CERTIORARI REDEFINED: WOULD THE "FUNCTIONAL RESTATEMENT" FUNCTION?*

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I. INTRODUCTION

Some pretrial rulings can impose unbearable pressures on a litigant, change the course of a case, and cause lasting harm. Sometimes, your client just cannot wait until the end of a case to appeal. Imagine that the trial court has just issued a non-final order adverse to your client that you think will likely be reversed on appeal. You research the possibility of interlocutory review to provide the studied and reasoned advice your client expects. You quickly realize that, unfortunately, your chances of obtaining interlocutory review are slim to none.[1]

While every litigant in Florida has a constitutional right to an appeal from a final order,[2] no such right exists as to a non-final order.[3] Florida courts discourage the piecemeal review of non-final orders,[4] so a litigant seeking interlocutory review of

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1. The Florida Rules of Appellate Procedure were drafted to limit interlocutory review of non-final orders based on the theory that such review "waste[s] court resources and needlessly delays final judgment." *Travelers Ins. Co. v. Bruns*, 443 So. 2d 959, 961 (Fla. 1984).

2. *In re Amends. to the Fla. R. of App. P.*, 696 So. 2d 1103, 1104 (Fla. 1996).

3. *See* Philip J. Padovano, *Florida Appellate Practice* § 4:4, 97 (2011 ed., Thompson Reuters 2010) (explaining the limited nature of review of non-final orders).

4. *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 822 (Fla. 2004); *Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214, 215 (Fla. 1998).

non-final orders has very limited options in Florida state courts.[5] Florida Rule of Appellate Procedure 9.130 allows district courts to hear interlocutory appeals from non-final orders in civil cases that fall into one of ten categories.[6] And the district courts have discretion to review non-final orders that fall outside Rule 9.130 under their certiorari jurisdiction,[7] which ebbs and flows in response to changes to Rule 9.130.[8] Otherwise, certiorari jurisdiction is not limited to any specific kind of non-final orders and, theoretically, applies to most non-final orders.[9]

However, the district courts' certiorari jurisdiction to review non-final orders is constrained by key limitations that do not apply to appeals under Rule 9.130.[10] Common law certiorari is considered an extraordinary remedy, described as a "safety net" that covers the space between final appeals and the other writs.[11] Certiorari should not be used to circumvent Rule 9.130, so certiorari jurisdiction is available only in limited circumstances.[12] For these reasons, a litigant seeking certiorari review must show that the non-final order (1) constitutes a clear "departure from the essential requirements of the law," (2) resulting in material injury that (3) cannot be remedied on appeal from a final order.[13] This three-prong test is deceptive in that it appears to be simple, yet it has confounded judges and practitioners for decades.[14]

5. *See Heritage Paper Co. v. Farah*, 440 So. 2d 389, 390 (Fla. 1st Dist. App. 1983) (explaining that "procedures for taking interlocutory appeals . . . provide for review of only a limited group of non-final orders 'based upon the necessity or desirability of expeditious review'").

6. *Bd. of Trustees of the Internal Improvement Trust Fund v. Am. Educ. Enters., LLC*, 99 So. 3d 450, 454 (Fla. 2012); Padovano, *supra* n. 3, at 97–98.

7. Fla. R. App. P. 9.030(b)(2)(A); *Bd. of Trustees*, 99 So. 3d at 454.

8. William A. Haddad, *The Common Law Writ of Certiorari in Florida*, 29 U. Fla. L. Rev. 207, 215 (1977); Tracy E. Leduc, *Certiorari in the Florida District Courts of Appeal*, 33 Stetson L. Rev. 107, 124 (2003).

9. Padovano, *supra* n. 3, at 102.

10. *Id.* at 102–103.

11. *Broward Co. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001).

12. *Reeves*, 889 So. 2d at 822.

13. *Nader v. Fla. Dep't of Hwy. Safety & Motor Vehs.*, 87 So. 3d 712, 721 (Fla. 2012); *Reeves*, 889 So. 2d at 822.

14. *See* Haddad, *supra* n. 8, at 228 (noting that the departure from the essential requirements of the law requirement is vague and creates a "large grey area"); William H. Rogers & Lewis Rhea Baxter, *Certiorari in Florida*, 4 U. Fla. L. Rev. 477, 507 (1951) (complaining that "the practitioner will have to guess for himself [or herself] his [or her] chances of getting an interlocutory order reviewed"); *cf. Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 898 (Fla. 2003) (Wells, J., dissenting) (criticizing the majority opinion as making second-tier certiorari review "standardless and subject to the particular views of different appellate court panels as to which decisions meet an amorphous criterion");

The frustration with this three-prong test has prompted a recent call to replace the current test with a functional restatement of the standard for certiorari review.[15] The proponents of this functional restatement argue that the current three-prong test is "inherently unpredictable" given its subjective nature.[16] In place of the current three-prong test, they propose a functional test that examines (1) the nature and degree of the alleged error and (2) the justification for the appellate court to exercise its discretionary jurisdiction to immediately review the error.[17] The proponents of the functional restatement aim for many narrow, functional tests that apply to each different kind of non-final order reviewable under the district courts' certiorari jurisdiction.[18]

As this Article shows, however, practitioners' attempts to convince Florida's appellate courts to institute a functional restatement of the standard for certiorari review may ultimately be futile.[19] Part II of this Article describes the current subjective standard for certiorari review and the recently proposed functional restatement of the standard for certiorari review. Part III analyzes and compares the current subjective standard and the

Leduc, *supra* n. 8, at 121 (concluding that "practitioners can expect that the decision of whether to grant second-appeal certiorari review is not governed by a particular standard, but rather, is subject to the whims of the different district courts of appeal").

15. *See generally* Chris W. Altenbernd & Jamie Marcario, *Certiorari Review of Nonfinal Orders: Does One Size Really Fit All? Part I*, 86 Fla. B.J. 21 (Feb. 2012) (proposing the functional restatement) [hereinafter Altenbernd & Marcario I]; Chris W. Altenbernd & Jamie Marcario, *Certiorari Review of Nonfinal Orders: Trying On a Functional Certiorari Wardrobe, Part II*, 86 Fla. B.J. 14 (Mar. 2012) (applying the functional restatement to orders denying trial by jury and orders denying discovery) [hereinafter Altenbernd & Marcario II].

16. Altenbernd & Marcario I, *supra* n. 15, at 21.

17. *Id.* at 23.

18. *Id.* at 21; *e.g.* Altenbernd & Marcario II, *supra* n. 15, at 14–18 (describing different standards for certiorari review of orders denying trial by jury and orders denying discovery).

19. The scope of this Article is limited to analyzing Florida district courts' certiorari jurisdiction to review non-final orders in civil cases. This Article does not address issues associated with second-tier certiorari at the district court level and past and present certiorari review in the Supreme Court of the United States, the Florida Supreme Court, and Florida's circuit courts. *See e.g. Nader*, 87 So. 3d at 721–723 (distinguishing the different kinds of common law certiorari proceedings); Haddad, *supra* n. 8, at 209–210 (describing the Florida Supreme Court's prior ability to review orders by certiorari); Leduc, *supra* n. 8, at 114–121 (discussing second-tier certiorari in the district courts); Padovano, *supra* n. 3, at 118, 729 (explaining the circuit court's certiorari jurisdiction); Rogers & Baxter, *supra* n. 14, at 479–480 (summarizing certiorari review of Florida decisions by the Supreme Court of the United States).

proposed functional restatement in the context of three kinds of non-final orders: (1) orders denying motions to enforce settlement agreements; (2) orders denying motions to dismiss; and (3) orders allowing punitive damages claims. Part IV advocates for the use of the functional restatement as a litmus test to identify non-final orders that should be reviewed by interlocutory appeal under Rule 9.130. Part V concludes that, while a functional restatement of the standard for certiorari review may prove to be unworkable, expansion of the categories of orders reviewable under Rule 9.130 would result in the consistency and certainty that the functional restatement aims to create.

II. COMPETING STANDARDS FOR THE COMMON LAW WRIT OF CERTIORARI

A. The Birth of the Current Standard

Between 1885 and 1956, the Florida Supreme Court had constitutional power to issue writs of common law certiorari.[20] The Court initially limited certiorari review to consider only final judgments of lower appellate courts.[21] The Court eventually recognized a few exceptions to the general rule that only final judgments were reviewable by certiorari[22] and expanded the scope of certiorari jurisdiction to encompass review of any appellate order:

(1) rendered by a lower court lacking jurisdiction;[23]

20. Haddad, *supra* n. 8, at 209–210. The common law writ of certiorari is much older, dating back to the English common law, when certiorari was an original writ of chancery ordering a lower tribunal to return the record of a pending case so that the higher court could review the proceedings. *Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 525 (Fla. 1995). The Florida Supreme Court recognized its certiorari jurisdiction as early as 1855. *Id.* (citing *Halliday v. Jacksonville & Alligator Plank Rd. Co.*, 6 Fla. 304, 305 (1855)).

21. Rogers & Baxter, *supra* n. 14, at 502; *e.g. Davis v. First Nat'l Bank of Miami*, 16 So. 2d 46, 47 (Fla. 1943) (denying certiorari because the order under review was not a final judgment); *First Nat'l Bank of Gainesville v. Gibbs*, 82 So. 618, 620 (Fla. 1919) (stating that "[o]rdinarily the writ of certiorari may not be used to quash a judgment of an inferior court, unless such judgment is a final adjudication of the cause"). Today, *Davis* and *First National Bank* would be considered cases involving second-tier certiorari because the Supreme Court was reviewing appellate decisions of circuit courts sitting in their appellate capacities. *See* Leduc, *supra* n. 8, at 114–121 (discussing second-tier certiorari in the district courts).

22. Rogers & Baxter, *supra* n. 14, at 505.

23. *Seaboard Air Line Ry. v. Ray*, 42 So. 714, 716 (Fla. 1906).

(2) considered a "palpable miscarriage of justice";[24]

(3) resulting in a "substantial injury to the legal rights of the petitioner";[25] or

(4) that was "illegal or essentially irregular and violative of established principles of law . . . [resulting] in substantial injury to the legal rights of the petitioner, and for which no other adequate remedy is afforded by law."[26]

In the 1940s, the Court went further and began reviewing non-final orders of lower trial courts under its certiorari jurisdiction in *Kilgore v. Bird*.[27] *Kilgore* is the first decision where the Supreme Court used certiorari to review a non-final order of a trial court.[28] The *Kilgore* case involved a dispute over interrogatories that the defendant considered illegal.[29] After the trial court ordered the defendant to answer the interrogatories, the defendant filed a petition for writ of prohibition[30] in the Supreme Court.[31] The Supreme Court ruled that prohibition was not the proper remedy,[32] but certiorari was available to review whether the non-final order "require[d] an unauthorized proceeding or a departure from the essential requirements of the law and reasonably may cause substantial injury for which no other adequate remedy is afforded by the law."[33] Thus, the Supreme Court granted the defendant leave to amend his petition to seek a writ of common law certiorari.[34]

24. *Am. Ry. Express Co. v. Weatherford*, 93 So. 740, 742 (Fla. 1922).

25. *Miami Poultry & Egg Co. v. City Ice & Fuel Co.*, 172 So. 82, 84 (Fla. 1936).

26. *Florio v. Colquitt Hardware Co.*, 33 So. 2d 722, 725–726 (Fla. 1948) (quoting *Janet Realty Corp. v. Hoffman's Inc.*, 17 So. 2d 114, 117 (Fla. 1943)).

27. 6 So. 2d 541, 545 (Fla. 1942).

28. *See id.* at 547 (Brown, C.J., dissenting) (stating, "I do not recall any case where [certiorari review of a trial court's non-final order] has been done").

29. *Id.* at 543–544, 546.

30. "Prohibition is an extraordinary writ by which a superior court may prevent an inferior court or tribunal, over which it has appellate and supervisory jurisdiction, from acting outside its jurisdiction." *Mandico v. Taos Constr., Inc.*, 605 So. 2d 850, 853 (Fla. 1992).

31. *Kilgore*, 6 So. 2d at 546 (Brown, C.J., dissenting).

32. *Id.* at 542 (majority).

33. *Id.* at 545. The majority decision in *Kilgore* drew a strong rebuke from Chief Justice Brown, who insisted that "[t]he overwhelming weight of authority in this and other jurisdictions is to the effect that the modified common[ ]law writ of certiorari cannot be used to review interlocutory matters, but only to review final adjudications." *Id.* at 550 (Brown, C.J., dissenting).

34. *Id.* at 546 (majority).

