as an appeal").

34. Haddad, *supra* n. 15, at 218.

35. 306 So. 2d 102, 103 (Fla. 1974).

36. *Id.*

37. *Id.*

Despite the adoption of Article V, Section 2(a) and the Florida Supreme Court's opinion in *Johnson*, the Court did not expand review by certiorari, nor would one expect as much based on that case's particular facts. In *Johnson*, the State simply chose the wrong remedy when it petitioned for writ of certiorari instead of filing a notice of appeal.[38] Importantly, however, it did so in a timely manner and thereby saved its right to appellate review of the final order.[39] Thus, in accepting review of a timely filed but erroneously titled petition for certiorari, the Court did nothing to begin expanding the basis for certiorari review.

In fact, consistent with the trend begun in the 1960s, other courts also tightened the reins on review by petition for certiorari. In *Wright v. Sterling Drugs, Inc.*,[40] the Second District Court of Appeal addressed a petition seeking review of an order setting aside a final judgment upon default.[41] In reviewing the petition, the Second District engaged in wordsmithery again when interpreting the certiorari standard, explaining that such review

> lies only in exceptional cases such as those where the lower court acts without or in excess of its jurisdiction *or* where an interlocutory order does not conform to essential requirements of law *and* may reasonably cause material injury throughout the subsequent proceedings for which the remedy by appeal would be inadequate.[42]

The Second District denied the petition, noting that incurring expenses of "a trial on the merits has been held not to constitute material or irreparable injury."[43]

The Fourth District Court of Appeal came to a similar conclusion in *Leibman v. Sportatorium, Inc.*,[44] in which it denied a petition for writ of certiorari seeking review of an order setting aside a default.[45] The Fourth District, however, was somewhat more direct in explaining the standard, noting that even if the

38. *See id.* (explaining that the State would have received appellate review of the speedy trial order if it had filed a notice of appeal instead of a petition for writ of certiorari).
39. *Id.*
40. 287 So. 2d 376 (Fla. 2d Dist. App. 1973).
41. *Id.* at 376.
42. *Id.* (emphasis added).
43. *Id.* at 376–377.
44. 374 So. 2d 1124 (Fla. 4th Dist. App. 1979).
45. *Id.* at 1124.

trial court had departed from the essential requirements of law in vacating the default, "there [appeared to be] no injury which [could not] be remedied by appeal after final judgment."[46] Like the Second District in *Wright*, the Fourth District explained in *Leibman* that the burden of going "through a needless trial" simply did not rise to the level of a "material injury of an irreparable nature."[47] The Fourth District thus highlighted that the very first hurdle that the petitioner must surpass involves demonstrating a material injury that post-judgment appeal cannot remedy.[48] The courts seem to have had no reluctance in consistently holding that injury to one's wallet caused by proceeding with a "needless trial" does not, under most, if not all, circumstances, rise to the level of material, irreparable injury.

In numerous opinions in the 1980s and 1990s, the Florida Supreme Court continued to sculpt a certiorari standard that once, in the first part of the century, had been nearly indistinct in its application from review by appeal. For example, in *Martin-Johnson, Inc. v. Savage*,[49] the Court addressed a petition for certiorari seeking for the Court to review a denied motion to strike a claim for punitive damages.[50] There, the First District Court of Appeal declined review by certiorari, concluding that the petitioner had an adequate remedy by appealing the forthcoming final judgment.[51] Finding that decision in conflict with the Fifth District Court of Appeal's opinions in *Sunrise Olds-Toyota, Inc. v. Monroe*[52] and *Jaimot v. Media Leasing Corp.*,[53] the Florida Supreme Court approved the First District's decision in *Martin-Johnson*, agreeing that certiorari was inappropriate if a petitioner had an adequate remedy at law by appeal.[54] Thus, the Court disapproved the Fifth District's decisions in *Sunrise Olds-Toyota* and *Jaimot*.[55]

In so concluding, the Florida Supreme Court expressly emphasized that "common law certiorari [wa]s an extraordinary

46. *Id.*
47. *Id.*
48. *Id.*
49. 509 So. 2d 1097.
50. *Id.* at 1098.
51. *Id.*
52. 476 So. 2d 240 (Fla. 5th Dist. App. 1985).
53. 457 So. 2d 529 (Fla. 5th Dist. App. 1984).
54. *Martin-Johnson, Inc.*, 509 So. 2d at 1098.
55. *Id.* at 1101.

