

**In the Supreme Court of Florida**

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

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KEVIN VERICKER,  
Petitioner,

v.

NORMAN C. POWELL,  
Respondent.

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**RESPONDENT'S ANSWER BRIEF ON JURISDICTION**

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RECEIVED, 11/07/2022 08:48:22 PM, Clerk, Supreme Court

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### **Statement of the Issues**

Petitioner's jurisdictional brief raises three issues, which beyond issue number 1, appear to be merits-driven. Respondent would posit that the jurisdictional question is properly framed as:

Whether this Court should exercise its discretionary jurisdiction and review the decision of the Third District Court of Appeal, which decision reasoned that appellate court certiorari jurisdiction should not be expanded to include interlocutory review of a non-final order denying summary judgment under Fla. Stat. § 768.295.

The answer is "no."

### **Statement of the Case and Facts**

At the Trial Court level, this litigation arises out of a defamation lawsuit filed by Respondent, Norman Powell, against Petitioner, Kevin Vericker. The defamatory conduct that formed the basis of that suit arose from blog postings made by Petitioner that attacked Respondent's character and competence as the attorney for North Bay Village, a local South Florida municipality.

More than three (3) years after filing of the complaint, Petitioner filed a Motion for Summary which incorporated an Anti-SLAPP Motion (hereinafter "Summary Judgment/Anti-SLAPP Motion"). Following the filing of responses and the conducting of a hearing, the

Trial Court entered a written order denying Petitioner's Summary Judgment/Anti-SLAPP Motion. Petitioner sought certiorari relief from the Third District Court of Appeal. On August 10, 2022, the Third District issued its Opinion (See Appx. to Petitioner's Jurisdictional Brief), wherein the Court expressly "decline[d] Petitioner's invitation to expand our certiorari jurisdiction to review the challenged non-final order." *Vericker v. Powell*, 343 So.3d 1278, 1279 (Fla. 3d DCA 2022). In doing so, the Third District agreed with the Fourth District's decision in *WPB Residents for Integrity in Government, Inc. v. Materio*, 284 So.3d 555 (Fla. 4<sup>th</sup> DCA 2019), recognizing that the proper mechanism for implementing policy changes to the scope of what orders are/are not reviewable on an interlocutory basis is through amendment to Fla. R. App. 9.130, not through the expansion of the Court's limited certiorari jurisdiction. *Powell*, 343 So.3d at 1280-81. Petitioner now seeks to have this Court invoke its discretionary jurisdiction based on conflict.

While Petitioner attempts to advocate in his jurisdictional brief why he believes he should have won his Summary Judgment/Anti-SLAPP argument before the Trial Court, he lost, and, in certain instances, those arguments go beyond the contents or reasoning of

the Third District's Opinion.<sup>1</sup> The facts relevant to a jurisdictional analysis are contained within the Third District's majority Opinion.

Petitioner also makes a point of referring to the concurrence below more than once in his jurisdictional brief, alleging that all 3 judges in the Third District's panel agreed with the concurrence. See Petitioner's Brief at p. 5 & p. 10-11. Irrespective of how the opinion looks in the identification of the panel Judges' names, this does not even make sense. There were 3 Judges on the Third District's panel. If they all agreed with the concurrence's language and expressions, it would not be a concurrence, it would be the majority, and Judge

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<sup>1</sup> For example, Petitioner argues: "The summary judgment record does not reflect Petitioner knew any of his comments were false. And Petitioner had traditional journalistic sources for his commentary, including sources within the public records, see Petitioner's Brief at p. 4, and "The record below established that under the federal summary judgment standard this Court recently adopted, Respondent, a former village attorney, cannot pursue a defamation case because he failed to demonstrate actual malice," and "the Trial Court's decision is facially at odds with *Sullivan*." See Petitioner's Brief at p. 3. These claims do not appear in the Third District's decision and do not play a role in the immediate jurisdictional analysis. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986) ("Neither a dissenting opinion nor the record itself can be used to establish jurisdiction."). Suffice it to say Respondent's story differs considerably regarding the record below and Petitioner's defamatory conduct. If this Court accepts jurisdiction, those points may be raised in merits' briefing.

Gordo would not have to “write separately” as she mentions doing. A more logical conclusion is Judge Fernandez and Judge Scales represent the majority rationale, and Judge Gordo wrote her concurrence. It is only the majority opinion that is considered in this Court’s jurisdictional analysis. *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) (“the language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the decision of the district court of appeal.”).

## **Argument**

### **1. Conflict Jurisdiction**

Petitioner relies on two separate grounds for jurisdiction: (1) Certified Conflict, under Art. V, § 3(b)(4), Fla. Const., and (2) Express and Direct Conflict, under Art. V, § 3(b)(3), Fla. Const.<sup>2</sup>

The Third District certified conflict with three cases, all out of the Second District: *Gundel v. AV Homes, Inc.*, 264 So. 3d 304 (Fla. 2d DCA 2019); *Baird v. Mason Classical Academy, Inc.*, 317 So. 3d

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<sup>2</sup> Because the analysis of both is conflict driven, that discussion largely proceeds jointly within this jurisdictional brief.