Kilgore's expansion of the Court's certiorari jurisdiction soon led to the actual quashal of non-final orders. In *Atlantic Coast Line Railway Co. v. Allen*,[35] the Supreme Court quashed a trial court's order granting a subpoena *duces tecum* that sought materials protected by work product immunity.[36] In *Miami Transit Co. v. Hurns*,[37] the Court also quashed a discovery order that compelled production of materials protected by work product immunity.[38] Also, in *Kauffman v. King*,[39] the Court quashed an order denying a motion to dismiss on the ground of improper venue and explained that

> [c]ommon[ ]law certiorari is a discretionary writ and ordinarily will not be issued by this [C]ourt to review interlocutory orders in a suit at law, since such errors as are made may be corrected on appeal. It is only in exceptional cases, such as those where the lower court acts without or in excess of jurisdiction, or where the interlocutory order does not conform to the essential requirements of law and may reasonably cause material injury throughout the subsequent proceedings for which the remedy by appeal will be inadequate, that this [C]ourt will exercise its discretionary power to issue the writ.[40]

Thus, the current certiorari standard had emerged by the time the Court decided *Kauffman* in 1956.

The year 1956 is significant for another reason: substantial revisions to the Florida Constitution went into effect that year—the district courts were created.[41] The Supreme Court lost its general power to issue writs of common law certiorari.[42] Only the district courts and the circuit courts had certiorari jurisdiction to review orders from lower courts.[43] For this reason, the district courts have been largely responsible for refining the current standard and determining which non-final orders may be

35. 40 So. 2d 115 (Fla. 1949).
36. *Id.* at 116.
37. 46 So. 2d 390 (Fla. 1950).
38. *Id.* at 391.
39. 89 So. 2d 24, 25–26 (Fla. 1956).
40. *Id.* at 26. Interestingly, the *Kauffman* Court based its ruling on the injustice of requiring the petitioner "to incur the expense and be subjected to the inconvenience of defending this suit" in the wrong venue. *Id.*
41. Haddad, *supra* n. 8, at 210.
42. *Id.*
43. *Id.*

reviewed by certiorari.[44] The Supreme Court has been relegated to resolving conflicts between the district courts.[45]

B. The Current Three-Prong Test

The district courts were quickly confronted with proceedings to review non-final orders pursuant to their certiorari jurisdiction.[46] The district courts held that they had certiorari jurisdiction, under *Kilgore* and its progeny, to review non-final orders.[47] The district courts refined the standard for certiorari review, which was developed by the Supreme Court in *Kilgore* and *Kauffman*, into the current three-prong standard requiring that a petitioner establish "(1) a departure from the essential requirements of the law[ ] (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on postjudgment appeal."[48] These three prongs actually describe a two-step process, detailed below, where the district court first determines whether it has certiorari jurisdiction before deciding the merits of the petition.[49]

1. The Jurisdictional Prongs

The caselaw now requires that a district court first consider the last two prongs of the three-prong standard, which set the

44. *See e.g. Snyder v. Douglas*, 647 So. 2d 275, 276, 278 (Fla. 2d Dist. App. 1994) (ruling that non-final orders denying stay authorized by statute may be reviewed by certiorari); *King v. Thompson & McKinnon, Auchincloss Kohlmeyer, Inc.*, 352 So. 2d 1235, 1235 (Fla. 4th Dist. App. 1977) (granting certiorari and quashing an order compelling arbitration).

45. *See e.g. Bd. of Trustees*, 99 So. 3d 450, 457 (resolving conflict regarding certiorari review of non-final orders compelling production of overbroad discovery); *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1101 (Fla. 1987) (resolving conflict regarding certiorari review of non-final orders denying motions to strike a punitive damages claim), *superseded by statute*, Fla. Stat. § 768.72 (1989).

46. *See e.g. Boucher v. Pure Oil Co.*, 101 So. 2d 408, 411 (Fla. 1st Dist. App. 1957) (granting certiorari and quashing a non-final discovery order); *City of Sarasota v. Colbert*, 97 So. 2d 872, 874 (Fla. 2d Dist. App. 1957) (granting certiorari and quashing a non-final order allowing discovery of alleged work product).

47. *Boucher*, 101 So. 2d at 411; *City of Sarasota*, 97 So. 2d at 874.

48. *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 648 (Fla. 2d Dist. App. 1995); *AVCO Corp. v. Neff*, 30 So. 3d 597, 601 (Fla. 1st Dist. App. 2010).

49. Leduc, *supra* n. 8, at 108. This two-step process is a vestige of the pre-1939 procedure that required the petitioner to file separate briefs on jurisdiction and the merits. *Id.*; Haddad, *supra* n. 8, at 208.

jurisdictional threshold for certiorari review.[50] A party seeking certiorari review must demonstrate that he or she will suffer irreparable harm that cannot be corrected through some other means.[51] The district courts will dismiss any petition that fails these jurisdictional prongs.[52]

The different kinds of non-final orders that will cause irreparable harm escape any easy classification.[53] No comprehensive taxonomy of such orders exists.[54] At best, the caselaw reveals nothing more than certain patterns useful in identifying non-final orders that would satisfy the jurisdictional prongs.[55] For example, the courts have found that the following kinds of orders will cause irreparable harm warranting certiorari review:

- orders compelling disclosure of privileged information;[56]
- orders granting or denying motions to disqualify counsel;[57]
- orders granting a motion for jury interview;[58]

50. *Bd. of Trustees*, 99 So. 3d at 455; *Parkway Bank*, 658 So. 2d at 649; *see Spry v. Prof. Employer Plans*, 985 So. 2d 1187, 1188 (Fla. 1st Dist. App. 2008) (explaining that "[i]rreparable harm is a condition precedent to invoking certiorari jurisdiction, and so should be considered first").

51. *Bd. of Trustees*, 99 So. 3d at 457.

52. *E.g. Skipper v. Cooksey*, 808 So. 2d 279, 279 (Fla. 1st Dist. App. 2002); *Wal-Mart Stores, Inc. v. Strachan*, 82 So. 3d 1052, 1054 (Fla. 4th Dist. App. 2011).

53. Valeria Hendricks, *Writ of Certiorari in Florida*, in *Florida Appellate Practice* § 11.1, § 11.7 (8th ed., The Fla. Bar 2012); Padovano, *supra* n. 3, at 368. This problem has plagued practitioners for decades. *See* Rogers & Baxter, *supra* n. 14, at 507 (stating that "[t]he cases in which interlocutory orders at law have been held reviewable on certiorari are not classifiable generically").

54. Although several sources provide brief descriptions of orders reviewable by certiorari, none claims to be exhaustive. *E.g.* Matthew J. Conigliaro, *The Continuing Story of Certiorari*, 83 Fla. B.J. 38, 38–42 (Dec. 2009); Hendricks, *supra* n. 53, at 11-8 to 11-21; Padovano, *supra* n. 3, at 729–734; Sylvia H. Walbolt & Susan L. Landy, *Common Law Certiorari—Where an Appeal Will Not Provide an Adequate Remedy*, 70 Fla. B.J. 56, 56–58 (Oct. 1996).

55. Padovano, *supra* n. 3, at 368.

56. *E.g. McDonald's Rests. of Fla., Inc. v. Doe*, 87 So. 3d 791, 794 (Fla. 2d Dist. App. 2012) (allowing certiorari review of an order compelling the production of trade secrets); *State Farm Fla. Ins. Co. v. Kramer*, 41 So. 3d 313, 314–315 (Fla. 4th Dist. App. 2010) (granting certiorari to review assertions of work-product immunity and attorney-client privilege); *Hill v. State*, 846 So. 2d 1208, 1211–1212 (Fla. 5th Dist. App. 2003) (granting certiorari to review an order that allegedly violated psychotherapist-patient privilege).

57. *E.g. Walker v. River City Logistics Inc.*, 14 So. 3d 1122, 1123 (Fla. 1st Dist. App. 2009); *AlliedSignal Recovery Trust v. AlliedSignal, Inc.*, 934 So. 2d 675, 677 (Fla. 2d Dist. App. 2006); *Event Firm, LLC v. Augustin*, 985 So. 2d 1174, 1175–1176 (Fla. 3d Dist. App. 2008).

58. *Pesci v. Maistrellis*, 672 So. 2d 583, 585 (Fla. 2d Dist. App. 1996).

- orders compelling production of documents by a non-party;[59] and
- orders compelling genetic testing for a determination of paternity.[60]

By contrast, certiorari is not available if the non-final order merely exposes the petitioner to the waste of time, money, and effort in trying a case twice.[61] Interlocutory review itself will result in additional expense and delay.[62] The party seeking interlocutory review may ultimately obtain a favorable verdict, mooting the issue, or the order may appear less harmful or erroneous in light of a fully developed record.[63] Certiorari review of such non-final orders would flood the district courts with certiorari proceedings and interrupt cases in the trial courts.[64] Further, if the alleged harm can be remedied through a final appeal, a non-final appeal under Rule 9.130, or a different writ, then courts do not consider the harm irreparable.[65]

2. The Substantive Prong

If the non-final order under review satisfies the jurisdictional prongs, then the district court has discretion to decide whether the order "departs from the essential requirements of the law."[66]

59. *Rowe v. Rodriguez–Schmidt*, 89 So. 3d 1101, 1103 (Fla. 2d Dist. App. 2012).

60. *E.g. Dep't of Revenue v. Long*, 937 So. 2d 1235, 1237 (Fla. 1st Dist. App. 2006); *J.S. v. S.M.M.*, 67 So. 3d 1231, 1232–1233 (Fla. 2d Dist. App. 2011).

61. *Jaye*, 720 So. 2d at 214–215; *see also Whiteside v. Johnson*, 351 So. 2d 759, 760 (Fla. 2d Dist. App. 1977) (asserting that "[c]ertiorari is not designed to serve as a writ of expediency and should not be granted merely to relieve the petitioners seeking the writ from the expense and inconvenience of a trial"); *Mariner Health Care v. Griffith*, 898 So. 2d 982, 984 (Fla. 5th Dist. App. 2005) (stating that "the inconvenience and expense of litigation after an allegedly incorrect interlocutory ruling does not constitute the kind of material harm or irreparable injury for which certiorari review is available"); *contra Kauffman*, 89 So. 2d at 26 (granting certiorari because "it is palpably unjust" to require the petitioner to incur the expense, inconvenience, and time involved in retrying the case after a final appeal).

62. *Parkway Bank*, 658 So. 2d at 650.

63. *Martin-Johnson, Inc.*, 509 So. 2d at 1100.

64. *Id.*; *see also Jaye*, 720 So. 2d at 215 (stating that "piecemeal review of non[-]final trial court orders will impede the orderly administration of justice and serve only to delay and harass").

65. Leduc, *supra* n. 8, at 108; *see Bd. of Trustees*, 99 So. 3d at 455 (explaining that harm is not considered irreparable where it can be remedied on appeal).

66. *Parkway Bank*, 658 So. 2d at 649.

This phrase, described as "amorphous"[67] and "subjective,"[68] applies equally when district courts review non-final orders and circuit court appellate decisions.[69] Not surprisingly, this phrase has generated confusion among practitioners and judges, partly because of conflicting language in various Florida Supreme Court decisions.[70]

One of the earliest conflicts concerned whether certiorari review was limited to correct procedural errors. Although one line of Supreme Court opinions limited certiorari review to correct only procedural errors,[71] another line of cases ignored this limitation, and the scope of certiorari review was often as broad as the scope of review on plenary appeal.[72] The Florida Supreme Court, in *Combs v. State*,[73] resolved the conflict by holding that

> the phrase "departure from the essential requirements of law" should not be narrowly construed so as to apply only to violations [that] effectively deny appellate review or [that] pertain to the regularity of procedure. In granting writs of common[ ]law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been a violation of a

67. Walbolt & Landy, *supra* n. 54, at 56.

68. Padovano, *supra* n. 3, at 362.

69. *Id.* at 367 n. 2; *see Byrd v. S. Prestressed Concrete, Inc.*, 928 So. 2d 455, 457 (Fla. 1st Dist. App. 2006) (applying the definition developed in the second-tier certiorari context to the review of a protective order); *Jimenez v. Rateni*, 967 So. 2d 1075, 1077 (Fla. 2d Dist. App. 2007) (applying the definition developed in the second-tier context to the review of an order denying a motion for the assignment of an appellate case).

70. *Combs v. State*, 436 So. 2d 93, 95 (Fla. 1983).