remedy and should not be used to circumvent the interlocutory appeal rule which authorize[d] appeal from only a few types of non-final orders."[56] The Court continued, bluntly stating that "[g]enerally, all other appellate review [was] postponed until the matter [was] concluded in the trial court."[57] Apparently deeming even that explicit statement insufficiently blunt, the Court quoted the Advisory Committee Note to the Florida Appellate Rules' 1977 revision, which observed that "[i]t [was] extremely rare that erroneous interlocutory rulings [could] be corrected by resort to common law certiorari."[58]

Having sufficiently indicated its view of the incredibly rare character of certiorari relief, the Court turned to the case before it and explained that with respect to the denied motion to strike the punitive damages claim, the harm that could result from discovery of a litigant's finances was simply not the type of "irreparable harm" certiorari was intended to remedy.[59] Yet, in addressing that element, the Court explained that "[i]n certiorari proceedings, an order may be quashed only for certain fundamental errors."[60] Despite using terms generally associated with the "departure from the essential requirements of law" requirement, the Court, relying on *Kilgore*, explained that there was a "distinction between discovery orders that merely violate rules of evidence and may be corrected by a reversal[ ] and those that violate fundamental rights causing harm that cannot be remedied on appeal."[61] According to the Court, permitting interlocutory appeals by certiorari to the facts before it "would result in unwarranted harm to [the Court's] system of procedure," and the reasoning used in the case "could as easily be applied to the erroneous denial of a motion for summary judgment or a motion to join or dismiss a party."[62] Emphasizing that "[l]itigation of a non-issue will always be inconvenient and entail considerable expense of time and money for all parties in the case," the Court noted

56. *Id.* at 1098.
57. *Id.*
58. *Id.* at 1098–1099.
59. *Id.* at 1099.
60. *Id.*
61. *Id.*
62. *Id.* at 1100.

that the authorities were "clear that this type of harm [was] not sufficient to permit certiorari review."[63]

## *V. TIGHTENING THE STANDARD IN THE 1990s*

Apparently, despite years of pronouncements of the proper standard for certiorari review, the district courts continued, at least by the Florida Supreme Court's explanation, to improperly apply the standard for certiorari relief.[64] Accordingly, the Court continued to hone the certiorari standard into the last decade of the century, and in 1995, it issued, in quick succession, at least three opinions that further sharpened the standard.[65] For example, in *Allstate Insurance Co. v. Langston*,[66] the Court addressed Allstate's petition seeking relief from the trial court's compelled discovery of materials that Allstate claimed were irrelevant and protected by privilege.[67] The Fourth District Court of Appeal concluded that "irrelevancy alone was not a basis for granting certiorari absent a showing that disclosure could reasonably cause material injury of an irreparable nature."[68] Nevertheless, the Fourth District granted certiorari in part, compelled Allstate to produce certain items that it had claimed as work product for the trial court's in camera inspection, and ordered Allstate to produce documents pertaining to other document requests.[69] While the Fourth District held that certain materials were irrelevant, it ordered their production based on Allstate's inability to establish irreparable harm.[70]

On further review, the Supreme Court found no conflict between the Fourth District's conclusion, which held that requiring production of irrelevant discovery alone is an insufficient basis for certiorari review, and the holdings of *Martin-Johnson*, *Brooks*, and *Kilgore*, which stated that non-final orders are not

63. *Id.*

64. *Jones v. State*, 477 So. 2d 566, 568 (Fla. 1985) (citing numerous district court cases where certiorari was denied because the correct criteria for determining certiorari was not applied).

65. *E.g. Heggs*, 658 So. 2d 523; *Globe Newsp. Co. v. King*, 658 So. 2d 518 (Fla. 1995); *Allstate Ins. Co. v. Langston*, 655 So. 2d 91 (Fla. 1995).

66. 655 So. 2d 91.

67. *Id.* at 93.