264 (Fla. 2d DCA 2021); and *Davis v. Misheyev*, 339 So. 3d 449 (Fla. 2d DCA 2022).<sup>3</sup>

Respondent readily acknowledges that this Court has discretionary jurisdiction given the Third District’s certified conflict. See Art. V, § 3(b)(4), Fla. Const; Fla. R. App. P. 9.030(a)(2)(A)(vi). However, a certification of conflict does not mandate Supreme Court review. *State v. Barnum*, 921 So. 2d 513, 528 (Fla. 2005). Respondent also recognizes that this Court has discretionary jurisdiction over cases from the districts that truly present a direct and express conflict. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). However, “[o]ne of the tests for conflict jurisdiction” is whether the decisions “are irreconcilable.” *Aravena v. Miami-Dade County*, 928 So. 2d 1163, 1166 (Fla. 2006). Specifically, the overall “conflict must be such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter. If the two cases are distinguishable in

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<sup>3</sup> Other cases have since certified conflict with the Second District as well. See *Geddes v. Jupiter Island Compound, LLC*, 341 So.3d 3535 (Fla. 4<sup>th</sup> DCA 2022); *Novick v. Mango’s Tropical Cafe, LLC*, 2022 WL 3903529 (Fla. 3d DCA Aug. 2022). However, they provide no factual or legal analysis that is helpful to a jurisdictional determination.

controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise.” *Kyle v. Kyle*, 139 So. 2d 885, 887 (Fla. 1962) (internal citation omitted). This Court should decline to exercise its jurisdiction in this instance.

It’s initially important to review certiorari generally to determine whether the decisions here are truly irreconcilable and deserve this Court’s attention. In that regard, “[i]t is well settled that to obtain a writ of certiorari, there must exist ‘(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal.’” *Reeves v. Fleetwood Homes of Florida, Inc.*, 889 So. 2d 812, 822 (Fla. 2004) (citation omitted). “[B]efore certiorari can be used to review non-final orders, the appellate court must focus on the threshold jurisdictional question: whether there is a material injury that cannot be corrected on appeal, otherwise termed as irreparable harm.” *Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344, 351 (Fla. 2012).

Moreover, when it comes to certiorari, there is a difference between an alleged procedural/process failure and an alleged substantive error, in that review of an alleged procedural/process

failure may be appropriate for certiorari, while review of an alleged substantive error is generally not appropriate for certiorari. See *e.g.*, *Williams v. Oken*, 62 So. 3d 1129, 1135–36 (Fla. 2011) (A review of [*Globe Newspaper Co. v. King*, 658 So. 2d 518 (Fla. 1995)] . . . demonstrates three things: (1) that a defendant cannot demonstrate material harm required for certiorari review concerning whether a punitive damages claim is viable, or by analogy, an expert is qualified, because those things do not deprive the defendant of the statutorily guaranteed process, (2) utilizing certiorari to review the trial court’s findings regarding whether a claim for punitive damages exists, or, by analogy, whether an expert is qualified amounts to reviewing the sufficiency of the evidence, and (3) that granting a petition for writ of certiorari to review the sufficiency of the evidence is inappropriate.); See also Philip J. Padovano, *Review by certiorari—Unappealable nonfinal orders*, 2 Fla. Prac., Appellate Practice § 19:10 (2022 ed.) (recognizing the use of certiorari “to protect the process, not to correct errors made in the execution of the process” as a “critical distinction”).

While Respondent recognizes that Fla. Stat. § 768.295 is intended to provide a certain layer of protection to defendants who

claim to be the victim of a SLAPP suit, the mechanism the Legislature created for enforcing that right is an expedited motion process and procedure for considering those issues in Circuit Court. See Fla. Stat. § 768.295(4). The Legislature did not provide for certiorari review of an order that follows the proper implementation of that procedure/process,<sup>4</sup> and an Order denying a motion brought under Florida’s Anti-SLAPP statute does not violate a defendant’s Constitutional First Amendment rights.

Turning to the specifics of this case and a comparison with those from the Second District, it is without dispute that the Trial Court in *Powell* followed the statutory procedure, gave Petitioner his day in Court, and subsequently ruled on Petitioner’s Summary Judgment/Anti-SLAPP Motion. That is not what happened in *Gundel*.

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<sup>4</sup> Petitioner cites *Parvin v. Valhalla Props on Sand Key, LLC*, 949 So. 2d 1167 (Fla. 2d DCA 2007) for the proposition that “jurisdiction of the district courts to consider appeals of nonfinal orders may not be established by statute”, then argues “no inference may thus be made by section 768.295’s lack of a provision for interlocutory review.” See Petitioner’s Brief at p. 11-12. Petitioner ignores the distinction between direct appellate review of interlocutory orders (which is what *Parvin* was discussing) and certiorari. This case presents a question of certiorari, and the Legislature has, in other instances, provided for certiorari review. See *e.g.*, Fla. Stat. §§ 125.018, 165.081, 333.11, and 601.152.