71. *Id.* at 95 (quoting *Am. Nat'l Bank of Jacksonville v. Marks Lumber & Hardware Co.*, 45 So. 2d 336, 337 (Fla. 1950)). Practitioners understood certiorari review to "comprehend[ ] only (1) jurisdiction below[;] and (2) the regularity of the procedure followed below. It does not afford complete review of the litigation nor does it extend to the correctness of rulings of inferior courts on substantive law." Rogers & Baxter, *supra* n. 14, at 493.

72. *Heggs*, 658 So. 2d at 526; *Combs*, 436 So. 2d at 95. Practitioners complained that "the scope of substantive review by certiorari has often, for all practical purposes, been fully as broad as review by appeal in many of the cases, despite protestations by the Court to the contrary." Rogers & Baxter, *supra* n. 14, at 498.

73. 436 So. 2d 93.

> clearly established principle of law resulting in a miscarriage of justice.[74]

The problem then became figuring out what is "a clearly established principle of law."[75] The Second District Court of Appeal held that a lower court could not violate a clearly established principle of law where no Florida case squarely addressed the issue.[76] The Florida Supreme Court, in *Allstate Insurance Co. v. Kaklamanos*,[77] rejected this interpretation as too narrow because "'clearly established law' can derive from a variety of legal sources, including [caselaw], rules of court, statutes, and constitutional law."[78] Thus, certiorari review may be grounded in the application or interpretation of a relevant constitutional provision, statute, procedural rule, or caselaw.[79]

In the *Kaklamanos* opinion, Justice Wells noted that allowing certiorari review based on the application or interpretation of the law was inconsistent with *Ivey v. Allstate Insurance Co*.[80] In *Ivey*, the Supreme Court quashed a decision from the Third District Court of Appeal that "merely disagreed with the circuit court's interpretation of the applicable law, which . . . is an improper basis for common law certiorari."[81] *Ivey* was based on the rule that the erroneous application of the correct law to the facts does not constitute a departure from the essential requirements of the law.[82] To date, no decision has addressed the conflict identified by Justice Wells in *Kaklamanos*.[83]

74. *Id.* at 95–96.

75. Leduc, *supra* n. 8, at 112 (internal quotation marks omitted).

76. *Stilson v. Allstate Ins. Co.*, 692 So. 2d 979, 982–983 (Fla. 2d Dist. App. 1997); *see also Wolf Creek Land Dev., Inc. v. Masterpiece Homes, Inc.*, 942 So. 2d 995, 997 (Fla. 5th Dist. App. 2006) (holding that certiorari review was not available to review a non-final order because "there appears to be no [caselaw] on the matter").

77. 843 So. 2d 885.

78. *Id.* at 890.

79. *Id.*

80. *Id.* at 897–898 (Wells, J., dissenting) (discussing *Ivey v. Allstate Insurance Co.*, 774 So. 2d 679, 683 (Fla. 2000)); *see also* Leduc, *supra* n. 8, at 113–114 (criticizing *Kaklamanos* for expanding the scope of common law certiorari review).

81. 774 So. 2d at 683.

82. *Id.* at 682.

83. *See Kaklamanos*, 843 So. 2d at 898 (Wells, J., dissenting) (finding that the Court should have followed its own decision in *Ivey* and asserting that certiorari review should not be determined by whether the Court agrees with the circuit court's decision). Instead, the Supreme Court appears ready to abandon *Kaklamanos* and limit certiorari review to exclude cases where there is no precedent and "the law is not yet settled." *Citizens Prop. Ins. Corp. v. San Perdido Ass'n*, 104 So. 3d 344, 355 (Fla. 2012).

Recently, the district courts confronted cases where the circuit court applied binding precedent from a different district court that conflicted with clearly established statutory law.[84] A circuit court is bound to follow controlling precedent from other districts if its own district appellate court has not ruled on the issue, assuming no interdistrict conflict exists.[85] However, caselaw interpreting a statute is less authoritative than the statute itself.[86] For this reason, the Florida Supreme Court has held that certiorari relief is appropriate when the lower court's application of binding precedent disregards the plain language of a controlling statute.[87]

The absence of a bright-line test to determine whether an order causes "irreparable harm" or constitutes a "departure from the essential requirements of the law" allows the district courts broad discretion to exercise their certiorari jurisdiction.[88] This broad discretion is consistent with certiorari's status as a "safety net" and overall purpose of "fill[ing] the interstices between direct appeal and the other prerogative writs[,]"[89] but it has also exposed the current standard for certiorari review to valid criticism.[90]

C. The Proposed "Functional" Restatement

Proponents of the functional restatement criticize the current, subjective three-prong standard as "inherently unpredictable because it contains no objective standards and often requires each judge to inject his or her own unstated policies into these proceedings."[91] They contend that "concepts like 'departure,' 'essential requirements,' 'material injury,' and 'adequate remedy' are all subjective terms that nearly defy definition."[92] According

84. *Dep't of Hwy. Safety & Motor Vehs. v. Nader*, 4 So. 3d 705, 709–711 (Fla. 2d Dist. App. 2009), *aff'd*, 87 So. 3d 712 (Fla. 2012).

85. *Pardo v. State*, 596 So. 2d 665, 666–667 (Fla. 1992).

86. *See Nader*, 87 So. 3d at 726 (stating that "[s]uch a result would treat [caselaw] interpreting a statute as more authoritative than the statute itself—a proposition that is not supported by our precedent").

87. *Id.* at 725–726.

88. *Combs*, 436 So. 2d at 95–96 (asserting that "the district courts must be allowed a large degree of discretion so that they may judge each case individually").

89. *Broward Co.*, 787 So. 2d at 842.

90. *E.g.* Altenbernd & Marcario I, *supra* n. 15, at 22–23.

91. *Id.* at 21.

92. *Id.* at 22.

to the proponents of the functional restatement, these vague terms have fostered the creation and adoption of "[m]ore [r]hetoric [t]han [r]eason."[93] They argue that courts have made some seemingly groundless distinctions to find that some orders are more deserving of certiorari review than others.[94]

Of their many points, the proponents of the functional restatement validly highlight the current rule that litigation expense cannot form the basis for certiorari relief.[95] They argue quite accurately that "this rule only makes sense if it's not your money."[96] They recognize that public policy dictates that an appellate court should not intrude upon a trial court case based solely upon the timing, nature, and size of the litigation expense.[97] They conclude, however, that "the 'it's only money' reason to avoid certiorari review does not help create a rational review policy."[98]

Litigation expense as a basis for certiorari relief has been a contentious subject for well over a half a century.[99] While a few opinions have granted certiorari review based upon litigation expense, those cases are few and far between.[100]

93. *Id.*

94. *Id.* at 23.

95. *See id.* (explaining that courts deny review because expense is not considered an irreparable harm); *see also Wright v. Sterling Drugs, Inc.*, 287 So. 2d 376, 376–377 (Fla. 2d Dist. App. 1973) (asserting that "[t]he incurring of the expense of a trial on the merits has been held not to constitute material or irreparable injury").

96. Altenbernd & Marcario I, *supra* n. 15, at 23.

97. *Pullman Co. v. Fleishel*, 101 So. 2d 188, 190 (Fla. 1st Dist. App. 1958) (finding that "[a]lthough . . . the expense of defending the action may well be substantial, . . . to grant the relief sought would, in the final analysis, produce more harm to our system of procedure than could be compensated by any benefit petitioner might derive from issuance of the writ it seeks"); *see also Wright*, 287 So. 2d at 376–377 (holding that, if litigation expense were a proper basis for certiorari review, "many interlocutory orders . . . would be subject to review by certiorari[, which] would result in an unseemly intrusion into the progress of the case in the trial court").

98. Altenbernd & Marcario I, *supra* n. 15, at 23.

99. In *Patten v. Daoud*, 12 So. 2d 299 (Fla. 1943) (per curiam), in a four-to-three decision, the court per curiam denied a petition for writ of certiorari. *Id.* at 299. The defendants sought review of an interlocutory order "sustaining a declaration seeking damages for civil conspiracy." *Id.* at 302 (Chapman, J., dissenting). In his dissent, Justice Terrell considered the case to be one that merited a grant of certiorari because it presented a purely legal issue and intervention would avoid a complex trial involving a large volume of evidence and thousands of dollars of expenses. *Id.* at 300 (Terrell, J. dissenting). "It would be a travesty on justice to require this to be done and then on appeal from final judgment dispose of the case on the ground that the declaration failed to state a cause of action. Any appeal that imposes such a burden on litigants is inadequate." *Id.*

100. *See Enfinger v. Baxley*, 96 So. 2d 538, 540–541 (Fla. 1957) (granting certiorari to prevent a defendant from having to defend a lawsuit in an improper venue), *receded from*,

Based upon these concerns, the proponents conclude that the "one-size-fits-all" approach of current certiorari law fails to offer reliable and consistent results to "the wide array of issues presented by common law certiorari."[101] Instead, critics of the inherently unpredictable current standard propose replacing it with a "'functional' restatement."[102] The functional restatement would consist of two main questions:

> (1) Has the trial court committed an error that can be identified with a high level of confidence from the limited record provided in an original proceeding?
>
> (2) Can the reviewing court confidently state that the trial court's error will be so detrimental to the goal of providing a fair, consistent, accurate, and even-handed dispute[-]resolution process that it should use its resources to interfere in the trial court proceeding to correct the problem?[103]

For each of these questions, the proponents suggest a number of key policies that courts should consider.[104] For example, when considering the first question, the appellate court should contemplate the likelihood the error would result in a reversal on appeal.[105] And in considering the second question, the appellate court should determine whether the burden upon a party caused by the error is sufficiently great that he or she is deprived of due process or that the public might perceive the trial court to be an "illegitimate forum for fair decision[-]making."[106]

The goal of this new test "is to announce policies and related predictable rules for determining when 'exceptional circum-

Brown v. Nagelhout, 84 So. 3d 304, 308–311 (Fla. 2012); *Kauffman*, 89 So. 2d at 26 (quashing an order denying a motion to dismiss for improper venue because it would be "palpably unjust" to require the petitioner "to incur the expense and . . . inconvenience" of defending a suit in an improper venue and then, if reversed on plenary appeal, to have the petitioner defend the suit again in the proper venue); *Leithauser v. Harrison*, 168 So. 2d 95, 97 (Fla. 2d Dist. App. 1964) (stating that "the probability that a verdict . . . would have to be reversed . . . and the injustice of requiring the plaintiffs to incur the expense and inconvenience of trying these suits a second time . . . lead us to conclude that this case is an exceptional one in which the writ [of certiorari] should issue").

101. Altenbernd & Marcario I, *supra* n. 15, at 21.
102. *Id.*
103. *Id.* at 23.
104. *Id.* at 23–24.
105. *Id.* at 23.
106. *Id.* at 24.

stances' exist."[107] The answers to the two preliminary questions would determine whether the district court *should* review the subject interlocutory order.[108] Thereafter, the proponents suggest that, "[a]s the courts encounter petitions for certiorari review of each type of [non-final] order, they could create precedent announcing narrower, functional tests for use only in that context, with a view toward helping lawyers decide whether to pursue a certiorari proceeding in a district court."[109] In other words, it would be up to the courts to develop independent principles for each type of order to determine whether that error could be corrected on certiorari review.[110]

To test their functional analysis, the proponents created hypothetical cases addressing two types of interlocutory orders: orders denying trial by jury and orders denying discovery.[111] In each hypothetical case, application of the functional test resulted in the appellate court likely granting certiorari review so long as the petitioner could create a sufficient record for review.[112]

This Article applies the proponents' functional analysis to three more types of orders: orders denying motions to enforce settlement, orders denying motions to dismiss, and orders allowing punitive damages claims.

III. THE COMPETING STANDARDS IN ACTION

A. Orders Denying Motions to Enforce Settlement Agreements

Assume you have been retained by an insurance company to defend its insured, who has been sued in an automotive negligence case[113] in Leon County.[114] Your client rear-ended the plaintiff's car, allegedly causing substantial personal injury. Long before the lawsuit began, the plaintiff sent your client's insurance company a demand letter requesting tender of $100,000. The day

107. *Id.* at 23.
108. Altenbernd & Marcario II, *supra* n. 15, at 15–16.
109. Altenbernd & Marcario I, *supra* n. 15, at 21.
110. *Id.*; Altenbernd & Marcario II, *supra* n. 15, at 16.
111. Altenbernd & Marcario II, *supra* n. 15, at 14, 16.
112. *Id.* at 15, 17.
113. The facts of this hypothetical are loosely based upon those discussed in *Mercury Insurance Co. of Florida v. Fonseca*, 3 So. 3d 415, 416 (Fla. 3d Dist. App. 2009).
114. Leon County falls within the territorial jurisdiction of the Florida First District Court of Appeal. Fla. Stat. §§ 26.021, 35.02 (2012).

after receipt, the insurance company responded by sending a check for $100,000 with a letter asking for the plaintiff's signature on an enclosed settlement release. The plaintiff rejected the check and instituted the lawsuit against your client instead, seeking an amount well above your client's $250,000 policy limit.

