IN THE SUPREME COURT OF FLORIDA

ANDRZEJ MADURA,

Petitioner,

vs.

Case Number: SC06-999
L.T. Case Number: 2D06-915

FULL SPECTRUM LENDING, INC.
and **COUNTRYWIDE HOME LOANS, INC.**,

Respondents.
_____/

RESPONDENTS' BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS[1]

Respondents, Full Spectrum Lending, Inc. ("Full Spectrum") and Countrywide Home Loans, Inc. ("Countrywide") object to the facts as stated by Petitioner Andrzej Madura ("Petitioner") in his initial brief and, therefore, assert the following:

On July 26, 2000, Petitioner received a residential mortgage loan from Full Spectrum. **(A1:1-2.)** Countrywide subsequently became the owner of, and service provider for, Petitioner's loan. (A1:4; A2:2.)

As part of the original consideration for his mortgage loan, Petitioner signed an arbitration agreement, in which he agreed to arbitrate any "claim" arising out of or relating to his "credit transaction." (A2 Ex.1.) The term "credit transaction" is defined in the arbitration agreement by specific reference to Petitioner's loan number and by incorporation of his loan documents. (*Id.*) The term "claim" is broadly defined to encompass "anything" arising out of or relating to Petitioner's credit transaction and any documents that contain information about his credit transaction. (*Id.*)

Despite his obligation to arbitrate, Petitioner filed a complaint in the Twelfth Judicial Circuit in Manatee County, in May 2002. (A1.) All of Petitioner's claims

[1] Unless otherwise stated, all references to the appendix filed by Respondents in support of this brief will be referenced by the symbol "A" so that "A1:1-4 refers to pages 1 through 4 of Tab 1 of the Respondents' appendix.

were based on a prepayment penalty, which he insisted was not part of his original loan transaction. Petitioner alleged in his original complaint that Respondents forged his signature and his wife's signature on loan documents containing the prepayment penalty. (A1:4.) In his complaint, Petitioner alleged that Respondents had violated Florida's usury, forgery and racketeering statutes. (*Id.*)

In response to Petitioner's complaint, Respondents moved to enforce the arbitration agreement that was part of the credit transaction. (A2.) On August 5, 2002, the trial court issued a written order granting Respondents' motion to compel arbitration. (A3.) The trial court first recognized that the arbitration agreement was governed by the Federal Arbitration Act and, therefore, "any doubts about the arbitrability of an issue must be resolved in favor of arbitration." (A3:2.) Regarding the terms and scope of the arbitration agreement, the trial court found:

> The arbitration agreement obligates the parties to arbitrate any "claim" arising out of or relating to the credit transaction. "Claim" is broadly defined. However, it specifically includes allegations of fraud and misrepresentation, alleged violations of state usury law and consumer protection statutes, and "anything" flowing from documents containing information about the loan.

(A3:2.) As a result, the court specifically ordered that Petitioner's allegations of fraud and forgery should be arbitrated since they were "clearly encompassed by his arbitration agreement." (A3:3.) Accordingly, the trial court compelled Petitioner to arbitrate his claims before the National Arbitration Forum, and held that his claims "[could] not be litigated judicially." (A3:3.)

Petitioner appealed the trial court's arbitration order to the Second District Court of Appeal, which affirmed that order *per curiam* without written opinion. (A4.) Petitioner moved for rehearing and rehearing *en banc*, which requests were denied. (A5.) Petitioner then moved for clarification of the *per curiam* affirmance, and his motion was stricken as unauthorized. (A6.) Petitioner next petitioned the United States Supreme Court for certiorari. That petition was denied without opinion on November 17, 2003. (A7.)