In *Gundel*, the Second District concluded (a) the trial court was wrong in refusing to even rule on a summary judgment motion filed under the Anti-SLAPP statute (*see Gundel*, 264 So. 3d at 313) and (b) the trial court utilized the wrong dismissal standard in evaluating a motion to dismiss filed under the Anti-SLAPP statute. (*see Gundel*, 264 So. 3d at 314-15).<sup>5</sup> Accordingly, while *Gundel* discusses the policy behind Fla. Stat. § 768.295, what the Court actually did was reverse a procedural/process failure of the trial court. *Gundel* is thus distinguishable from the instant case.

The *Davis* decision also arose out of a motion to dismiss, not a motion for summary judgment. Relying on *Gundel* and the motion to

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<sup>5</sup> The dismissal standard question revolves around the Second District's determination "that a motion to dismiss based on the Anti-SLAPP statute requires the trial court to do more than accept as true the factual allegations in the four corners of the complaint and draw all reasonable inferences therefrom in favor of the claimant." *Gundel*, 264 So. 3d at 314. The Third District has disagreed with this motion to dismiss burden shifting analysis. *See Lam v. Univision Communications, Inc.*, 329 So.3d 190, 197 (Fla. 3d DCA 2021). The instant case, however, arises out of a summary judgment motion, not a motion to dismiss. It also contains no discussion of burden shifting. Accordingly, this case does not present circumstances which bring that disagreement to the forefront or present an ideal opportunity for this Court to address it.

dismiss burden-shifting analysis therein contained, the Court indicated:

it appears that the trial court did not analyze the Anti-SLAPP statute when ruling on the motion to dismiss because, as already explained, the trial court could not have made the necessary determinations under the statute. Rather, the unelaborated order of dismissal suggests that the trial court denied the motion utilizing an incorrect motion-to-dismiss standard....

*Davis*, 339 So. 3d at 453 (footnote omitted). The Second District remanded the case for further consideration of the motion to dismiss. The immediate case, by comparison, did not involve a motion to dismiss and did not involve a trial court's failure to analyze the statute. *Davis* is similarly distinguishable from the instant case.

Regarding *Baird*, conflict is admittedly a closer call. However, *Baird* too arose out of a motion to dismiss that was filed. And, while the *Baird* Court recognized that the trial court conducted the necessary hearing, the Court appears to combine its jurisdictional analysis with the burden-shifting analysis applicable to motions to dismiss in the Second District. *Powell*, by comparison, involved a motion for summary judgment, and no burden-shifting or procedural/process concerns whatsoever.

Because the immediate case arises out of a motion for summary judgment, not a motion to dismiss, because both *Gundel* and *Davis* are procedural/process failure cases, and because even *Baird* highlights the disagreement over a motion to dismiss approach under the statute without certifying conflict, this case does not present the factual or legal scenario best suited for the Court to address differences that may appear to exist.

## **2. This Case Does Not Warrant Supreme Court Review**

First, this Court may moot even a potential future conflict to the extent it amends Fla. R. App. P. 9.130 in connection with the proceedings ongoing in Case No. SC22-1084.

Second, Petitioner argues that the Court should take this case because he has fundamental rights, and absent his petition being heard, he will lose those rights. *See* Petitioner's Brief at p. 12-13. Though this is more of a merits-based argument, reality is, Petitioner was heard through utilization of the statutory process/procedure. He presented a motion for summary judgment that was considered and denied. This Court does not need to take this case to right that ship.

Finally, despite Fla. Stat. § 768.295 having been on the books for years, and similar statutes existing in other contexts (*see e.g.*, Fla.

Stat. § 718.1224 and Fla. Stat. § 720.304), the alleged conflict is relatively new. In fact, it appears that *Gundel* is the first decision to evaluate the issue, and the circumstances are not fully flushed out. For example: (a) there is no guarantee that the timing of bringing a motion within the context of the litigation, or a corresponding delay in doing so, will not be a future consideration in determining whether irreparable harm has been suffered through denial of that motion, (b) there is no guarantee the Second District would reach the same conclusion if it were presented with the same facts as *Powell*, and (c) the circumstances could differ based upon how factually developed the record is, or whether the motion effectively attacks the complaint on its face.

### **Conclusion**

For the reasons stated herein, it is respectfully submitted that this Court should exercise its discretion and decline to accept jurisdiction.

Dated: November 7, 2022

Respectfully submitted,

/s/ Andrew M. Feldman

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**FELDMAN KODSI**

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief on Jurisdiction has been furnished via the Court's E-Filing Portal, which will send a Notice of Service of Court Document to: Faudlin Pierre, Esq., PIERRE SIMON, *Attorney for Petitioner* ([fplaw08@yahoo.com](mailto:fplaw08@yahoo.com)); and on Dwayne A. Robinson, Esq., KOZYAK TROPIN & THROCKMORTON LLP, *Attorney for Petitioner* ([drobinson@kttlaw.com](mailto:drobinson@kttlaw.com)).

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this Answer Brief was prepared in Bookman Old Style, 14-point font, and contains 2,494 words, in compliance with Rules 9.045(b) and 9.120(d) of the Florida Rules of Appellate Procedure.

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