You immediately recognize that you have strong legal authority to raise an affirmative defense of settlement.[115] You assert the affirmative defense in your answer to the complaint and file a motion shortly thereafter to enforce the settlement agreement.[116] At the hearing on your motion, the parties stipulate to the facts and present the court with a pure question of law: did the parties' actions constitute a settlement? Despite *Mercury Insurance Co. v. Fonseca*,[117] which answers the question in the affirmative,[118] the trial court denies your motion. It finds that no settlement agreement had been reached. Discovery, and eventually a trial, will proceed.

With the denial of your motion, your client is faced with the prospect of expensive litigation and a trial on issues that were conclusively settled, or so you thought. You quickly file a notice of appeal to seek review of this order by the Florida First District Court of Appeal. Your opponent then promptly files a motion to dismiss your appeal as one from a non-final, non-appealable order.

When you initially found *Fonseca*, where the Third District reviewed a case that was factually on all fours with yours, you did not scrutinize the basis for that court's interlocutory review.[119] Returning to that opinion with a new mission, you discover with dismay that the court avoided including any relevant information about the procedure by which it conducted its review.[120] Nor did the court indicate the exact type of order on review.[121] All that you

115. *See generally Fonseca*, 3 So. 3d 415 (holding that similar facts established an enforceable settlement).

116. *See Hanson v. Maxfield*, 23 So. 3d 736, 739–740 (Fla. 1st Dist. App. 2009) (recognizing the potential for an affirmative defense of settlement); Fred O. Goldberg, *Enforcement of Settlements: A Jurisdictional Perspective*, 85 Fla. B.J. 30, 31 (July/Aug. 2011) (discussing the jurisdictional issues involved in reopening cases to enforce settlements).

117. 3 So. 3d 415.

118. *Id.* at 417.

119. *Id.* at 415.

120. *Id.* at 416–417.

121. The court indicated that "[t]he single issue on appeal is whether correspondence between Fonseca and [the insurance company] was sufficient to form a settlement. The trial court held that it was not." *Id.* at 416.

can infer is that the court did not review the order under certiorari because the opinion refers to the parties as "Appellant" and "Appellee."[122]

So now you take to the books seeking a basis to support your plea for interlocutory review.[123] As you scour caselaw, you discover that the law on this jurisdictional issue is unclear, unsettled, and probably not in your favor.

Most of the cases you read that are remotely relevant to your research cite to *Naghtin v. Jones*,[124] which appears to be something of a seminal case in this arena. In *Naghtin*, the trial court entered judgment against the defendants.[125] While an appeal was pending, the parties entered into a settlement agreement in which the defendants and their insurance company paid the plaintiffs $800,000, with another $400,000 contingent upon the outcome of the appeal.[126] The appellate court vacated the entire judgment.[127] On remand, the plaintiffs claimed they were owed more money under the settlement agreement, while the defendants claimed the proceedings were over.[128] The trial court ordered a trial on a single issue, capping damages at the $400,000 amount described in the settlement agreement.[129] The defendants appealed.[130]

On appeal, the court determined that it had no jurisdiction to review the order.[131] The court held that the order was not a final order under Rule 9.030(b)(1)(A), nor was it an enumerated nonfinal order under Rule 9.130(a)(3)(C)(iii).[132] Further, it was not reviewable by petition for writ of certiorari.[133] The court stated, "That a non-final order puts the parties to the expense of a trial that an appeals court may later determine to have been unneces-

122. *Id.*

123. *See* Christopher Sprague, Student Author, *The Power of Interlocutory Appeals: Defining the Essence of Personal Jurisdiction through the Scope of Appellate Jurisdiction*, 29 Nova L. Rev. 75, 85–88 (2004) (listing the categories under which an interlocutory appeal may be granted).

124. 680 So. 2d 573 (Fla. 1st Dist. App. 1996).

125. *Id.* at 575.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 576.

sary is not a proper ground for the grant of a petition for writ of common law certiorari."[134] The court instructed that "the defendants' remedy is by appeal from the final judgment."[135]

The next case you find is *Croteau v. Operator Service Co. of South Florida*.[136] There, the parties entered into a settlement agreement pursuant to court-ordered mediation.[137] One party refused to go along with the settlement, claiming it was not binding, so the other filed an authorized[138] motion to enforce.[139] When the trial court denied enforcement, the defendants filed a petition for writ of certiorari.[140] The appellate court agreed with the *Naghtin* court that certiorari did not lie,[141] but in this case, the court held that the order was an appealable partial final judgment[142] due to its evolution from court-ordered mediation.[143] The court changed the petition's designation[144] to a notice of final appeal for further consideration.[145]

Continuing along the chain of caselaw, you next come across *Delmas v. Harris*,[146] in which the plaintiffs filed suit against the defendants after engaging in settlement negotiations with the defendants' insurer.[147] The defendants raised the affirmative defense of settlement, claiming that the prior negotiations resulted in a completed agreement.[148] The defendants then filed a motion to enforce the settlement.[149] The trial court held an evidentiary hearing on the motion and then entered a partial final judgment in favor of the plaintiffs on the motion to enforce the settlement.[150]

134. *Id.*
135. *Id.*
136. 721 So. 2d 386 (Fla. 4th Dist. App. 1998).
137. *Id.* at 387.
138. *See* Fla. R. Civ. P. 1.730(c) (authorizing sanctions for failure to perform agreements entered into after mediation).
139. *Croteau*, 721 So. 2d at 387.
140. *Id.*
141. *Id.*
142. Fla. R. App. P. 9.110(k) allows for review of partial final judgments either on interlocutory appeal or on plenary appeal.
143. *Croteau*, 721 So. 2d at 387.
144. *See* Fla. R. App. P. 9.040(c) (stating in part that "[i]f a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought").
145. *Croteau*, 721 So. 2d at 387.
146. 806 So. 2d 578 (Fla. 4th Dist. App. 2002).
147. *Id.* at 578–579.
148. *Id.* at 579.
149. *Id.*
150. *Id.*

The defendants sought to appeal the order, but the appellate court determined there was no jurisdictional basis for review.[151] Agreeing with *Naghtin*, the court held that the order was not an appealable non-final order under Rule 9.130(a).[152] Nor was the order reviewable by certiorari because "[c]ertiorari is not designed to serve as a writ of expediency."[153] Further, the court held that this order could not be deemed an appealable partial final judgment like the order examined in *Croteau*.[154] There was further labor (the trial on the merits) for the trial court, and if the end result of the proceedings were a finding in favor of the defendants, the settlement issue would be moot.[155]

To add to the confusion, you find that some courts, in addition to the Third District in *Fonseca*, have chosen to review similar enforcement orders while declining to address the jurisdictional issue. For example, in *Cirrus Design Corp. v. Sasso*,[156] the Fourth District undertook review of an order denying the defendant's motion to enforce three settlements between the defendant and three plaintiffs in three related cases.[157] The plaintiffs' first argument on appeal was that the order was a non-appealable, non-final order.[158] The appellate court disagreed with that contention "without discussion" before addressing the merits of the substantive issues.[159]

In *Maldonado v. Rojas*,[160] two members of a three-judge panel, sitting per curiam, dismissed an appeal with only a cita-

151. *Id.*

152. *Id.*

153. *Id.* (quoting *Naghtin*, 680 So. 2d at 577) (internal quotation marks omitted).

154. *Delmas* distinguished *Croteau* on two bases. *Id.* First, while *Croteau* dealt with an issue where one side refused to carry out a settlement agreement, *Delmas* involved a finding by the trial court that a settlement agreement never existed. *Id.* "While there might be special reasons to enforce an actual settlement before any trial takes place on the underlying claim, there is no similar urgency to review an order merely determining that the parties did not in fact settle their controversy." *Id.* Second, *Delmas* noted that the court in *Croteau* was authorized to enter judgment on the settlement under Florida Rule of Civil Procedure 1.730 because the settlement arose out of court-ordered mediation under Rules 1.700–1.750. *Id.* The same authority did not exist in *Delmas* where the settlement arose from events outside the lawsuit. *Id.* at 579–580.

155. *Id.* at 580.

156. 95 So. 3d 308 (Fla. 4th Dist. App. 2012).

157. *Id.* at 309–310.

158. *Id.* at 310.

159. *Id.* The court noted in a footnote that the case was governed by *Croteau* rather than *Delmas* because, unlike in *Delmas*, there was a written settlement in each of the three cases on appeal. *Id.* at 310 n. 2.

160. 45 So. 3d 13 (Fla. 2d Dist. App. 2010).

tion to *Delmas*.[161] In *Maldonado*, however, Judge Altenbernd specially concurred in the dismissal, providing a lengthier recitation of the facts.[162] He explained that, in the underlying case, the plaintiff sued a defendant in an automobile negligence suit, and the defendant raised the affirmative defense of settlement.[163] The trial court "merely entered an order denying the defendant's motion to enforce the settlement and grant[ed] the [plaintiff's] motion for summary judgment on the affirmative defense of settlement."[164] Judge Altenbernd agreed that this particular order granting summary judgment was not appealable.[165]

However, Judge Altenbernd noted that "[i]f the order . . . were an order determining that the releases were unenforceable or were a partial final judgment on the issue of settlement," the appellate court would have jurisdiction to review the order under Florida Rule of Appellate Procedure 9.110(k).[166]

Returning to your own case, you are at a loss as to how to respond to the motion to dismiss. You did not obtain your settlement by way of court-ordered mediation, so your order is not a partial final judgment reviewable under Rule 9.110(k).[167] Your order is not an enumerated appealable non-final order under Rule 9.130.[168] And certiorari is unavailable under the current standard because the only harms you can allege all arise out of the potential cost and time of proceeding through an unnecessary trial.[169]

You think that your client's best and only hope is to try to convince the court to apply the proposed functional test to determine whether the order merits early intervention. With respect to the first prong, you think that the error can be identified with a

161. *Id.* at 13.
162. *Id.* (Altenbernd, J., specially concurring).
163. *Id.* at 13–14.
164. *Id.* at 14.
165. *Id.*
166. *Id.*
167. *See Croteau*, 721 So. 2d at 387 (holding that a court-ordered mediation is a partial final judgment under Florida law).
168. Fla. R. App. P. 9.130; s*ee Naghtin*, 680 So. 2d at 575 (dismissing appeal on jurisdictional grounds).
169. *See Pullman Co.*, 101 So. 2d at 190 (denying certiorari partly because "defending any legal action . . . is one of the hazards of living and doing business under a system of free enterprise in which one who conceives himself to be injured is privileged to seek redress in a court of law").

high level of confidence.[170] *Fonseca* is factually on point, establishing that your client and the plaintiff did, in fact, reach a settlement agreement as a matter of law.[171] The only record necessary for a full review of the issue is the order on appeal and the transcript of the hearing on your motion.[172] In your case, that record demonstrates that the court "failed to follow binding precedent" and so the error "would result in a reversal on direct appeal with little or no debate among appellate judges."[173]

You are equally confident that you could show that the test's second prong is also satisfied.[174] The trial court's order would appear, to the public and your client, to be unfair in that it burdens your client with the unnecessary expense of lengthy and costly discovery, to be followed by a lengthy and costly trial.[175] The court system will also have to waste its precious time on a pointless trial.[176] The prospect of the protracted proceedings may induce your client's insurance company to enter a new settlement agreement for a higher amount than previously agreed just to avoid further extended litigation.[177] If the insurance company does not settle, your client will be left to fret about the possibility of personal liability for any excess judgment[178] that the plaintiff insists it can obtain. And once the trial concludes, you think the appellate court would have to reverse the final appeal under *Fonseca* for entry of an order enforcing the original settlement, nullifying all the proceedings that happened after your motion to enforce was denied.[179]

170. *See* Altenbernd & Marcario I, *supra* n. 15, at 23 (providing a test to address meritorious appeals arising out of non-final orders).

171. *See* 3 So. 3d at 417 (reasoning that once a party proposed settlement, all that was needed was acceptance by the other party to create a binding agreement).

172. Altenbernd & Marcario II, *supra* n. 15, at 17.

173. Altenbernd & Marcario I, *supra* n. 15, at 23.

174. *Id.*

175. *Id.* at 23–24.

176. *See id.* at 23 (proposing that appellate courts reverse non-final orders only if they would be reversed "on direct appeal with little or no debate among appellate judges").