In June 2005, almost three years after the trial court ordered the parties to arbitrate the dispute, Petitioner moved to amend his original complaint. (A8.) In his motion, Petitioner claimed that he learned during "investigation and discovery" that the loan transaction was based on forged instruments and, therefore, he had reason to believe that Respondents committed fraud. (A8:1.) Specifically, Petitioner's proposed amended complaint contained counts for: (1) rescission and damages under the federal Truth in Lending Act, 15 U.S.C § 1601, *et seq*.; (2) failure of consideration; (3) rescission of the mortgage due to forgery; (4) fraud; (5) usury under Sections 687.071 and 687.03, Florida Statutes; and (6) uttering forged loan instruments in violation of Sections 831.02 and 831.09, Florida Statutes. (*Id.*)

Respondents opposed the motion, noting that the allegations of forgery were not a new "discovery" since they had also formed the basis for the claims asserted

in Petitioner's original complaint. (A9:1, 5.) Granting the motion for leave to amend would therefore have only delayed proceedings further because the claims proposed in the amended complaint would also squarely fall within the arbitration provision of the loan documents. (A9:6-8.) Thus, judicial resources would have been squandered in getting the same allegations to the same arbitration authority, ultimately leading to the same result. In short, Respondents suggested that Petitioner's proposed amended complaint was merely a futile attempt to circumvent the trial court's arbitration order. (A9:2.)

Upon review of the pleadings, on January 31, 2006, the trial court denied Petitioner's motion for leave to amend. (A10.)

Petitioner then filed a petition in the Second District Court of Appeal seeking certiorari review of the trial court's order denying leave to amend his complaint. (A11.) On March 16, 2006, the Second District dismissed his petition, without further explanation. (A12.) The court later issued an order explaining that Petitioner's certiorari petition had been "dismissed on March 16, 2006, for lack of jurisdiction." (A13.)

Subsequently, Petitioner filed a motion and an amended motion requesting that the Second District reconsider its dismissal of his petition for writ of certiorari. (A14-15.) The Second District then issued an unpublished order denying both

motions for reconsideration on April 13, 2006 (the "Order"). (A16.) The court's unpublished Order states in its entirety:

> Petitioner's motion for reconsideration and amended motion for reconsideration are denied. This Court's order of March 16, 2006 dismissed petitioner's petition for writ of certiorari because the order denying petitioner's motion for leave to file an amended complaint is not reviewable by certiorari. *See Harry Pepper & Assoc., Inc. v. City of Cape Coral*, 369 So. 2d 969 (Fla. 2d DCA 1979).

(A16.)

Following this denial, Petitioner asked this Court to grant discretionary review of the Second District's unpublished Order. In his petition, Petitioner contends that the Order conflicts with the Fourth District Court of Appeal's decision in *Hall v. Wajechowski*, 312 So. 2d 204 (Fla. 4th DCA 1975).

This Court accepted jurisdiction on February 27, 2007.

SUMMARY OF THE ARGUMENT

The only issue before this Court under alleged express and direct conflict jurisdiction is whether the district court's unpublished Order – which does not constitute precedent – properly denied Petitioner's motions seeking reconsideration of the district court's earlier order dismissing Petitioner's petition for writ of certiorari. In support of its Order denying reconsideration, the district court cited *Harry Pepper*. Petitioner argues that the district court's order directly and expressly conflicts with the Fourth District Court of Appeal's decision in *Hall*.

However, no express conflict exists, and this Court should decline to exercise jurisdiction.

The Second District's order is nothing more than an unpublished, routine, one-paragraph order containing no discussion of the facts of the instant case or any application of law to the relevant facts. Such orders are not precedent. This Court's express and direct conflict jurisdiction is for purposes of avoiding confusion and maintaining uniformity in the precedent setting case law of this State. Thus, because the Order does not constitute precedent, this Court should decline to exercise jurisdiction.

Additionally, the facts pertinent to the decision in *Hall* are completely different from the facts at issue here. Thus, the unpublished Order does not expressly and directly conflict with the Fourth District's holding – on its face or otherwise – as required by Article V, section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). Accordingly, even though this Court has preliminarily accepted jurisdiction to review the purported "conflict" raised by the Petitioner, this Court should nevertheless decline to exercise its discretionary jurisdiction in this appeal.

In the alternative, if this Court finds that a sufficient conflict does exist, the Court should affirm the Second District's unpublished Order. Petitioner's petition for writ of certiorari sought review of an interlocutory order that denied his motion

for leave to amend his complaint. Based on the district court's reference to *Harry Pepper*, it is clear that the district court determined that, under the facts of this case, it did not have jurisdiction because Petitioner would have an adequate remedy to address any claimed error in the trial court's order by way of direct appeal following final judgment.