68. *Id.*

69. *Id.*

70. *Id.* at 94.

subject to certiorari review absent a departure from the essential requirements of law that causes material injury incapable of remedy on appeal.[71] Still, the Supreme Court quashed the Fourth District's opinion "to the extent that it permits discovery even when it has been affirmatively established that such discovery is neither relevant nor will lead to the discovery of relevant information."[72]

A few months later, the Supreme Court addressed the standard for certiorari review when a district court reviews a circuit court's appellate order concerning a county court's order.[73] Addressing a different standard, the *Heggs* Court provided a helpful timeline of certiorari review in Florida, particularly with respect to the common requirement that the order under review departed from the essential requirements of law.[74] Notably, the Court stated that its decisions "mandate[d] a narrow standard of review and emphasize[d] that certiorari should not be utilized to provide 'a second appeal.'"[75]

The same day the Court released its opinion in *Heggs*, it announced its opinion in *Globe Newspaper Co. v. King*,[76] which addressed whether an appellate court may grant certiorari relief to review a trial court order permitting a plaintiff to amend its complaint to assert a claim for punitive damages.[77] Recognizing that Florida Statutes, Section 768.72's enactment after the Court's decision in *Martin-Johnson* "create[d] a substantive legal right not to be subject to a punitive damages claim and ensuing financial worth discovery until the trial court ma[de] a determination that there [wa]s a reasonable evidentiary basis for recovery of punitive damages," the Court agreed certiorari was appropriate where the petitioner demonstrated that "the procedures of [S]ection 768.72 ha[d] not been followed."[78] The Court would not, however, go a step further to hold that certiorari was proper to review the sufficiency of the evidence that the trial

71. *Id.* at 94–95 (citing *Martin-Johnson, Inc*, 509 So. 2d at 1099).
72. *Id.* at 95.
73. *Heggs*, 658 So. 2d at 524–525.
74. *Id.* at 525–530.
75. *Id.* at 529.
76. 658 So. 2d 518.
77. *Id.* at 519.
78. *Id.* at 519–520.

court considered in such a determination.[79] Citing *Martin-Johnson*, the Court explained that certiorari was not "available to review a trial judge's determination of the sufficiency of the ultimate facts pleading a claim for punitive damages."[80]

In addressing the certiorari standard, the Court explained that the harm that may follow from allowing a punitive damages claim to proceed "do[es] not rise to the level of material harm that permits certiorari review," and reiterated that financial harm rarely, if ever, constitutes material harm or harm that cannot be remedied on appeal post-judgment.[81] Rather, the material harm that would justify certiorari review would be denial of the requisite procedures; namely, the provision of an evidentiary hearing afforded to litigants under Florida Statutes, Section 768.72.[82] According to the Court, to grant certiorari relief for any alleged harm beyond the failure to follow the procedures set forth in Florida Statutes, Section 768.72 would do "harm to our system of procedure in allowing substantive certiorari review at [that] stage of a trial . . . as . . . stated in *Martin-Johnson*."[83]

The Supreme Court continued to take up certiorari decisions certified as being in conflict with opinions of other district courts of appeal into the late 1990s and early 2000s. For instance, in *Jaye v. Royal Saxon, Inc.*,[84] the Court reviewed a decision of the Fourth District Court of Appeal that dismissed a petition for certiorari to review an order striking a demand for jury trial.[85] Notably, while it cited Article V, Section 4(b)(4) of the Florida Constitution as vesting district courts with discretionary jurisdiction to issue writs of certiorari and Florida Rule of Appellate Procedure 9.030(b)(2)(A) as "authoriz[ing] district courts to use the writ of certiorari to review non[-]final orders . . . not directly appealable under Florida Rule of Appellate Procedure 9.130," the Court reiterated that such review "is an extraordinary remedy and should not be used to circumvent the interlocutory appeal rule[,] which authorizes appeal from only a few types of non-final

79. *Id.* at 520.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. 720 So. 2d 214 (Fla. 1998).
85. *Id.* at 214.

orders."[86] The Court thereby reminded litigants that while district courts are vested with such discretion, their exercise of such discretion is incredibly limited.