177. *See id.* at 24 (explaining that the burdens of expensive litigation often lead parties to settle a case to avoid the risk of losing at trial).

178. *See Black's Law Dictionary* 919 (Bryan A. Garner ed., 9th ed., West 2009) (defining "excess judgment" as "[a] judgment that exceeds all of the defendant's insurance coverage").

179. *Cf.* Robert G. Kerrigan, *Allowing Interlocutory Appeals from Orders Denying Summary Judgment*, 80 Fla. B.J. 42, 46 (Oct. 2006) (recognizing that the rationale for the traditional rule against allowing "piecemeal" review of pretrial orders is that allowing such review, "while perhaps efficient in some cases, would in the long run be inefficient because it would allow separate appeals of matters that did not resolve the entire case[ ]

In light of these numerous concerns, the social and economic cost of allowing the unnecessary trial to proceed surely outweighs the cost of intervention.[180] The appellate court could quickly avoid these costs by correcting the error with a simple, narrowly drafted opinion relying upon *Fonseca*.[181]

You explain the uncertainty in the caselaw to your client. You propose responding to the motion to dismiss with argument based on the functional restatement. Frustrated, your client approves your proposed course of action. You file the response and hope for the best.

B. Orders Denying Motions to Dismiss

Now, assume that you represent a property insurance carrier. The carrier insures a large shopping plaza in Pinellas County and another similar property in Hernando County. A late-season hurricane blows through both counties, leaving a trail of destruction. Both properties are heavily damaged, so both property owners submit property insurance claims to your client. Both property owners are unsatisfied with your client's payments, which they view as inadequate to compensate them for the damage to their property. They each sue your client. One owner files suit in Pinellas County, which is within Florida's Second District Court of Appeal. The other owner files suit in Hernando County, which is within Florida's Fifth District Court of Appeal.

The two lawsuits are identical. Each contains one count for breach of contract and a second count for insurer bad faith, a statutory cause of action authorized by Florida Statutes Section 624.155.[182] The breach of contract counts seek to recover the limits of the insurance policy proceeds. The insurer bad faith counts seek to recover consequential damages, alleged to be the interest on construction loans taken out to rebuild the properties in the absence of insurance proceeds, and business income losses result-

and that could have been reviewed pursuant to a single appeal from a final judgment"); Sylvia H. Walbolt & Joseph H. Lang, Jr., *Original Proceedings, Writ Large*, 83 Fla. B.J. 38, 38 (Oct. 2009) (noting that original jurisdiction is narrowly confined by caselaw that "expresses an overwhelming bias against piecemeal appeals").

180. Altenbernd & Marcario I, *supra* n. 15, at 24.

181. *Id.* In *Fonseca*, the appellate court intervened prior to trial to decide the narrow issue of whether a contract for settlement had been formed. 3 So. 3d at 417.

182. Fla. Stat. § 624.155(1)(b)(1) (2012).

ing from your client's alleged delay and eventual refusal to pay all policy proceeds.[183] The liability for these extra contractual damages is based on allegations that the insurer did not pay what it owed on the insurance contract when, had it been acting in good faith and with due regard for the insured, it should have done so.[184] The bad faith count alleges your client underpays claims as a regular business practice and as a result, should pay punitive damages.[185]

The carrier seeks your advice on how it should respond to the lawsuits. You advise the carrier in each case to answer the breach of contract count and move to dismiss the bad faith count as premature. You base your advice on *Vest v. Travelers Insurance Co.*,[186] where the Supreme Court held that an action under Section 624.155 "is premature until there is a determination of liability and extent of damages owed on the first-party insurance contract."[187] Since the "extent of damages owed on the first-party insurance contract" will not be known until the breach of contract count is resolved, you reason that the action under Section 624.155, which seeks extra contractual damages, must be dismissed as premature.[188]

On the basis of *Vest*, you move to dismiss the bad faith counts of the complaints, and the trial court denies your motion in both cases. Your client asks what appellate remedy is available to him. Because this is not a final order, but only one denying a motion to dismiss,[189] you turn to the remedy of a petition for writ of certiorari to the district court of appeal. Your research leads you to the

183. The fact pattern is drawn loosely from *QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n*, 94 So. 3d 541, 543–544 (Fla. 2012).

184. *See e.g. Mayfair H. Ass'n v. QBE Ins. Corp.*, 2009 WL 2132704 at *1 (S.D. Fla. July 14, 2009). In *Mayfair House Association*, a condominium association sued its property insurer under Section 624.155, alleging the insurer had failed to compensate it for hurricane damage when "it could and should have done so, had it acted . . . with due regard" for the association's interest. *Id.* at *2 (internal quotation marks omitted).

185. Fla. Stat. § 624.155(5)(a).

186. 753 So. 2d 1270 (Fla. 2000).

187. *Id.* at 1276.

188. *Id.* The Court clarified its position, maintaining, "[w]e continue to hold in accord with *Blanchard*[,] . . . [and t]his avoids the problem *Blanchard* dealt with, which was the splitting of causes of action. However, a claim brought prematurely is not subject to a summary judgment. Such a claim should be dismissed as premature." *Id.*

189. Orders denying motions to dismiss are not enumerated in Florida Rule of Appellate Procedure 9.130.

conclusion that the fate of the Pinellas action is different from the fate of the Hernando action.

Both the Second and Fifth District Courts of Appeal recognize that a trial court commits legal error by allowing a Section 624.155 action to proceed before the breach of insurance contract action is concluded.[190] The Fifth District, in *Hartford Insurance Co. v. Mainstream Construction Group, Inc.*,[191] held that "there must first be a determination regarding coverage and contractual issues between [the policyholder] and [the insurer] before an action for bad faith can proceed."[192] The Second District has recognized the same point of law in *State Farm Mutual Automobile Insurance Co. v. O'Hearn*:[193]

> As to the order denying [the insurer]'s motion to dismiss, we agree with [the insurer] that the trial court departed from the essential requirements of the law. There is an abundance of [caselaw] that holds that a first-party bad faith claim does not accrue until there has been a final determination of both liability and damages in an underlying coverage claim.[194]

The Second and Fifth Districts take different approaches on the jurisdictional prong of the certiorari test. The Fifth District finds that irreparable injury is inflicted on the insurer when it is required to defend a breach of contract action at the same time it defends against a Section 624.155 bad faith claim.[195] The Fifth District further holds that "an insurer would be prejudiced by having to litigate either a bad faith claim or an unfair settlement practices claim in tandem with a coverage claim[ ] because the evidence used to prove either bad faith or unfair settlement practices could jaundice the jury's view on the coverage issue."[196] Therefore, you conclude the Fifth District will accept a petition for certiorari where a trial court has denied a motion to dismiss a premature bad faith claim.

190. *State Farm Mut. Automobile Ins. Co. v. O'Hearn*, 975 So. 2d 633, 635 (Fla. 2d Dist. App. 2008); *Hartford Ins. Co v. Mainstream Constr. Group, Inc.*, 864 So. 2d 1270, 1272 (Fla. 5th Dist. App. 2004).

191. 864 So. 2d 1270.

192. *Id.* at 1272.

193. 975 So. 2d 633.

194. *Id.* at 635.

195. *Mainstream Constr. Group, Inc.*, 864 So. 2d at 1271.

196. *Md. Cas. Co. v. Alicia Diagnostic, Inc.*, 961 So. 2d 1091, 1092 (Fla. 5th Dist. App. 2007).

You conclude the Second District will reach a different conclusion. In *O'Hearn*, the court ruled:

> While we recognize that some courts have held that such orders are reviewable by way of certiorari in first-party bad faith actions, . . . we follow this court's [rule] . . . that the denial of a motion to dismiss results in a premature claim going forward does not, by itself, establish irreparable harm to the insurer. Therefore, because [the insurer] cannot establish that it will suffer irreparable harm as a result of the denial of its motion to dismiss, we dismiss the petition to the extent it is directed to that order.[197]

The Second District concluded that "an appellate court does not generally have certiorari jurisdiction to review an order denying a motion to dismiss even when the cause of action is one for first-party bad faith."[198]

So, under the existing certiorari test, you reasonably conclude that the Fifth District would likely take jurisdiction over your client's petition for certiorari and that you would likely prevail. In the Second District, however, the outcome would likely be different. Your client likely would not obtain immediate review of the order denying its motion to dismiss the premature bad faith claim.

You think that your client's best and only hope is to try to convince the Second District to apply the functional test to determine whether your order merits early intervention. You know the Second District already agrees with you as to the first prong of the test. *O'Hearn* is factually on point and appears to be settled in the Second District's jurisprudence. The only parts of the record that the appellate court must necessarily review to support its early intervention are the complaint, motion to dismiss, and transcript of the hearing where your client's motion to dismiss was denied.[199]

You then ask whether the Second District "can confidently state that the trial court's error is so detrimental to the goal of providing a fair, consistent, accurate, and even-handed

197. 975 So. 2d at 636.

198. *Id.*

199. *See* Altenbernd & Marcario II, *supra* n. 15, at 17 (suggesting that a hearing transcript could be sufficient to evaluate whether a case qualifies for certiorari review).

dispute[-]resolution process that it should use its resources to interfere in the trial court proceeding to correct the problem."[200] At this point, you realize that while the Fifth District Court of Appeal views the legal error as sufficiently detrimental to the goal of providing an even-handed trial,[201] the Second District does not.[202] This was the conclusion the Second District announced in prior cases.[203] You are confident that you could show the test's second prong is also satisfied: that the trial court's order would, to the public and your client, appear to be unfair and that it burdens your client with the unnecessary expense of costly discovery, to be followed by an expensive trial. You can make an excellent argument that the court system will waste its precious time and taxpayer money on pointless proceedings that the appellate court has agreed are infected with serious legal error. You realize then, in all likelihood, the Second District's strict adherence to its precedent that certiorari is not available to review orders denying a motion to dismiss will likely trump the goal of providing a fair, accurate, and even-handed dispute-resolution process.

C. Orders Allowing Claims for Punitive Damages

Assume next that your client is sued in Miami for breach of fiduciary duty in a shareholder derivative suit.[204] The plaintiffs allege that your client, without notice to any shareholders, executed documents withdrawing the authorization to do business in Florida. The plaintiffs also allege that your client then transferred and conveyed the assets of the corporation's New Jersey subsidiary to a close corporation whose sole shareholders are your client and his wife. The plaintiffs further claim that your client then renamed the close corporation and resumed business in Florida.

A few months later, you receive the plaintiffs' motion for leave to amend the complaint to include a claim for punitive

200. *Id.* at 14.
201. *Mainstream Constr. Group, Inc.*, 864 So. 2d at 1271.
202. *O'Hearn*, 975 So. 2d at 636.
203. *Id.*
204. This factual scenario is based on *Chemplex Florida v. Norelli*, 790 So. 2d 547 (Fla. 4th Dist. App. 2001).

damages under Florida Statutes Section 768.72.[205] The motion included a proffer of documents from the different corporations and affidavits from the plaintiffs that recite the facts alleged in the complaint.[206] You also receive a request for financial-worth discovery of both the close corporation's finances and your client's personal finances.

You file a response in opposition to the motion where you object that punitive damages are not recoverable in equitable actions, such as shareholder derivative suits. You also move for a protective order[207] seeking to stop the financial-worth discovery on the ground that such discovery was not relevant to the plaintiffs' sole count for breach of fiduciary duty.

At the hearing, the trial judge rejects your arguments based on the statutory language indicating that Section 768.72 applies to "any civil action"[208] and "all causes of action."[209] The trial judge then denies your motion for a protective order and, based on the proffer, grants the plaintiffs' motion to include a punitive damages claim. You immediately move to stay the financial-worth discovery while you pursue appellate review, and the trial judge grants your motion on the record.[210]

Your client directs you to pursue any avenue for interlocutory review of the trial court's rulings. Your research quickly uncovers the leading case, *Globe Newspaper Co. v. King*,[211] where the Florida Supreme Court held that the district courts had "certiorari jurisdiction to review whether a trial judge has conformed with the procedural requirements of [S]ection 768.72."[212] According to *Globe Newspaper*, Section 768.72 "create[s] a substantive legal right not to be subject to a punitive damages claim and ensuing financial[-]worth discovery until the trial court makes a determi-

205. *See* Fla. Stat. § 768.72(1) (2012) (allowing a party to move to amend his or her complaint to assert a claim for punitive damages).

206. *See id.* (requiring "a reasonable showing by evidence in the record or proffered" as a condition precedent to asserting a claim for punitive damages).

207. *See* Fla. R. Civ. P. 1.280(c) (allowing a party to request an order "that the discovery not be had").

