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INTRODUCTION

FLORIDA APPELLATE LAW: CERTIORARI REVIEW OF NON-FINAL ORDERS

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I. A NEW APPROACH TO CERTIORARI

The Florida courts' ongoing attempt to devise a predictable, yet adaptable approach to common law certiorari has been disappointing. As Judge Chris Altenbernd and Jamie Marcario remark in the lead article of this symposium issue of the *Stetson Law Review*, the ambiguity of certiorari standards deprives reviewing courts of much guidance.[1]

One problem these authors identify is the caselaw's fondness for rhetorical flight. After all, how often do we expect competent trial judges to engage in acts of "judicial tyranny" or to tolerate true "miscarriages of justice"?[2] Yet apparently they do this from time to time, as shown by the occasional granting of certiorari petitions. And what are "essential requirements of the law" that distinguish them from nonessential legal requirements?[3] If Judge Altenbernd and Ms. Marcario are right, judges must fend for

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1. Chris W. Altenbernd & Jamie Moore Marcario, *Certiorari Review of Non-Final Orders: Does One Size Really Fit All?* 42 Stetson L. Rev. 381, 386–387, 398–399 (2013).

2. *Id.* at 387.

3. *Id.* at 387–388.

themselves when applying these tropes and so must "rely on their own unstated rules and policies."[4]

Concerns like these, these authors argue, call for a "functional restatement" of review standards for certiorari.[5] Their choice of the term "restatement" seems apt. Contemporary restatements often embody elements of the functional approach advocated by Judge Altenbernd and Ms. Marcario. Restatements self-consciously elaborate on the policies underlying the legal standards restated.[6] Likewise, restatements attempt to develop guidelines that are context specific and thus fulfill Judge Altenbernd and Ms. Marcario's call for discrete approaches to the varying issues presented in certiorari petitions (e.g., denial of a jury trial, denial of discovery).[7] Finally, restatements are typically a blend of existing practices—the "restated" part—and prescriptions for how issues not fully developed in the courts might be resolved.[8] Judge Altenbernd and Ms. Marcario appear to recognize that, over time, a body of caselaw will develop to provide sure answers for recurring issues presented in certiorari review; and until that caselaw does develop, the courts can apply the policies the authors outline to make a sensible choice.[9]

II. EXPLORING POSSIBLE IMPLICATIONS OF THE NEW PROPOSAL

Restatements, of course, are developed by organized bodies (sections of the American Law Institute) through a formal process involving written proposals, commentary, debate, revision, and final vote.[10] A process akin to that is used when the Florida

4. *Id.* at 388.

5. The authors address the review by state district courts of appeal of the non-final rulings of circuit courts. They point out that different policies will govern "second-tier review" of final lower court orders. *Id.* at 389 n. 35.

6. For example, this is characteristic of the *Restatement (Second) of Conflict of Laws*' approach to choice-of-law issues. *See e.g.* Michael S. Finch, *Choice-of-Law Problems in Florida Courts: A Retrospective on the Restatement (Second)*, 24 Stetson L. Rev. 653, 658–660 (1995) (discussing the *Restatement (Second)*'s statement of policies that should guide the resolution of all choice-of-law issues).

7. Altenbernd & Marcario, *supra* n. 1, at 382, 392–401.

8. *See generally* E. Allan Farnsworth, *Ingredients in the Redaction of the* Restatement (Second) of Contracts, 81 Colum. L. Rev. 1 (1981) (discussing the processes by which the *Restatement (Second) of Contracts* was drafted).

9. Altenbernd & Marcario, *supra* n. 1, at 396–397.

10. *See* Farnsworth, *supra* n. 8, at 3–5 (describing the process by which the *Restatement of Contracts* was revised).

Supreme Court considers proposed amendments to the appellate rules. That process is used when the Court considers authorizing new forms of interlocutory review under Florida Rule of Appellate Procedure 9.130, thus precluding the need to resort to certiorari review.[11] In *Certiorari Redefined: Would the "Functional Restatement" Function?*, Anthony Russo, Ezequiel Lugo, and Jared Krukar argue that this rulemaking process is the better forum in which to implement the policies developed by Judge Altenbernd and Ms. Marcario.[12] This process, they point out, is "deliberative, transparent, and fair."[13] Further, it establishes a uniform approach to certiorari review throughout the state and reduces the "useless labor" lawyers and judges must undertake when review is governed by the development of certiorari standards through adjudication.[14] As for those occasions where certiorari review is the only thing available, Mr. Russo, Mr. Lugo, and Mr. Krukar argue that its ambiguity actually serves a purpose—providing judges greater discretion in granting certiorari review and, at the same time, ensuring that such review remains rare.[15]