In his petition for writ of certiorari, Petitioner did not meet the well-established three-pronged test for determining when certiorari jurisdiction is appropriate. First, as the district court concluded, Petitioner has an adequate remedy for any claimed error by appealing from a final judgment following arbitration of this dispute. Second, Petitioner failed to allege any sufficient irreparable harm to merit certiorari review. And third, the trial court's order did not depart from the essential elements of the law. Therefore, this Court should conclude that the district court correctly dismissed Petitioner's petition for writ of certiorari and properly denied his motions for reconsideration.

ARGUMENT

I. NO EXPRESS CONFLICT EXISTS TO SUPPORT DISCRETIONARY REVIEW BY THIS COURT.

Standard of Review.

Under the Florida Constitution and the Florida Rules of Appellate Procedure, this Court has discretionary jurisdiction to review decisions of district courts of appeal that "*expressly and directly* conflict with a decision of another

district court of appeal or of the supreme court on the same question of law." Fla. R. App. P. 9.030(a)(2)(A)(iv) (emphasis added); Art. V, § 3(b)(3), Fla. Const. The basis for conflict must appear within the four corners of the district court's decision. *Beaty v. State*, 701 So. 2d 856, 857 (Fla. 1997).

Argument.

Petitioner contends that the Second District's unpublished Order "expressly and directly conflicts" with the Fourth District Court of Appeal's decision in *Hall*. Although this Court initially granted jurisdiction, the Court should now dismiss the appeal for lack of jurisdiction because the Second District's order does not expressly and directly conflict with any decision of another district court of appeal or of this Court.

At the Second District, Petitioner sought certiorari review of a trial court's order denying him leave to amend his complaint after being ordered to arbitrate the claims alleged in his original complaint. (A11.) The Second District dismissed the petition for lack of jurisdiction, and Petitioner sought reconsideration. (A12-15.) In denying Petitioner's motions for reconsideration, the Second District issued a routine, unpublished, one-paragraph Order explaining that the trial court's order was "not reviewable by certiorari," citing *Harry Pepper*. (A16.)

The primary purpose of the Florida Constitution's grant of discretionary jurisdiction to this Court to review direct and express conflicts of appellate

decisions is to avoid confusion by maintaining uniformity in this State's precedent-setting case law. *Wainwright v. Taylor*, 476 So. 2d 669 (Fla. 1985). The unpublished Order at issue is not a "decision" as contemplated in Article V, Section 3(b)(3) of the Florida Constitution. It is a routine, unpublished order – not even published with a table citation. Such an order does not constitute precedent. *See, e.g., Ullah v. State*, 679 So. 2d 1242 (Fla. 1st DCA 1996) (publishing previously unpublished order so that holding will set precedent).

Moreover, the only authority to which the Order cites, *Harry Pepper*, is not pending review in this Court; nor has that decision been reversed by this Court. *Jollie v. State*, 405 So. 2d 418 (Fla. 1981) (supreme court may take jurisdiction of per curiam opinions, which do not constitute precedent, only if such opinions cite as controlling authority a decision that is either pending review in or has been reversed by the supreme court).[2]

Additionally, even if the unpublished Order at issue did constitute precedent, neither that Order nor the *Harry Pepper* decision *expressly and directly* conflict with the decision in *Hall*. Under express and direct conflict jurisdiction, the conflict must be apparent from the four corners of the decision under review.

[2] Although this Court has, on very rare occasion, accepted jurisdiction to review an unpublished order of a district court, it has done so in instances where the unpublished order specifically certified conflict with another case pending review in this Court. *See, e.g., Dep't of Law Enforcement v. House*, 678 So. 2d 1284 (Fla. 1996).

Beaty v. State, 701 So. 2d at 857. The Second District's order at issue contains no description of the proceedings or of the facts before the trial court below. Similarly, the *Harry Pepper* decision contained no description of the facts causing the trial court to deny the motion for leave to amend, and no discussion of the law as applied to the particular petitioners in that case or the relevant facts. For that reason alone, jurisdiction should be denied because no express and direct conflict between the instant, unpublished Order, and the *Hall* decision is evident from the four corners of the Order.