208. Fla. Stat. § 768.72(1).

209. *Id.* at § 768.72(4).

210. *See* Fla. R. App. P. 9.310(a) (allowing a party to seek a stay of a non-final order pending appellate review); *see generally* Anthony J. Russo, *The Stay of Judgments and Proceedings in Florida State Courts*, 86 Fla. B.J. 31, 32–33 (Jan. 2012) (discussing ways to seek stays pending appellate review).

211. 658 So. 2d 518 (Fla. 1995).

212. *Id.* at 519.

nation that there is a reasonable evidentiary basis for recovery of punitive damages."[213] The Court reasoned that forcing a party to disclose financial information without compliance with Section 768.72 would cause irreparable harm because an appeal from a final order cannot restore a party's rights under the statute.[214] For this reason, the *Globe Newspaper* Court held "that appellate courts should grant certiorari in instances in which there is a demonstration by a petitioner that the procedures of [S]ection 768.72 have not been followed."[215]

However, *Globe Newspaper* also held that the district courts lack certiorari jurisdiction to review the sufficiency of the evidence considered by the trial court.[216] The Florida Supreme Court, relying on *Martin-Johnson, Inc. v. Savage*,[217] explained that the resulting harm would not rise to the level of irreparable harm.[218] The *Martin-Johnson* Court reasoned that the harm caused by disclosure of financial information was not "significantly greater" than the harm created by discovery in a case where the appellate court determines the complaint should have been dismissed.[219] The *Martin-Johnson* Court was concerned about interrupting trial court proceedings and opening the floodgates to interlocutory review of orders denying motions to dismiss.[220] Thus, *Globe Newspaper* prohibits certiorari review of the factual basis of a claim for punitive damages.[221]

213. *Id.*

214. *Id.* at 520.

215. *Id.* For example, certiorari would be appropriate to review an order allowing a claim for punitive damages "prior to a party asking for and receiving leave of the court." *Simeon, Inc. v. Cox*, 671 So. 2d 158, 160 (Fla. 1996); *see also Royal Carib. Cruises, Ltd. v. Doe*, 44 So. 3d 230, 233 (Fla. 3d Dist. App. 2010) (quashing an order allowing a claim for punitive damages where the trial court did not make the evidentiary inquiry or the factual determinations required by Section 768.72), *quashed on other grounds*, *Bd. of Trustees*, 99 So. 3d at 459; *Strasser v. Yalamanchi*, 677 So. 2d 22, 23 (Fla. 4th Dist. App. 1996) (quashing an order allowing punitive damages claim before the trial court determined there was a reasonable basis to support the claim); *Keller Indus., Inc. v. Kennedy*, 668 So. 2d 328, 329 (Fla. 4th Dist. App. 1996) (quashing an order allowing punitive damages because the trial court did not conduct an evidentiary hearing).

216. 658 So. 2d at 520.

217. 509 So. 2d 1097.

218. 658 So. 2d at 520.

219. 509 So. 2d at 1100. The Court explained that: (1) financial information is not privileged; and (2) the petitioner's privacy interest was lower than the level of privacy associated with work product, trade secrets, or the identity of a confidential informant. *Id.*

220. *Id.*

221. 658 So. 2d at 220; *e.g. Parker, Landerman & Parker, P.A. v. Riccard*, 871 So. 2d 1043, 1043–1044 (Fla. 5th Dist. App. 2004) (denying petition for writ of certiorari in a case

Your client's problem, however, does not fall squarely into either of the two categories described in *Globe Newspaper*. The issue for the appellate court, in your view, would not be whether the court complied with Section 768.72 or whether the plaintiffs' proffer was sufficient to support a punitive damages claim. Instead, the issue would be whether punitive damages are allowed, as a matter of law, in a shareholder derivative suit.

You narrow the scope of your research to better reflect what you consider to be the real issue. You find a line of cases where the appellate courts granted certiorari and quashed orders allowing punitive damages because such damages were not available as a matter of law.[222] Your case is in Miami, however, and the Third District Court of Appeal has rejected this line of cases.[223] The Third District explained that, based on *Globe Newspaper*, it lacked certiorari jurisdiction to review the trial court's decision to allow a claim for punitive damages where the plaintiff and the trial court have complied with the procedural requirements of Section 768.72.[224]

where the petitioner argued the party seeking punitive damages had not shown a reasonable basis to support a claim for punitive damages); *Massey Servs., Inc. v. Brown*, 801 So. 2d 307, 308 (Fla. 5th Dist. App. 2001) (denying petition for writ of certiorari and determining that the trial court followed requirements for adding a claim for punitive damages).

222. *See McGuire, Woods, Battle & Boothe, LLP v. Hollfelder*, 771 So. 2d 585, 586–587 (Fla. 1st Dist. App. 2000) (remanding to trial court with instructions to strike the punitive damages claim); *Chemplex Fla.*, 790 So. 2d at 549–550 (quashing order allowing punitive damages because such damages were not available as a matter of law in a shareholder derivative suit); *Nova S.E. U., Inc. v. McCollough*, 693 So. 2d 1125, 1125–1126 (Fla. 4th Dist. App. 1997) (granting certiorari where no record evidence would have supported an award of punitive damages against an employer); *see also Ortega v. Silva*, 712 So. 2d 1148, 1149 (Fla. 4th Dist. App. 1998) (explaining that "[a]llowing a claimant to seek punitive damages as part of a claim in which such exemplary damages are unavailable as a matter of law[ ] is tantamount to allowing them without determining whether there is an evidentiary basis for them").

223. *Carnival Corp. v. Iscoa*, 922 So. 2d 359, 360–361 (Fla. 3d Dist. App. 2006).

224. *Id.* Curiously, the Third District would have granted certiorari review if the plaintiffs had not raised Section 768.72. *See Capco Props., LLC. v. Monterey Gardens of Pinecrest Condo.*, 982 So. 2d 1211, 1214–1215 (Fla. 3d Dist. App. 2008) (quashing an order compelling production of personal financial information in a case where such information was not relevant and the plaintiff had not sought punitive damages under Section 768.72); *e.g. Spry*, 985 So. 2d at 1188–1189 (quashing an order compelling production of financial information where plaintiff presented no evidence showing relevance); *Vega v. Swait*, 961 So. 2d 1102, 1103–1104 (Fla. 4th Dist. App. 2007) (quashing an order compelling personal finance information because there was no showing that the information was relevant); *Mogul v. Mogul*, 730 So. 2d 1287, 1290 (Fla. 5th Dist. App. 1999) (holding that "[t]he disclosure of personal financial information may cause irreparable harm to a person forced to disclose it, in a case in which the information is not relevant").

You decide to explore whether the functional restatement would lead to a different result. Under the first prong of the functional restatement,[225] you think the limited record in this case is sufficient to allow the appellate court to identify the error. An award of punitive damages in this shareholder derivative case would be an error that an appellate panel would reverse on appeal from a final order.[226] The ruling involves a pure question of law that leaves no discretion to the trial court. And the pleadings, the proffer, and the transcript of the hearing are sufficient for the appellate court to evaluate the propriety of allowing the plaintiffs to assert a claim for punitive damages and compelling production of your client's financial-worth discovery. For these reasons, the trial court's orders are capable of interlocutory review with basically the same level of accuracy as review on final appeal.

You next analyze the second prong to determine whether there is an adequate justification for the appellate court to exercise its discretionary certiorari jurisdiction.[227] As Justice Anstead explained in *Globe Newspaper*, the requirement that the party seeking punitive damages establish a reasonable basis for such damages is the heart of Section 768.72:

> The legislature has specifically granted the petitioner a substantive right to be free of financial discovery, absent a particularized evidentiary showing. A violation of the statutory provisions obviously cannot be remedied on plenary appeal. As has often been stated, by then "the cat is out of the bag." Consistent with the intent of the legislature in imposing this requirement, and, presumably expecting that it would be

225. Altenbernd & Marcario I, *supra* n. 15, at 23 (framing the first prong as a question of whether the trial court has "committed an error that can be identified with a high level of confidence from the limited record provided").

226. *See McGuire*, 771 So. 2d at 586–587 (quashing an order allowing punitive damages because statutes governing punitive damages did not overrule caselaw prohibiting punitive damages in a shareholder derivative suit); *Chemplex Fla.*, 790 So. 2d at 549–550 (quashing an order that allowed punitive damages because punitive damages were not available as a matter of law in shareholder derivative suits).

227. Altenbernd & Marcario I, *supra* n. 15, at 23 (framing the second prong of the test as whether the trial court's error will be so harmful to a fair judicial proceeding that the reviewing court should intervene).

> enforced by the courts, I would hold that certiorari review is appropriate in such cases.[228]

Additionally, "personal finances are among those private matters kept secret by most people."[229] Thus, the erroneous disclosure of financial-worth discovery would violate the constitutional right to privacy under Article I, Section 23, of the Florida Constitution.[230]

Further, you know that a cost-benefit analysis supports interlocutory review. The appellate court can correct the error on certiorari review with a brief opinion that can be issued with little expense of judicial resources or time.[231] This limited appellate cost is likely to save the parties and the court the considerable amount of time spent in discovery and litigation of the punitive damages claim. Therefore, based on your analysis under the functional restatement, you determine that the trial court's orders involve the kind of error and the circumstances that would meet the general policies behind the functional restatement.

You meet with your client to explain that the Third District is unlikely to take certiorari jurisdiction of this case. You also note the functional restatement and how this case meets this proposed new approach. You explain to your client that there is a slim possibility that the court would adopt the functional restatement, review this case, and quash the trial court's orders. Your client again directs you to pursue any avenue for interlocutory review of the trial court's rulings. You file the petition for writ of certiorari asserting interdistrict conflict and arguing that the Third District should adopt the functional restatement. The question is now out of your hands.

228. 658 So. 2d at 521 (Anstead, J., dissenting); *Massey Servs., Inc.*, 801 So. 2d at 308 n. 1.

229. *Rowe*, 89 So. 3d at 1103 (quoting *Woodward v. Berkery*, 714 So. 2d 1027, 1035 (Fla. 4th Dist. App. 1998)) (internal quotation marks omitted).

230. *Id.* (quoting *Borck v. Borck*, 906 So. 2d 1209, 1211 (Fla. 4th Dist. App. 2005)).

231. *E.g. McGuire*, 771 So. 3d at 586–587 (quashing an order that allowed punitive damages because the statutes governing punitive damages did not overrule the existing caselaw prohibiting punitive damages in a shareholder derivative suit); *Chemplex Fla.*, 790 So. 2d at 549–550 (quashing an order allowing punitive damages because such damages were not available as a matter of law in a shareholder derivative suit).

D. The Problems with the Functional Restatement

1. Convincing the Appellate Courts to Adopt the Functional Restatement

The value of the functional restatement is clear to the clients in all three of our examples. But what would it take to actually shift the courts to this new approach? The path to this goal is ominous and replete with obstacles.

First, the appellate court must consider abandoning over half a century of Florida common law precedent that establishes the current test for certiorari.[232] Moreover, because the functional approach requires the creation of new tests for each type of order that is deemed suitable for interlocutory review,[233] the appellate court would also need to be convinced that it should create those tests.[234] It would also require a majority of the entire court to make this decision: for any of the Florida district courts of appeal, the court must vote en banc to recede from its own precedent.[235]

But the appellate court is unlikely to simply recede from its prior opinions to adopt the functional approach. To eschew the current test would also create conflict with decades of caselaw from the other districts and the Florida Supreme Court.[236] The Court could simply quash the district court's opinion as violative of established common law.[237] Rather, the appellate court would more likely deny certiorari but certify the question to the Supreme Court,[238] letting the Supreme Court determine the

232. "[T]he linguistic description that constitutes the modern three-prong test and the meaning ascribed to its words do not derive from long-established, time-tested common law. Instead, they reflect an ongoing, relatively recent struggle to properly explain the nature and extent of review by a district court of appeal in a certiorari proceeding. If we can find better words, nothing in the common law prohibits us from using them." Altenbernd & Marcario I, *supra* n. 15, at 22.

233. *Id.* at 21; Altenbernd & Marcario II, *supra* n. 15, at 16.

234. Creation of new tests in disregard of established precedent may violate the philosophy of "judicial restraint." *See Black's Law Dictionary* 852 (Bryan A. Garner ed., 7th ed., West Group 1999) (defining "judicial restraint").

235. *See State v. Washington*, 2012 WL 2400879 at *6 (Fla. 3d Dist. App. June 27, 2012) (explaining that "only this Court, sitting en banc, may recede from an earlier opinion").