The Court dismissed any argument that an order striking a demand for jury trial causes material harm incapable of being remedied on appeal, supporting limited certiorari review and noting "that piecemeal review of non[-]final trial court orders will impede the orderly administration of justice and serve only to delay and harass."[87] Despite the petitioner's assertion and the Court's apparent agreement that the case concerned a fundamental right to a jury trial, the Court concluded that any violation of such right could be corrected on post-judgment appeal and therefore approved the Fourth District's dismissal of the petition.[88] Among the "irreparable harm" arguments the Supreme Court rejected was the petitioner's assertion that a direct appeal could not remedy "the time, effort, and expense of trying a case twice."[89] The Court simply reasoned that "the nonjury trial may result in a decision by the trial judge that will cause the petitioner to conclude that there is no reason to seek appellate review" without addressing the potential that the petitioner may conclude just the opposite and may not be able to finance an appeal or subsequent trial if successful on appeal.[90] The Court thereby avoided directly addressing the potential wasted time, expense, and effort in conducting a second trial that might have been easily avoided by disposing of the jury trial issue early in the case before trial. Based on its prior decisions, however, the wasted expense of conducting a second trial would not, under any circumstances, constitute irreparable harm.

The Court again cited the policy of avoiding "piecemeal review of non[-]final trial court orders" to justify limited certiorari review in quashing an order of the Second District Court of Appeal that concluded it had certiorari jurisdiction to review a non-final order denying summary judgment on a defense of work-

86. *Id.* at 214–215 (quoting *Martin-Johnson, Inc.*, 509 So. 2d at 1098, in its assertion that certiorari review "should not be used to circumvent" interlocutory appeal).

87. *Id.* at 215.

88. *Id.*

89. *Id.*

90. *Id.*

er's compensation immunity.[91] Because the subject order was a "simple denial of summary judgment[, it] did not depart from the essential requirements of the law," nor did it constitute material harm incapable of being remedied on appeal because any determination that respondents were not entitled to immunity could be addressed on appeal after trial.[92] Again, because any harm could be remedied by a second trial after appeal, the Court concluded that there was no demonstration of irreparable harm, notwithstanding the considerable expense a second trial would entail.[93]

## *VI. THE SUPREME COURT'S OPINION IN* AMERICAN EDUCATIONAL ENTERPRISES, LLC

The Florida Supreme Court's tendency toward increasingly limited review has continued to the extent that it could be termed a "trend," given that the limited review has continued to this day and was most recently on display in the Court's opinion in *Board of Trustees of the Internal Improvement Trust Fund v. American Educational Enterprises, LLC*.[94] There, the Supreme Court addressed whether overbreadth may form the proper basis for certiorari review of a discovery order.[95] Originally, the trial court granted a motion to compel production of financial documents, ordering the respondent, American Education Enterprises (AEE), to produce its own financial documents as well as those of a related entity.[96] AEE petitioned for a writ of certiorari, requesting that the Third District Court of Appeal quash the trial court's order compelling production.[97] The Third District granted the petition, explaining that the trial court's order was overbroad because it compelled disclosure of corporate financial documents outside the relevant time frame, required disclosure of corporate financial documents not relevant to the disputed issues, and required discovery of corporate financial records far removed from

91. *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 822–823 (Fla. 2004) (quoting *Jaye*, 720 So. 2d at 215).
92. *Id.* at 822.
93. *Id.*
94. 99 So. 3d 450.
95. *Id.* at 454.
96. *Id.* at 453.
97. *Id.*

the time of the purchase of the property at issue in the litigation.[98]

The Board, however, petitioned the Florida Supreme Court on the grounds that the Third District's reliance on overbreadth failed to satisfy the standard for certiorari relief and was in express and direct conflict with other decisions.[99] While the Supreme Court was specifically tasked with determining the propriety of certiorari review of a discovery order, it took time to reiterate that such relief "is an *extraordinary remedy* and should not be used to circumvent the interlocutory appeal rule[,] which authorizes appeal from only a few types of non-final orders."[100] Citing its opinion in *Reeves*, the Court emphasized that the limitations on certiorari review are premised upon "the rationale that 'piecemeal review of non[-]final trial court orders will impede the orderly administration of justice and serve only to delay and harass.'"[101] Most importantly, however, the Court reiterated that demonstrating the existence of material harm incapable of being remedied on direct appeal is a condition precedent to invoking a district court's certiorari jurisdiction.[102]

While certainly not announcing new law, the Supreme Court removed all doubts—if there were any—that the very first hurdle a party must clear when seeking certiorari relief from a non-final order not appealable under Rule 9.130 is demonstrating the existence of "material injury of an irreparable nature."[103] Failure to do so will require that the petition for writ of certiorari be denied.[104] Harkening back to its decision in *Martin-Johnson, Inc.*, the Court reiterated its unwillingness to extend the list of non-final orders reviewable by interlocutory appeal, noting the numerous cases explaining that certiorari relief is "an 'extremely rare' remedy that will be provided in 'very few cases.'"[105]

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98. *Am. Educ. Enters., LLC v. Bd. of Trustees of the Internal Improvement Trust Fund*, 45 So. 3d 941, 944–946 (Fla. 3d Dist. App. 2010).