Further, even if the facts in the instant case were set forth in the order at issue, the factual scenario reviewed by the Fourth District in *Hall* was obviously very different from the factual scenario reviewed by the Second District in this case. In *Hall*, the Fourth District issued a writ of certiorari and quashed a trial court's order denying plaintiffs' motion for leave to amend their pleadings. Plaintiffs' counsel had inadvertently omitted a prayer for damages that had previously been included and explored in discovery. *Hall*, 312 So. 2d at 204. The error was discovered at the pretrial conference, at which point Plaintiffs' counsel immediately moved to amend the complaint. *See id.* Thus, Petitioner's motion for leave to amend was motivated by discovery of an inadvertent omission. Under those specific circumstances, the Fourth District found that denying leave to amend

was an abuse of discretion that could not be adequately corrected by plenary review. *Id.*

The facts in this case could not be more dissimilar. Here, based on claims in his original complaint, Petitioner had been previously ordered to arbitration. In the arbitration order, the trial court specifically found all of Petitioner's claims were encompassed by the arbitration agreement and could not be "litigated judicially." (A3.) After appealing the trial court's arbitration order all the way to the United States Supreme Court without any success along the way, Petitioner filed his motion for leave to amend his complaint at the trial court. (A8.)

Respondents opposed Petitioner's motion for leave to amend on grounds that, because the proposed amended complaint Petitioner sought to file alleged the same ultimate facts, the claims raised in the proposed complaint would also be subject to arbitration. (A9.) Respondents argued that Petitioner's attempt to amend his complaint three years after-the-fact would be "futile" and was merely an attempt to circumvent the trial court's arbitration order. Thus, as opposed to *Hall*'s motion, which was driven by an inadvertent omission, Petitioner's motion to amend in this case was driven by an intent to avoid compliance with a standing court order and a specific finding had been made by the trial court that the amendment was unjustified, futile, and designed to circumvent the court's arbitration order.

Additionally, as found by the Second District, Petitioner certainly had an alternative and adequate remedy: He could have simply complied with the trial court's arbitration order. In the more informal context of arbitration, Petitioner could likely have raised all claims and arguments, including those contemplated in his proposed amended complaint. If a decision was entered adverse to Petitioner at arbitration, and if the arbitrator's decision was confirmed by the trial court, Petitioner would then have the right to appeal any appropriate issues, including an appeal of the trial court's order denying leave to amend – which, again, would have been futile given the trial court's specific finding that the proposed amended complaint's claims were also subject to arbitration. If the appellate court then found that denying leave to amend was error, the case could be remanded to the trial court with instructions to allow amendment of the complaint and to hold new proceedings in the case. Such procedure has long been recognized as appropriate for the purpose of avoiding piece-meal appeals. *See Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214, 215 (Fla. 1998) (certiorari review, by design, is extremely limited because allowing piecemeal review of nonfinal trial court orders would impede the orderly administration of justice and serve only to delay and harass).

Therefore, in the absence of an expressly and directly conflicting decision involving an analogous factual scenario, this Court should decline to exercise its discretionary jurisdiction of the unpublished Order. Accordingly, Respondents

respectfully urge this Court to decide that, based on the record and the orders issued in this case, discretionary jurisdiction was improvidently granted.

II. THE DISTRICT COURT PROPERLY DECLINED TO EXERCISE CERTIORARI JURISDICTION.

Standard of Review.

As discussed in more detail hereinafter, the standard of review of a district court's decision denying a petition for writ of certiorari is whether the district court abused its discretion in applying the three-prong test that must be met to grant a writ of certiorari. *State v. Steele*, 921 So. 2d 538 (Fla. 2005).

Argument.

District Courts of Appeal have discretion to issue writs of certiorari to review nonfinal orders of lower tribunals other than those appealable as a matter of right under Rule 9.130, Florida Rules of Appellate Procedure. *See* Art. V, section 4(b)(3), Florida Const.; Fla. R. App. P. 9.030(b)(2)(A). Rule 9.130(a)(3) describes certain nonfinal orders that are specifically subject to appeal at the district courts. The petition at issue here asked the Second District to accept certiorari review of a nonfinal order not falling within those categories specifically enumerated in Rule 9.130.