236. *See Bd. of Trustees*, 99 So. 3d at 459 (overturning decisions that have granted certiorari for claims of overly broad discovery orders).

237. Fla. Const. art. V, § 3(b)(3); Fla. R. App. P. 9.030(a)(2)(A)(iv).

238. Fla. Const. art. V, § 3(b)(4); Fla. R. App. P. 9.030(a)(2)(A)(v).

applicability of the new test.[239] If the issue has made it this far, the task is now to convince a majority of the Supreme Court to abandon its precedent in favor of this new functional standard.[240]

The daunting task upon the party seeking to gain review of its order under the functional approach can be summarized thusly: convince a majority of a district court of appeal and then a majority of the Supreme Court to abandon decades of established precedent in favor of an approach that requires appellate judges to establish new tests for every type of order they encounter, all based upon a theory so far only proposed in articles in the Florida Bar Journal.[241]

2. The Multiple Standards Created by the Functional Approach

Once the courts have adopted the functional restatement, a new problem would arise. The functional restatement, after all, only identifies "circumstance[s] in which the appellate courts should fashion narrow, context-specific tests for determining whether certiorari review is appropriate."[242] A court that finds a particular order subject to certiorari review must then figure out a specific test for use only when reviewing that kind of order.[243]

For example, the proponents of the functional restatement suggest two different tests for certiorari review of orders denying discovery. First, when the order involves a novel issue, the district court should review the order if: (1) no clear law on the issue exists; and (2) the trial judge certifies that the order involves an

239. *See* Nancy Marshall-Genzer, Am. Pub. Media Marketplace Video, *The Origin of "Kick the Can"* (Marketplace posted on Dec. 19, 2011) (transcript available at http://www.marketplace.org/topics/life/origin-kick-can) (exploring the roots and overuse of the phrase "kick the can," particularly relating to instances when a party runs and hides).

240. A majority of the current Court appears unlikely to adopt a functional approach, given the recent ruling that "the writ of certiorari cannot be used simply because strong policy reasons support interlocutory review." *San Perdido Ass'n*, 104 So. 3d at 353. As Justice Lewis has explained: "the proper mechanism for the expansion of the scope of interlocutory review is not to eviscerate one hundred years of well-grounded, common law jurisprudence regarding certiorari review." *Id.* at 358 (Lewis, J., specially concurring).

241. Altenbernd & Marcario I, *supra* n. 15; Altenbernd & Marcario II, *supra* n. 15.

242. Altenbernd & Marcario II, *supra* n. 15, at 17.

243. *See* Altenbernd & Marcario I, *supra* n. 15, at 21 (explaining that "[a]s the courts encounter petitions for certiorari review of each type of non[-]final order, they could create precedent announcing narrower, functional tests for use only in that context, with a view toward helping lawyers decide whether to pursue a certiorari proceeding in a district court").

exceptional issue not resolved by binding authority.[244] Second, when there is binding precedent, the district should review the order if: (1) there is a factual basis to predict a substantial probability that the requested discovery will lead to the discovery of admissible evidence; (2) the evidence is not cumulative, collateral, or sought solely for the sake of impeachment; and (3) the evidence will be "at least moderately relevant" to an issue to be decided by the fact-finder.[245] While more detailed than the current standard, these tests are still plagued with terms (like "substantial probability" and "at least moderately relevant") that are no clearer than "departure from the essential requirements of the law."[246]

The gradual development of these specific tests on a case-by-case basis will increase uncertainty in the short term. Practitioners will try to take advantage of the adoption of the functional restatement, but they will have no way of anticipating the particular test that a district court will ultimately apply. Trial courts would have no advance notice that their rulings may be erroneous. And district courts may end up disagreeing with one another about the appropriate test for a particular kind of order.

This uncertainty will, in turn, affect the timely resolution of cases. Trial courts will be faced with more stays of proceedings pending certiorari review. The number of certiorari petitions will likely increase after the courts embrace the functional restatement and before the courts agree on the specific tests applicable.[247] Further, dissatisfied litigants will likely seek to invoke the Florida Supreme Court's discretionary review to challenge the district courts' rulings.

The current certiorari standard is not perfect. The proposed functional restatement aims to remove the vagueness of the current standard. But the current standard is vague and open to interpretation for a reason: the writ of certiorari is meant to be a "safety net" in the "interstices between direct appeal and the other prerogative writs."[248] Certiorari would probably not fulfill its intended purpose without the flexibility created by the vague-

244. Altenbernd & Marcario II, *supra* n. 15, at 18.

245. *Id.*

246. *Id.*

247. *See Eberhardt v. Eberhardt*, 666 So. 2d 1024, 1025 (Fla. 4th Dist. App. 1996) (attributing an increase in certiorari petitions to practitioners' perception that the Supreme Court had expanded the standard for certiorari review).

248. *Broward Co.*, 787 So. 2d at 842.

ness of the current standard. Thus, the functional restatement should not replace the current certiorari standard; instead, it should serve as a sieve to identify orders that should be reviewable under Florida Rule of Appellate Procedure 9.130.[249]

IV. THE ALTERNATIVE: FLORIDA RULE OF APPELLATE PROCEDURE 9.130

The legal infrastructure of Florida Rule of Appellate Procedure 9.130 has produced a transparent, effective, and responsive system to systematically and thoughtfully identify classes of orders that should be reviewed on an interlocutory basis.

As we have seen, some classes of orders, such as orders compelling disclosure of privileged communication or trade secrets, are so important that litigants can count on the district court exercising its discretionary certiorari jurisdiction over the issue.[250] And for some classes of orders that deserve immediate appellate attention, the Florida Supreme Court has created an immediate right of appeal through the vehicle of Rule 9.130.[251] Using this rule, the Court creates a uniform jurisdictional platform for an entire class of orders, bypassing the certiorari process and relieving the party seeking review from the burden of showing a particular order departs from the essential requirements of law and causes injury not remediable on plenary appeal. Those two characteristics are, in essence, deemed inherent in these classes of orders reviewable under Rule 9.130.

A. A Short History of Rule 9.130, Florida Rule of Appellate Procedure

In 1980, Florida voters decided to alter the jurisdiction of the Florida Supreme Court by adopting an amendment to Article V of the Florida Constitution.[252] This amendment provided to the dis-

249. *See San Perdido Ass'n*, 104 So. 3d at 353 (explaining that "if strong policy reasons favor interlocutory review, this Court will direct that the categories of appealable nonfinal orders be expanded by amendment to the rules and not by expanding use of the common law writ of certiorari").

250. *See supra* pt. II(B)(1) (discussing the jurisdictional prongs of certiorari review).

251. Justice Lewis has identified this rulemaking process as the "'common sense mechanism' to resolve the limited scope of certiorari review of interlocutory orders." *San Perdido Ass'n*, 104 So. 3d at 358 (Lewis, J., specially concurring).

252. *In re Emerg. Amends. to R. of App. P.*, 381 So. 2d 1370, 1371 (Fla. 1980).

trict courts of appeal the jurisdiction to review interlocutory orders, with a provision written as follows:

> (b) JURISDICTION.—
>
> > (1) District courts of appeal shall have jurisdiction to . . . review interlocutory orders in such cases to the extent provided by rules adopted by the [S]upreme [C]ourt.[253]

The district courts of appeal possessed the jurisdiction to review interlocutory orders under the prior constitutional provision.[254] The important difference for this discussion is that the amendment called for "rules adopted by the [S]upreme [C]ourt."[255] The Supreme Court, anticipating approval of the constitutional amendment, had prepared proposed amendments to Florida Rule of Appellate Procedure 9.130 to implement the changes.[256] Rule 9.130 (Proceedings to Review Non-Final Orders) was restated as follows:

> This rule applies to review of the non-final orders authorized herein the district courts of appeal and the circuit courts. . . .
>
> > (3) Review of non-final orders of lower tribunals is limited to those which:
> >
> > > (A) concern venue;
> > >
> > > (B) grant, continue, modify, deny or dissolve injunctions, or refuse to modify or dissolve injunctions;
> > >
> > > (C) determine:
> > >
> > > > (i) jurisdiction of the person;
> > > >
> > > > (ii) right to immediate possession of property;
> > > >
> > > > (iii) right to immediate monetary relief or child custody in domestic relations matters; or

253. Fla. Const. art. V, § 4(b)(1) (amended 1980).

254. This prior provision stated: "The [S]upreme [C]ourt shall provide for expeditious and inexpensive procedure in appeals to the district courts of appeal[ ] and may provide for review by such courts of interlocutory orders or decrees in matters reviewable by the district courts of appeal." Fla. Const. art. V, § 5(3) (1968) (revised 1972).

255. Fla. Const. art V, § 4(b)(1) (amended 1980).

256. *In re Emerg. Amends. to R. of App. P.*, 381 So. 2d at 1385–1386.

> (iv) the issue of liability in favor of a party seeking affirmative relief.[257]

Rule 9.130 replaced former Florida Rule of Appellate Procedure 4.2.[258] Rule 4.2 had provided litigants an alternative to certiorari for interlocutory relief but only to a limited number of specified interlocutory orders. In 1967, Florida Appellate Rule 4.2(a) stated, in relevant part:

> Rule 4.2. Interlocutory Appeals
>
> > a. Application. Appeals may be prosecuted in accordance with this rule from interlocutory orders in civil actions that, from the subject matter of the relief sought, are such as formerly were cognizable in equity, and from interlocutory orders relating to venue or jurisdiction over the person, from orders granting partial summary judgment on liability in civil actions . . . .[259]

The 1980 version of Rule 9.130 provided the district courts with the jurisdiction to review a greater variety of interlocutory orders than did the former appellate Rule 4.2, and in the committee notes to the new rule, the authors explained their intentions.[260]

The Advisory Committee characterized these enumerated interlocutory orders as "the most urgent interlocutory orders."[261] The Committee sought to relieve petitioners from the "heavy burden" that the common law writ of certiorari imposed to show "that a clear departure from the essential requirements of law has resulted in otherwise irreparable harm."[262] The Committee anticipated that it would be "extremely rare that erroneous interlocutory rulings can be corrected by resort to common law certio-

257. *Id.*

258. Fla. R. App. P. 9.130 advisory comm. nn. (amended 1977).

259. *See WEG Indus., SA v. Co. De Seguros Generales Granai*, 937 So. 2d 248, 251 (Fla. 3d Dist. App. 2006) (emphasis omitted) (quoting Florida Appellate Rule 4.2(a) as it was in 1967).

260. "Although the committee notes to [Appellate R]ule 9.040(b) are only persuasive authority and are not part of the rule, . . . this Court may look to the notes as a means of determining the clear intent of the rule." *Kaweblum v. Thornhill Ests. Homeowners Ass'n*, 755 So. 2d 85, 87 (Fla. 2000).

261. Fla. R. App. P. 9.130 advisory comm. nn.

262. *Id.*

rari."[263] Whether correction by certiorari is "rare" or not can be debated, but, again, we see evidence of judicial intent that certiorari should not be a common remedy. Consistent with that sentiment, the Committee voiced an intent to retain the distinction between the remedy afforded by Rule 9.130 and the remedy of certiorari.

This dual-track approach allows measured access to immediate appellate review of interlocutory orders. On the one hand, Rule 9.130 provides a ready-made jurisdictional basis, consistent over all five Florida judicial districts, allowing for the immediate review of entire classes of orders, apparently those that repeat with sufficient frequency to warrant a place on the Rule 9.130 list and that are deemed to be "most urgent."[264] For all other types of orders, which may not recur with sufficient frequency to justify a separate rule or do not always possess the required urgency, the matter of immediate review is tested by the case-by-case certiorari process.[265] The rule process is a necessary complement to the common law case-by-case certiorari process.

Article V, Section 4, empowers the Supreme Court to define the district courts' jurisdiction over interlocutory orders.[266] Judicial Administration Rule 2.140 establishes a detailed procedure for the regular review and amendment of the appellate rules, including Rule 9.130.[267] The process established by Rule 2.140 is a useful tool to quickly fashion sensible changes to the law of appellate jurisdiction, superior in many—but not all—situations to the case-by-case common law determination of the certiorari process.

First, the rule process of identifying those classes of orders that are immediately reviewable is deliberative, transparent, and fair.[268] Rule 2.140 commands The Florida Bar to appoint an Appellate Court Rules Committee to consider rule-change pro-

263. *Id.*

264. *See* Fla. R. App. P. 9.130(3)(A)–(D) (providing a list of the most urgent non-final orders).

265. *See id.* at 9.130 advisory comm. nn. (noting that the most urgent interlocutory orders are appealable under Rule 9.130 but that relief may be obtainable under common law certiorari—albeit in rare circumstances).