Celene Humphries makes a similar point in *The Proposal to Restate the Certiorari Standard to Ensure Review of Non-Final Orders That Implicate the Right to Due Process Would Change the Historical Scope and Use of the Certiorari Writ*.[16] She contends that implementation of Judge Altenbernd and Ms. Marcario's proposal would lead to de facto expansion of Rule 1.930 by essentially making some forms of certiorari review automatic.[17] She uses as an example the review of orders denying due process rights like the right to jury trial.[18] If the result of using Judge Altenbernd and Ms. Marcario's functional test is to confer automatic review authority for some issues, Ms. Humphries argues that the test is better suited for implementation by the Supreme

11. Anthony Russo, Ezequiel Lugo & Jared Krukar, *Certiorari Redefined: Would the "Functional Restatement" Function?* 42 Stetson L. Rev. 403 (2013).

12. *Id.* at 433–442.

13. *Id.* at 440.

14. *Id.* at 441.

15. *Id.* at 436, 439.

16. Celene H. Humphries, *The Proposal to Restate the Certiorari Standard to Ensure Review of Non-Final Orders That Implicate the Right to Due Process Would Change the Historical Scope and Use of the Certiorari Writ*, 42 Stetson L. Rev. 447 (2013).

17. *Id.* at 455.

18. *Id.* at 453–455.

Court when it formally amends Rule 9.130 to add new forms of interlocutory appeal.[19]

Two other articles in the symposium argue for expanded review of non-final orders in very specific settings—and illustrate differing views about the relative value of interlocutory review under Rule 9.130 and certiorari review. In *Why Non-Final GARA Denials Deserve Certiorari Review: "When Your Money Is Gone, That Is Permanent, Irreparable Damage to You"*, Petra Justice and Erica Healey make a strong case for interlocutory review of orders denying general aviation manufacturers their federal defense to product liability suits. The General Aviation Revitalization Act (GARA) is a federal "statute of repose" intended to spare general aviation manufacturers the time and expense of litigating older claims.[20] And when trial courts wrongfully deny that defense, the harm is irreparable on appeal because one main purpose of the federal defense is to protect the manufacturers from having to litigate.[21] The authors thus argue that certiorari review is especially justified when law creates what is essentially suit immunity for a defendant.[22]

In *No More Lip Service: Why Florida Appellate Rules Should Allow for Non-Final Appeal of Orders Granting Disqualification of a Party's Attorney*, Mark Miller makes a strong case for interlocutory review of orders disqualifying a party's lawyer.[23] But unlike Ms. Justice and Ms. Healey, Mr. Miller argues that certiorari review is too limited to adequately address the merits of the issue on review.[24] Apparently recognizing this, some courts have creatively expanded the scope of certiorari review to achieve case justice—leading to decisions that may recite the exacting standards for certiorari review but that evade them in application.[25] This highlights an important point in the dispute about whether to address discrete issues through certiorari review or review

19. *Id.* at 455.

20. Petra L. Justice & Erica T. Healey, *Why Non-Final GARA Denials Deserve Certiorari Review: "When Your Money Is Gone, That Is Permanent, Irreparable Damage to You"*, 42 Stetson L. Rev. 457, 457–458 (2013).

21. *Id.* at 458.

22. *Id.* at 487–488.

23. Mark Miller, *No More Lip Service: Why Florida Appellate Rules Should Allow for Non-Final Appeal of Orders Granting Disqualification of a Party's Attorney*, 42 Stetson L. Rev. 489, 489 (2013).

24. *Id.* at 489–490, 493.

25. *Id.* at 493.

under Rule 9.130; namely, that the *scope* of certiorari review may be as much a problem as its limited availability.