Certiorari review by district courts of circuit court interlocutory orders is "an extraordinary remedy and should not be used to circumvent [Rule 9.130] which authorizes appeal from only a few types of non-final orders." *Martin-Johnson, Inc.*

v. Savage, 509 So. 2d 1097, 1098 (Fla. 1987). As a result, certiorari review should be used only in limited circumstances "based on the notion that piecemeal review of nonfinal trial court orders will impede the orderly administration of justice and serve only to delay and harass." *Jaye*, 720 So. 2d at 215; *see also* Fla. R. App. P. 9.130 (Committee Notes, 1977 Amendment) (anticipating that because the most urgent interlocutory orders are appealable under Rule 9.130, resort to common law certiorari to correct erroneous interlocutory rulings would be "extremely rare"). All other appellate review should be postponed until a final judgment is entered by the trial court. *Martin-Johnson, Inc.*, 509 So. 2d at 1098.

This Court has thus recognized that "district courts must be allowed a large degree of discretion so that they may judge each case individually" and that district courts should exercise certiorari discretion "only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983). To permit interlocutory review in inappropriate instances "would result in unwarranted harm to our system of procedure" and "appellate courts would be inundated by petitions." *Martin-Johnson*, 509 So. 2d at 1100.

As such, this Court has articulated a three-pronged test for district courts to apply when determining whether certiorari review is appropriate. *See Kilgore v. Bird*, 6 So. 2d 541, 544 (Fla. 1942); *Reeves v. Fleetwood Homes of Fla., Inc.*, 889

So. 2d 812, 822 (Fla. 2004) (finding that the writ of certiorari test is "well settled"). Specifically, a petitioner must establish that all three of the following conditions exist before certiorari should be granted: (1) the trial court's order must constitute a departure from the essential requirements of law; (2) the order must cause material injury throughout subsequent proceedings; and (3) the injury must be one for which there will be no adequate remedy after final judgment. *Reeves*, 889 So. 2d at 822; *see also Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995); *Martin-Johnson, Inc.*, 509 So. 2d at 1099.

In *Parkway Bank v. Fort Myers Armature Works, Inc.*, the Second District Court of Appeal addressed the "confusing distinction between a dismissal of a certiorari petition for lack of jurisdiction and a denial of a petition after a review of the nonfinal order on its merits."[3] 658 So. 2d 646, 648 (Fla. 2d DCA 1995). It is important to note that the petition for writ of certiorari at issue, here, was dismissed for lack of jurisdiction – not denied after a review of the merits. The *Parkway Bank* decision explained:

> [I]t is still necessary for an appellate court to conduct a jurisdictional analysis prior to testing whether the nonfinal order passes the standard of review on its merits, i.e., whether the order is a "departure from the essential requirements of law." Thus, . . . a petitioner must establish that an interlocutory order creates material harm irreparable by postjudgment appeal before this court has power to determine whether

[3] It is also worth noting that the opinion explaining this important distinction in *Parkway Bank* was authored by Judge Altenbernd, who also sat on the panel that dismissed Petitioner's petition.

> the order departs from the essential requirements of the law. If the jurisdictional prongs of the standard three-part test are not fulfilled, then the petition should be dismissed rather than denied.

658 So. 2d at 649; *see also Bared & Co., Inc. v. McGuire*, 670 So. 2d 153, 156 (Fla. 4th DCA 1996).

Judge Altenbernd's well-reasoned decision in *Parkway Bank* and the unpublished Order at issue are both wholly consistent with this Court's decision in *Topps v. State*, 865 So. 2d 1253 (Fla. 2004). In *Topps*, this Court concluded that, when an extraordinary writ proceeding – such as the petition for writ of certiorari at issue here – is dismissed and not considered on its merits, the dismissal does not extinguish the petitioner's right to have the merits adjudicated at a later time.