266. Fla. Const. art. V, § 4(b)(1).

267. Fla. R. Jud. Admin. 2.140.

268. *See San Perdido Ass'n*, 104 So. 3d at 358 (Lewis, J., specially concurring) (explaining that "[t]he careful consideration given to potential amendments to the appellate rules would result in well-crafted, limited interlocutory review").

posals.[269] The Committee is to "be composed of attorneys and judges with extensive experience and training in the area of practice of the [C]ommittee calling for . . . [the] frequent use of the rules."[270] The Florida Bar appoints these attorneys and judges for terms of specific duration and charges them with considering requests for rule changes from those both within and outside the Committee.[271] The process is structured to be open and inclusive.

The Committee prepares formal reports and proposals every three years.[272] The Committee provides the report to the Florida Supreme Court and the legislative leadership[273] and also publishes it on The Florida Bar website and in The Florida Bar News.[274] The Committee maintains meeting minutes and records that are available to the public on The Florida Bar website.[275]

The Supreme Court may order oral argument on the merits of the proposals, with notice to legislators and members of the judiciary.[276] After notice and hearing, the Supreme Court decides whether to adopt or reject the recommendations with a written, published order.[277] This open, public process provides sharp contrast to the case-by-case work of three district court judges who, in relative secrecy, labor with the input of only the two parties to the petition to determine if an interlocutory ruling is immediately reviewable.

269. Fla. R. Jud. Admin. 2.140(a)(3).

270. *Id.* at 2.140(a)(4).

271. *Id.* at 2.140(a)(6). Rule 2.140(a)(6) provides:

> The committees may originate proposals [for amendments to the Rules of Appellate Procedure] and are charged with the duty of regular review and reevaluation of the rules to advance orderly and inexpensive procedures in the administration of justice. The committees may accept or reject proposed amendments or may amend proposals. The committees shall keep minutes of their activities, which minutes shall reflect the action taken on each proposal. Copies of the minutes shall be furnished to the clerk of the [S]upreme [C]ourt, to the board of governors of The Florida Bar, and to the proponent of any proposal considered at the meeting.

Id.

272. *Id.* at 2.140(b)(1).

273. *Id.* at 2.140(b)(2), (4).

274. *Id.* at 2.140(b)(2).

275. *See* The Fla. Bar, *Appellate Court Rules*, http://www.floridabar.org/cmdocs/cm205.nsf/WDOCS (accessed Apr. 1, 2013) (providing links to the Committee's meeting minutes, agendas, and other documents).

276. Fla. R. Jud. Admin. 2.140(b)(5).

277. *Id.* at 2.140(b)(6)–(7). Rule 2.140 also provides that the Supreme Court may draft emergency amendments without recommendation from the Rules Committee. *Id.* at 2.140(d).

Second, the rulemaking process establishes jurisdiction over an entire class of interlocutory orders with certainty and uniformity over all five judicial districts. The district court's power to provide immediate review of an order is not based on the particular conception of one district court as to what constitutes irreparable injury. No questions arise in the litigant's mind as to whether the district court will find the troublesome order to be one "that departs from the essential requirements of law."[278] A stated purpose of Rule 9.130 is to eliminate useless labor.[279] When a class of interlocutory orders is placed on the Rule 9.130 list, certiorari becomes irrelevant; a litigant need not argue the jurisdictional basis of the court to hear the case, and the court need not expend its time on deciding the question. Moreover, attorneys can advise clients with greater certainty as to the clients' appellate options, a most precious opportunity.[280]

Third, the standard of review in a Rule 9.130 proceeding will be the same standard of review applied in a plenary appeal. The standard of review in certiorari—altered by the need to show a "departure from essential requirements of the law"—is both more difficult for the petitioner and less clear. The result of review in a certiorari proceeding may differ from the result in a plenary appeal. This inconsistency is not likely to promote the goals of a fair, predictable, and efficient adjudication.[281]

Still, the Rule 2.140 process cannot replace certiorari. Certiorari proceedings allow three district court judges to consider their jurisdiction to review a particular order within thirty days of the

278. *See id.* at 2.140(b)(5) (describing the open-forum process for amending court rules, which provides a stark contrast to a district court's case-by-case basis for determining whether an order departs from the essential requirements of law).

279. Fla. R. App. P. 9.130 comm. nn.

280. "One does not need to expatiate upon the value of certainty in a developed legal system. Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable." Benjamin N. Cardozo, *The Growth of the Law* 3 (2d prtg., Greenwood Press 1975).

281. For instance, on plenary appeal, "[t]he standard of review for the denial of a continuance is abuse of discretion." *Fasig v. Fasig*, 830 So. 2d 839, 841 (Fla. 2d Dist. App. 2002). But, on certiorari review, while the abuse of discretion standard is acknowledged, the abuse must rise to a level that creates irreparable harm. *See e.g. SSJ Mercy Health Sys., Inc. v. Posey*, 756 So. 2d 177, 179 (Fla. 4th Dist. App. 2000) (explaining that "[a]lthough ordinarily an order denying continuance does not present the prospect of irreparable harm necessary for the exercise of certiorari jurisdiction, . . . and this court regularly dismisses petitions seeking such relief, in this case we believe that forcing counsel to choose between effectively representing his client and caring for his wife in her final days creates the potential for harm that cannot be remedied on plenary appeal").

rendering of that order.[282] By contrast, the same three judges have no power to amend Rule 9.130 to provide the court with the jurisdiction needed to review that same order; only the Supreme Court holds the power to alter Rule 9.130 in the course of deciding a case.[283] And that power is no help to a trial court litigant. Pursuant to the Rule 2.140 process, the Appellate Rules Committee can recommend an emergency rule change to the Supreme Court, and that application may be accepted and considered in an expedited manner.[284] But again, the process is too deliberative to be immediately useful to an individual litigant. Thus, for most litigants, certiorari remains the sole avenue for interlocutory relief.

B. The Chronicle of the Work of the Appellate Rules Committee and the Supreme Court Shows the Rule 2.140 Process Is a Success

Rule 2.140 provides the Bar and Bench the continuous opportunity to consider whether developments in the law—outside the context and procedural requirements of a particular lawsuit—show a need for change in the interlocutory jurisdiction of the district courts. The rule process has been used to:

- clarify the district courts' jurisdiction over partial final judgments;[285]
- expand the district courts' interlocutory jurisdiction;[286]

282. Florida Rule of Appellate Procedure 9.100(c) requires the petitioner to file his or her petition "within [thirty] days of rendition of the order to be reviewed."

283. Fla. R. Jud. Admin. 2.140(d). And it has done so. *Mandico*, 605 So. 2d at 854–855.

284. Fla. R. Jud. Admin. 2.140(e). This procedure has been employed successfully, as well. *Amend. to Fla. R. of App. P. 9.130*, 663 So. 2d 1314, 1314–1315 (Fla. 1995) (granting The Florida Bar's emergency petition to amend Rule 9.130 to include specified family law orders).

285. *The Fla. Bar Re: R. of App. P.*, 463 So. 2d 1114, 1116 (Fla. 1984). In 1985, the Supreme Court approved rule changes to clarify the district courts' jurisdiction over partial final judgments. *Id.*

286. *In re Amends. to Fla. R. of App. P.*, 84 So. 3d 192, 195 (Fla. 2011) (permitting interlocutory review of orders that determine the issue of forum non conveniens); *In re Amends. to Fla. R. of App. P.*, 2 So. 3d 89, 92 (Fla. 2008) (permitting interlocutory review of orders that concern writs of replevin, garnishment, or attachment, and orders that determine the entitlement of a party to an appraisal under an insurance policy); *In re Amends. to Fla. R. of App. P.*, 894 So. 2d 202, 215 (Fla. 2005) (permitting interlocutory review of orders determining that a governmental entity has taken action that has inordinately burdened real property within the meaning of Florida Statutes Section 70.001(6)(a)); *In re Amends. to Fla. R. of App. P.*, 609 So. 2d 516, 517 (Fla. 1992) (permitting review of orders that grant or deny the certification of a class and orders regarding the appointment of a

- allow the Supreme Court to act on an emergency basis to conform the district courts' jurisdiction over orders concerning worker's compensation immunity;[287]
- quickly conform the district courts' interlocutory jurisdiction to changes to Family Law Rules of Procedure;[288]
- adopt a new rule regarding procedures for appeal of orders denying immunity in federal civil rights cases consistent with federal procedure;[289]
- remove classes of orders that may be immediately reviewed and so, narrow the district courts' jurisdiction.[290]

The deliberative process of Rule 2.140 is a time-tested success. The process is deliberative, transparent, and firmly rooted in the Florida Constitution. This process is ideal for identifying interlocutory orders that should be immediately reviewable. It is well suited to resolve interdistrict conflicts as to whether a class of orders qualifies for certiorari, in favor of immediate review, by the expedient process of amending Rule 9.130 to include the class of orders at issue.

Because the rule process is deliberative and applicable to entire classes of orders, it is not the appropriate forum for resolving jurisdictional questions as to a particular case. Attorneys or

receiver or the termination of a receivership); *The Fla. Bar re: R. of App. P.*, 463 So. 2d at 1116 (permitting interlocutory review of non-final orders that determine whether a party is entitled to arbitration).

287. *Mandico*, 605 So. 2d at 854–855 (using its emergency rulemaking power to amend Rule 9.130 to provide the district courts with jurisdiction to review orders that determine a party is not entitled to worker's compensation immunity as a matter of law).

288. In 1995, the Supreme Court responded to an emergency petition from the Appellate Court Rules Committee to amend Rule 9.130 to allow interlocutory review of orders under Florida Family Law Rule of Procedure 12.540 because of the recent adoption of the Family Law Rules of Procedure. *Amend. to Fla. R. of App. P. 9.130*, 663 So. 2d at 1314–1315.

289. In 1996, "Subdivision (a)(3)(C)(viii) was added in response to the [S]upreme [C]ourt's request in *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994) . . . direct[ing] the [Appellate Rules] [C]ommittee to propose a new rule regarding procedures for appeal of orders denying immunity in federal civil rights cases consistent with federal procedure." Fla. R. App. P. 9.130 advisory comm. nn. (1996 Amendment). Rule 9.130 was thereafter amended to permit district courts to review orders that rule, as a matter of law, a party is not entitled to absolute or qualified immunity in a civil rights claim arising under federal law. *Id.*

290. *In re Amends. to Fla. R. of App. P.*, 780 So. 2d 834, 860 (Fla. 2000) (constricting jurisdiction of the district courts under Rule 9.130 by eliminating their jurisdiction over orders that resolve the issue of liability in favor of a party seeking affirmative relief).

any member of the public who sees the repeating jurisdictional problems can advance proposals to the Committee to include certain classes of orders that they see regularly as candidates for inclusion in Rule 9.130. The Appellate Rules Committee can screen these proposals for suitability and recommend or deny them after its deliberations.

Proponents (and opponents) of a particular proposal to include a class of orders in the list of Rule 9.130 orders can use the functional approach to support their position. Is the order one from which the district court can determine, with a high level of confidence from the limited record available, that the circuit court has committed an error? Can the district court confidently state that the circuit court's "error is so detrimental to the goal of providing a fair, consistent, accurate, and even-handed dispute[-]resolution process that it should use its resources to interfere in the trial court proceeding to correct the problem"?[291] An affirmative answer to these two questions means that a class of orders is a fair candidate for inclusion in the Rule 9.130 list.

We have seen from the record of achievement of the Appellate Rules Committee that it is particularly well suited to respond to these proposals and provide an answer for litigants in future years, one that fulfills the avowed purpose of Rule 9.130, to avoid "useless labor."[292]

V. CONCLUSION

Certiorari jurisdiction should remain a flexible tool for practitioners to seek review of non-final orders that otherwise escape appellate review. The certiorari standard should remain loosely defined and malleable to provide the courts discretion to grant the writ. Abandoning the current certiorari standard in favor of the functional restatement may open a Pandora's box that would unleash confusion and uncertainty by undoing over half a century of certiorari precedent. However, the functional restatement is a powerful test to identify orders that should be immediately reviewed. Those classes of orders that pass the functional restatement test will be prime candidates for inclusion in Rule 9.130, which has a well-developed rulemaking process that would pro-

291. Altenbernd & Marcario II, *supra* n. 15, at 14.
292. Fla. R. App. P. 9.130 advisory comm. nn.

vide transparency and result in certainty and uniformity. For this reason, the Florida Supreme Court (in its rulemaking capacity) and The Florida Bar's Appellate Rules Committee should consider using the functional restatement to screen and evaluate further amendments to Rule 9.130.