99. Petr.'s Br. on Jxn., *Bd. of Trustees of the Internal Improvement Trust Fund v. Am. Educ. Enters., LLC*, 2010 WL 5397384 at **4–10 (Fla. Dec. 2010) (No. SC10-2251); *Am. Educ. Enters., LLC*, 99 So. 3d at 453–454.

100. *Am. Educ. Enters., LLC*, 99 So. 3d at 454 (emphasis in original) (quoting *Martin-Johnson, Inc.*, 509 So. 2d at 1098) (internal quotation marks omitted).

101. *Id.* (quoting *Reeves*, 889 So. 2d at 822) (citation omitted).

102. *Id.* (quoting *Jaye*, 720 So. 2d at 215).

103. *Id.* at 455.

104. *Id.*

105. *Id.* (quoting *Martin-Johnson, Inc.*, 509 So. 2d at 1098–1099).

In reaching its decision, the Florida Supreme Court cited *Topp Telecom, Inc. v. Atkins*,[106] parenthetically noting that the case determined "[a]n erroneous order compelling discovery when the cost and effort to do so is burdensome but not destructive is simply not 'sufficiently egregious or fundamental to merit the extra review and safeguard provided by certiorari.'"[107] By citing *Topp Telecom, Inc.*, the Court appeared to lend credence to a theory of irreparable harm not previously approved by that Court or most of the district courts of appeal. The Fourth District's opinion in *Topp Telecom*, though often characterized as merely dicta, has been described as creating a "financial ruin" test in certiorari proceedings challenging orders permitting burdensome discovery.[108]

The "financial ruin" test, purportedly created by the Fourth District in *Topp Telecom, Inc.*, has not been without criticism. Most notably, in a concurring opinion in *Communities Finance Co. v. Bjork*,[109] Judge Klein criticized that portion of the *Topp Telecom, Inc.* opinion as mere dicta and agreed with Judge Stone's concurring opinion in *Topp Telecom, Inc.*, adding that "the financial ruin dicta in *Topp* is contrary to the opinion of the Florida Supreme Court in *Elkins v. Syken*."[110]

In *Elkins*, the Supreme Court approved a district court order that quashed orders requiring extensive production of files and financial documents from the litigants' expert witness.[111] In so concluding, the Supreme Court commented that "[p]retrial discovery was implemented . . . to eliminate the element of surprise, to encourage the settlement of cases, [and] to avoid costly litigation," among other things.[112] It was never intended "to make the discovery process so expensive that it could effectively deny access to information and witnesses or force parties to resolve

106. 763 So. 2d 1197, 1200 (Fla. 4th Dist. App. 2000).

107. *Am. Educ. Enters., LLC*, 99 So. 3d at 455.

108. *See Cmmw. Land Title Ins. Co. v. Higgins*, 975 So. 2d 1169, 1178 (Fla. 1st Dist. App. 2008) (recognizing the "financial ruin" test set forth in *Topp Telecom, Inc.*, but finding that even if it was the correct standard to apply in certiorari challenges to orders permitting discovery, it was "not the correct standard to apply at the precertification stage of a putative class action").

109. 987 So. 2d 231 (Fla. 4th Dist. App. 2008).

110. *Id.* at 232 (Klein, J., concurring) (typeface altered) (referring to *Elkins v. Syken*, 672 So. 2d 517, 522 (Fla. 1996)).

111. 672 So. 2d at 520, 522. The district court concluded that the production was too burdensome. *Id.* at 522.