The *Parkway Bank* decision is also consistent with this Court's instruction that, "*as a condition precedent* to invoking a district court's certiorari jurisdiction, the petitioning party must establish that it has suffered an irreparable harm that cannot be remedied on direct appeal." *Jaye*, 720 So. 2d at 215 (emphasis added) (citing *Parkway Bank* and other cases). Therefore, "[i]t must be made, at least prima facie, clear in the petition that the harm is incurable by final appeal." *Bared & Co., Inc.*, 670 So. 2d at 157. Petitioner has failed to make any such prima facie showing in this case.

A. Adequate Remedy on Direct Appeal from Final Judgment.

In this case, the Second District properly applied the three-pronged test articulated in *Reeves* and in other binding precedent. And, following this Court's instruction in *Jaye* and its own precedent in *Parkway Bank*, the court looked first to the jurisdictional question: Could the Petitioner's alleged "harm" be adequately remedied by post-judgment appeal? By referring to *Harry Pepper*, the district court indicated its conclusion. In *Harry Pepper*, the Second District held that the petitioner had "an adequate remedy to attack the propriety of the order by way of appeal from the final judgment." 369 So. 2d at 970.

By citing *Harry Pepper* in the order at issue, the Second District indicated that, based on the facts of this case, Petitioner would have an adequate remedy to challenge the trial court's order on appeal from final judgment. As a result, there was no need for the court's inquiry to proceed further: Petitioner was unable to meet all three required prongs of the established certiorari test. The district court was correct in this finding, and its judgment should not be disturbed. As previously discussed, Petitioner could have arbitrated his claims and, if an adverse decision was ultimately entered against him, he could have appealed that final judgment.

Similar reasoning was applied by this Court in *Jaye*. In *Jaye*, a trial court denied the petitioner's demand for a jury trial. The district court dismissed the

petition for writ of certiorari, finding that it lacked jurisdiction to issue the writ. 720 So. 2d at 214. This Court agreed and concluded that the trial court's order could be adequately corrected on appeal from final judgment. If error was found on appeal, the case could be remanded back to the trial court to conduct a new trial with a jury. The Court specifically rejected the petitioner's claim that having to try the case twice would cause her "irreparable harm." *Id.* at 215. Therefore, this Court affirmed dismissal of the petition seeking certiorari review. *Id.* at 216.

The order at issue here is also analogous to an order denying summary judgment or a motion to dismiss, both of which have almost universally been deemed not appropriate for certiorari review. *See, e.g., Reeves*, 889 So. 2d at 822 (finding certiorari review by district court inappropriate because any error by trial court in denying summary judgment could be adequately remedied on appeal); *Martin-Johnson, Inc.*, 509 So. 2d at 1098 (holding that appellate courts may not review orders denying motions to dismiss by certiorari).

Though *Globe Newspaper Co. v. King* involved a motion seeking leave to amend a complaint, the facts of that case are easily distinguished. 658 So. 2d 518 (Fla. 1995). Specifically, in *Globe Newspaper*, a plaintiff's motion to amend his complaint to add punitive damages was granted by the trial court after an evidentiary hearing pursuant to section 768.72, Florida Statutes. The defendant

petitioned for certiorari review. The district court denied certiorari review, but certified a conflict with other district court decisions to this Court.

This Court held in *Globe Newspaper* that certiorari should be granted when a petitioner is able to demonstrate that statutory procedures for amending a complaint to include a punitive damages claim have not been followed by the trial court. *Id.* at 519. However, the Court further held that it is *improper* to grant certiorari to review the sufficiency of evidence considered by the trial judge in compliance with those statutory procedures. *Id.* at 520.

In this case, Petitioner did not propose amending his complaint to add punitive damages; he does not claim that statutory procedures were not followed. Rather, his proposed amended complaint added only claims similar to his original claims that would likewise be sent to arbitration.