III. OTHER INTERESTING PERSPECTIVES ON CERTIORARI REVIEW

Three other articles offer valuable perspectives on certiorari review. Two articles provide useful overviews of the historical development of certiorari standards in Florida courts. In Board of Trustees of Internal Improvement Trust Fund v. American Educational Enterprises*: The Development of the Certiorari Standard in Florida*, Judge Monterey Campbell and Kristie Hatcher-Bolin emphasize the rarity of certiorari review and also discuss a lingering problem in assessing whether a petitioner can show a threat of irreparable injury unless interlocutory review is granted—when does the financial burden of litigating a case become so great that a delay in reviewing the trial court's error until entry of the final judgment threatens a party with financial ruin?[26] In *A Historical Comparison of Certiorari Review Standards in Florida's Appellate Courts*, Robert Telfer traces the parallel development of certiorari standards and Florida's appellate courts.[27]

In *A Catch-22 of Cert Review: How Florida's "Clearly Established Law" Requirement Stifles Caselaw Development, and How Sunbursting Can Help the Sunshine State*, Hosea Horneman, Steven Blickensderfer, and Trevor Jones offer a fascinating examination of an unintended implication of the certiorari requirement that petitioners show that the lower court violated "clearly established law."[28] In some situations, this requirement retards the development of the law and sound legal precedent by insulating bad legal precedent from further review. The main example given by the authors occurs where a lower court dutifully follows its obligation under the *Pardo* principle and conforms to the prece-

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26. Monterey Campbell & Kristie Hatcher-Bolin, Board of Trustees of Internal Improvement Trust Fund v. American Educational Enterprises*: The Development of the Certiorari Standard in Florida*, 42 Stetson L. Rev. 505, 521–523 (2013).

27. Robert J. Telfer III, *A Historical Comparison of Certiorari Review Standards in Florida's Appellate Courts*, 42 Stetson L. Rev. 525, 526 (2013).

28. Hosea M. Horneman, Steven M. Blickensderfer & Trevor C. Jones, *A Catch-22 of Cert Review: How Florida's "Clearly Established Law" Requirement Stifles Caselaw Development, and How Sunbursting Can Help the Sunshine State*, 42 Stetson L. Rev. 545, 545–546, 549–552 (2013).

dent from some other district—precedent that appears mistaken.[29] When the lower court has complied with *Pardo* and followed this mistaken, extra-district precedent, it has complied with the "clearly established" principle in *Pardo* but denied the aggrieved party a foundation for seeking certiorari review.[30]

The authors offer several ways out of this dilemma. One solution calls for "sunbursting," or granting courts the power to essentially review and reverse the mistaken precedent while applying the new precedent prospectively to future litigants only.[31] The authors analogize to a related practice in Section 1983 litigation, where federal courts may resolve legal issues even though the resolution won't affect the individual litigants before the court.[32] While it's unclear whether the Florida Supreme Court would endorse such a practice or whether litigants would find it useful in seeking to correct lower court errors, the proposal is worth exploring.

IV. SECOND-TIER CERTIORARI REVIEW

The final piece in this symposium addresses a distinct form of certiorari review not addressed by earlier articles—review of local governmental zoning decisions through circuit court review and "second-tier" certiorari review in the district courts. In *Another Review of Petitions for Writ of Certiorari in Zoning Cases: Property Rights, Police Power, and the Right to Appeal*, Sylvia Walbolt and Annette Lang highlight serious deficiencies in this review, including: (1) limits on the circuit courts' review power that can insulate agency fact-finding from meaningful review; (2) the district courts' lack of power to review the sufficiency of evidence supporting local zoning decisions; and (3) the district courts' lack of power to review misinterpretations and misapplications of law.[33] One particularly troubling concern is the current absence of any requirement that local agencies issue findings of

29. *Id.* at 550–552.
30. *Id.* at 551.
31. *Id.* at 559–566.
32. *Id.* at 563–564 (discussing qualified immunity standards under Section 1983).
33. Sylvia H. Walbolt & Annette Marie Lang, *Another Review of Petitions for Writ of Certiorari in Zoning Cases: Property Rights, Police Power, and the Right to Appeal*, 42 Stetson L. Rev. 575, 587–598 (2013).

fact.[34] To the contrary, the authors suggest that current review standards may actually encourage agencies to refrain from fact-finding so as to better insulate their decisions from review.[35]

Ms. Walbolt and Ms. Lang explore several possible solutions to the problems they raise. While some involve expanding certiorari review by developing functional standards like those advocated by Judge Altenbernd and Ms. Marcario, the scope of the problems suggests that only a change in administrative review statutes or formal appellate rules may suffice.[36]

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In conclusion, our thanks to the authors who took the time to explore these important, if sometimes technical, issues in appellate review. And we hope that all readers find something in this symposium to enhance their understanding of this challenging form of judicial review.

34. *Id.* at 591–595.
35. *Id.* at 593–594.
36. *Id.* at 610–613.