112. *Id.*

their disputes unjustly."[113] The Court in *Elkins* also notably commented that "[t]he right to a jury trial in the constitution means nothing if the public has no faith in the process and if the cost and expense are so great that access is basically denied to all but the few who can afford it."[114]

Notwithstanding the Supreme Court's comments in *Elkins*, Judge Klein indicated that in the case then before the Fourth District, *Communities Finance Co.*, the discovery requested was not unduly burdensome or overbroad "under any standard[ ] because the trial court was careful to limit it," and it was "for that reason, and not for the reason that the discovery fails to meet the 'financial ruin' standard," that Judge Klein agreed that the petition should be dismissed.[115]

Other courts, however, have not been so critical of *Topp Telecom, Inc.* In *Allstate Insurance Co. v. Hodges*,[116] the Second District Court of Appeal cited *Topp Telecom, Inc.* for the proposition that "[m]ost economic concerns regarding the cost of litigation do not involve the essential requirements of the law or a violation of a clearly established principle of law resulting in a miscarriage of justice."[117] By implication, of course, some economic concerns do rise to the level of effectively denying some litigants access to the courts.

In this respect, the Supreme Court's comments in *Elkins* are actually quite notable and do not appear to be in direct contrast with the dicta in *Topp Telecom, Inc.* Though the *Elkins* opinion certainly does not construct or voice any approval for the application of a "financial ruin" test, it aptly comments on the "cost" to the public's faith in the legitimacy of the "system" where access to the system is virtually limited to those who can afford to pay the high cost of admission.[118] That "cost of admission" no doubt includes the cost to "fix" mistakes in the trial court, in terms of time and money, whether by final appeal, interlocutory appeal, or certiorari. The specter that sometimes rises in practitioners' and parties' minds is whether the criteria for granting discretionary certiorari relief are continually narrowed to benefit the judiciary

113. *Id.*
114. *Id.*
115. 987 So. 2d at 232 (Klein, J., concurring).
116. 855 So. 2d 636 (Fla. 2d Dist. App. 2003).
117. *Id.* at 639–640.
118. *Elkins*, 672 So. 2d at 522.

and the orderly administration of justice at the expense of speedily and economically deciding the issues that move the case to a conclusion.

Both the Fourth District in *Topp Telecom, Inc.* and *Florida Department of Agriculture and Consumer Services v. Cox*,[119] and the Second District in *Hodges* concluded that generally such financial burden, as long as it is not "destructive," is not "sufficiently egregious or fundamental to merit the extra review and safeguard provided by certiorari" because, among other things, "the party imposed upon may later seek reallocation of the costs incurred for the discovery as the prevailing party."[120]

What both *Hodges* and *Cox*, and similar opinions, fail to consider is that there is no guarantee that a litigant will actually recover expenses incurred in responding to such discovery or in conducting a second trial after the first has been overturned based on a pretrial order that could have been addressed before the parties spent their money, time, and efforts on the first trial. In this respect, "putting off 'til tomorrow what we could do today" results in more than the litigants expending needless time, effort, and money. It also wastes judicial resources. Because the issue is so subjective, also left for another day is whether there are any criteria universally applicable by which the determination of what financial burden may be "destructive" so as to constitute material, irreparable harm. What is sauce for the goose may not necessarily be sauce for the gander, particularly in times of general economic distress.

Perhaps the Supreme Court's opinion in *American Educational Enterprises* does not set a new standard for certiorari relief, and perhaps it even further constrains such review. Still, the Court's citation to *Topp Telecom, Inc.*—especially its choice of parenthetical[121]—demonstrates that perhaps waste of financial resources, to the extent such expenditures may be "destructive"

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119. *Fla. Dep't of Agric. & Consumer Servs. v. Cox*, 947 So. 2d 561 (Fla. 4th Dist. App. 2006).

120. *Hodges*, 855 So. 2d at 641 (internal quotation marks omitted) (citing *Topp Telecom, Inc.*, 763 So. 2d at 1200–1201 n. 5); *see Cox*, 947 So. 2d at 565 (finding that petitioner did not demonstrate "irreparable injury that cannot be corrected on final appeal" where the order at issue "simply requires the Department to advance the costs of providing notice to class members and expressly provides that such costs are 'subject to taxation following entry of final judgment'").

121. *Supra* n. 107 and accompanying text.

(whatever that term means), may in fact satisfy the element of material, irreparable harm required to obtain certiorari review, despite the Court's evident reiteration of the limits of the standard and the availability of such relief.