Notably, the Second District has granted certiorari quashing orders denying leave to amend in limited circumstances – thus further illustrating that the Second District determined that certiorari was inappropriate in this case based on the particular facts of this case. *See, e.g., Hallmark Builders, Inc. v. Hickory Lakes of Brandon, Inc.*, 458 So. 2d 45 (Fla. 2d DCA 1984). Moreover, in *Martin-Savage,* this Court cited with approval the decision of the Fifth District Court of Appeal in *Hawaiian Inn of Daytona Beach Inc. v. Snead Const. Corp*., 393 So. 2d 1201 (Fla. 5th DCA 1981) – for the purpose of illustrating cases in which certiorari should not

generally be granted because an adequate remedy existed at the end of the proceedings. As in this case, in *Hawaiian Inn of Daytona Beach*, the Fifth District refused to grant certiorari to review a trial court's order that denied the petitioner's request to amend the complaint, stating: "The possibility that the trial court is committing reversible error by denying leave to amend and that this case might ultimately be reversed for a new trial for that reason, with the resulting waste of time and money, exists in all cases and does not mean that an appeal after final judgment is 'inadequate.'" *Id*. at 1202. The Fifth District further stated: "If the order is erroneous, it can be corrected on plenary appeal. Appellate courts should interfere with the trial judge's conduct of a case before judgment to a minimum extent to prevent harassment and delay in the orderly administration of justice." *Id.*

In light of the particular facts of this case, the Second District was correct in determining that Petitioner will have an adequate remedy by way of appeal from final judgment. Therefore, it properly declined to exercise certiorari jurisdiction in this case.

B. No Material Injury.

If the Court chooses to look beyond the "adequate remedy" prong to the second jurisdictional prong – "material injury throughout the remainder of the proceedings" – it will find that Petitioner is also unable to meet this requirement of the certiorari test.

Petitioner claimed in his petition for writ of certiorari that the trial court's order would force him to file a new lawsuit asserting his rescission claim, and noted, for the first time ever in the course of these proceedings, that there would be a "chance that his claims for a rescission would be barred by statute of limitation." (A11:5.) This claim is not only waived; bit it is also wholly without merit. At no time has Petitioner ever argued to the trial court that immediate amendment was necessary to avoid expiration of TILA's statute of limitations. (*Id.*) Because Petitioner has never raised this issue, he has failed to preserve the issue for appeal. (A8; A17-18.) It is a long-standing rule that the failure to preserve an issue for appellate review constitutes a waiver of the right to seek reversal based on that error. *See State v. Jefferson*, 758 So. 2d 661, 665 (Fla. 2000) ("Florida courts have traditionally held that questions not timely raised and ruled upon in the trial court will not be considered on appeal."); *see also Farinas v. State*, 569 So. 2d 425, 429 (Fla. 1990) (in the absence of fundamental error, an appellate court will not consider an issue that has been raised for the first time on appeal).

Moreover, no prejudice could exist because amended claims relate back to the filing of a motion to amend which contains the proposed amendment. *See Totura & Co. v. Williams*, 754 So. 2d 671 (Fla. 2000); *Leavitt Comm., Inc. v. Quality Comm. of Am., Inc.*, 939 So. 2d 257 (Fla. 1st 2006). This is true even when the statute of limitation has run in the interim. *See Holley v. Innovative Tech.*

of Destin, Inc., 803 So. 2d 749 (Fla. 1st DCA 2001). This means that even if the trial court wrongly denied amendment, and the decision were reversed on plenary appeal, Petitioner's amended claims would relate back to his motion for leave. He could therefore suffer no prejudice from having to wait until plenary appeal to correct this alleged error.

Moreover, Petitioner's TILA claims for damages and rescission were **already** time-barred as a matter of law. 15 U.S.C. § 1640(e) provides that: "[a]ny action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation." Courts interpret the one year statute of limitations for damages under TILA to start upon closing or consummation of the credit transaction. *See In re Smith*, 737 F.2d 1549, 1552 (11th Cir. 1984); *see also Littlefield v. Walt Flanagan & Co.*, 498 F.2d 1133, 1136 (11th Cir. 1974) (*citing Stevens v. Rock Springs Nat'l Bank*, 497 F.2d 307 (10th Cir. 1974)); *Malfa v. Household Bank*, 825 F. Supp. 1018, 1020 (S.D. Fla. 1993). It is undisputed that the loan closed on July 26, 2000. (A1:4.) The limitations period for any damages claim based upon alleged disclosure violations under TILA expired one year later — on July 26, 2001. This lawsuit, however, was not filed until May 2002 — almost a full year too late. (A1.) Further, Peitioner did not move for leave to amend his complaint until June 17, 2005 — four years too late. (A8.)

Likewise, Petitioner's right of rescission was **extinguished** three years after the July 2000 loan closing. *See* 15 U.S.C. § 1635(f) (a borrower's right of rescission shall "expire" three years after the date of consummation of the transaction, or upon sale of the property, whichever occurs first).[4] Petitioner did not propose amending his complaint to assert rescission until June, 2005 — two years after the right expired. (A1:4; A8.)

The only other prejudice Petitioner alludes to is the possible expense of additional litigation and uncertainty in adjudicating his rescission claim. It is well-established that "the time, effort, and expense of trying a case twice" is insufficient to establish irreparable harm. *Jaye*, 720 So. 2d at 215; *see also Florida Fish and Wildlife Commission v. Pringle*, 770 So. 2d 696, 697 (1st DCA 2000) ("It is well-settled that the time and expense of a trial which ultimately proves to have been unnecessary do not satisfy the 'irreparable harm' prong of [the certiorari] standard."); *Stoever v. Vedder Homes, Inc.*, 697 So. 2d 1247, 1248 (5th DCA 1997) (finding petitioners' claim of irreparable harm caused by expenditure of time and money on unnecessary trial and subsequent appeal was insufficient to justify

[4] The United States Supreme Court has held that as a matter of federal law, there is no right to rescind beyond the three year time limitation even as a defense to foreclosure or other collection action brought by the creditor. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (1998) (interpreting the language of section 1635(f) to extinguish the right of rescission after three years and not to merely deprive the borrower of a remedy after three years).

certiorari review). Thus, Petitioner cannot establish that the trial court's order will cause him "material injury" or "irreparable harm," which is necessary to warrant proper issuance of a writ of certiorari.

C. No Departure from Essential Requirements of Law.

Finally, if this Court reaches the merits of Petitioner's petition, the Court will find that there was no departure from the essential requirements of law in this case. To grant a petition for certiorari, there must be a "violation of a clearly established principle of law resulting in a miscarriage of justice." *Combs*, 436 So. 2d at 96. More specifically, this Court has explained:

> The required "departure from the essential requirements of law" means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, and act of tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.

Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 527 (Fla. 1995) (quoting *Jones v. States*, 477 So. 2d 566, 569 (Fla. 1985) (Boyd, C.J., concurring specially)).

Although a principle of law permitting liberal amendment of a complaint has been established, *see* Fla. R. Civ. P. 1.190(a), no miscarriage of justice occurred by denying Petitioner's proposed amendment in this case. If leave to amend had been permitted, here, all amended claims would have again fallen within the arbitration provision of the loan agreements. Thus, the amendment would have been futile to the proceedings, and would merely have resulted in additional delay to the parties

and waste of judicial resources. As a result, the trial court's order denying leave to amend did not result in any miscarriage of justice, but rather attempted to further the interests of justice under the circumstances of this case. Of course, Petitioner has ultimately foiled the trial court's attempt to avoid delay and waste by his tireless and expensive efforts to overturn the interlocutory order and avoid arbitration.

CONCLUSION

Because the Second District's order was not a decision setting forth any facts or any application of law to the particular facts of this case, and because the order does not expressly conflict with Fourth District's decision in *Hall v. Wojechowski*, Respondents respectfully request that this Court decline to exercise its discretionary jurisdiction. Alternatively, Respondents request that the Second District's order be affirmed because it correctly dismissed Petitioner's petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by United States Mail to Andrzej Madura, 3614 57th Avenue Drive West, Bradenton, Florida 34210 (*pro se* Petitioner), this 18th day of May, 2007.

/s/ Kimberly A. Leary
Kimberly A. Leary

CERTIFICATE OF COMPLIANCE WITH FONT STANDARDS

I hereby certify, pursuant to Florida Rules of Appellate Procedure 9.210(a)(2), that the size and style of type used in this petition is Times New Roman, 14 point.

/s/ Kimberly A. Leary
Kimberly A. Leary