IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
CASE NO.: 1D16-4379

SPA CREST MANUFACTURING, INC., a Georgia corporation,

Petitioner,

vs. L.T. Case No.: 16-2013-CA-006304

DARRYL WATERS, DARIAN WATERS, and KHAYLA WATERS,

Respondents.
_____/

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE AND FACTS

On March 31, 2011, Darryl Waters was driving a 2002 Ford Explorer on Interstate 95. (A2 at ¶¶ 8, 10.) His children, Darian and Khayla, were passengers in the vehicle. (A2 at ¶ 9.) Darryl stopped the vehicle in response to traffic. (A2 at ¶10.) While the Waters were stopped, an employee of Defendant Spa Crest Manufacturing, Inc. crashed into the rear of their vehicle and caused it to strike the rear of the vehicle directly ahead of it. (A2 at ¶11.) As a result, Darryl, Darian, and Khayla each suffered distinct and significant physical injuries. (A2 at ¶¶ 13, 18, 23.)

Darryl filed a personal injury suit, on behalf of himself and his children, in June 2013. (A7.) Darian and Khayla were precluded by law from pursuing their personal injury claims on their own behalf because they were minors at the time of the collision and at the time the suit was initiated. *See* Fla. R. Civ. P. 1.210(b) (representative must sue on behalf of minor). After the underlying suit was initiated, however, Darian and Khayla reached the age of majority and were permitted to pursue their claims on their own behalf. (Supp. App'x at 2, ¶ 4.) Darryl then amended the operative complaint, in March 2016, "to clarify that Darian Waters and Khayla Waters are plaintiffs in their own right, with their own separate, distinct, and independent claims."[1] (Supp. App'x at 2, ¶ 6; A2.)

[1] Darryl also amended the operative complaint to remove Defendant's employee, Chad Moreton, as a defendant. (Supp. App'x at 2, ¶ 6.)

The Second Amended Complaint, filed by Darryl, Darian, and Khayla ("Plaintiffs"), sets forth a distinct claim for each individual plaintiff to recover his or her injuries, losses, and damages caused by the negligence of Defendant's employee. (A2.) Defendant has since stipulated that: (1) Darryl was not negligent in causing the collision, (2) its employee was negligent in causing the collision, (3) the employee's negligence caused damage to Darryl, and (4) Defendant is responsible for its employee's negligence. (A11.) The only issues remaining for trial are individual: whether each plaintiff has suffered a permanent injury and the extent and nature of each plaintiff's damages.

In August 2016, consistent with their stated intention to pursue "their own separate, distinct, and independent claims," Plaintiffs filed a motion for separate trials on damages. (A13; Supp. App'x at ¶ 6.) Plaintiffs argued that trying three separate and stand-alone cases during the same trial would be inconvenient and prejudicial because each plaintiff had different injuries, different prognoses, different damages, and different witnesses. (A13.) Plaintiffs contended a joint trial would, among other things: (1) complicate scheduling of witnesses, (2) confuse the jury, (3) make it more difficult to try the case, (4) increase the possibility of error, and (5) reduce the likelihood of the jury's independent consideration of each Plaintiff's claim (i.e., if one plaintiff was not injured, none was, and vice versa). (A13.) Significantly, Plaintiffs also pointed out that the probability of inconsistent

verdicts was a non-issue because Defendant's liability—the only issue common to each claim—would not be litigated at trial. (A13 at ¶¶ 20-24.)

In response, Defendant conceded that "this is not a situation involving a possibility of inconsistent verdicts." (A15 at 4.) Defendant also conceded there was a possibility of prejudice—to both sides—if the claims were presented in a single trial. (A15 at 3.) Defendant's objection to separate trials was based entirely on "the interests of judicial economy." (A15 at 4.)

In reply, Plaintiffs disputed that three separate trials would be inconvenient. (A14 at ¶ 7.) Plaintiffs also pointed out additional prejudice—in the form of delay of Darryl's trial—due to the fact that Darian and Khayla had not yet reached maximum medical improvement in their treatment. (A14 at ¶¶ 10-15.) Plaintiffs emphasized that a jury would be "highly likely to unfairly compare the separate and distinct injuries, diagnoses, and prognoses between the older Darryl Waters and his two much younger children and vice versa," which would prevent a fair verdict. (A14 at ¶ 18.)

The trial court conducted a hearing on outstanding motions, including Plaintiffs' motion for separate trials. (A16). At the hearing, Plaintiffs' counsel focused on the differences among Plaintiffs' claims—different injuries, different treatment, different testimony, different ages, and different stages of medical improvement—and how those differences would be prejudicial in a consolidated

trial. (A16 at 5-9, 19.) Defendant's counsel agreed that a single trial could prejudice both sides but argued that the interests of judicial economy should dictate consolidation. (A16 at 9-12.)

Following the hearing, the trial court granted Plaintiffs' motion for separate trials. (A1.) The trial court, after considering the "pleadings, the verbal and written argument of the parties, and relevant authority," ordered that Darryl's trial "shall commence first and separate from the trials of the Plaintiffs, Darian Waters and Khayla Waters, which shall be scheduled thereafter." (A1.) Defendant then filed a petition for a writ of certiorari to review the trial court's order directing separate trials on damages. (Pet., filed on September 27, 2016.)

STANDARD OF REVIEW

A writ of certiorari is an extraordinary, common-law remedy that must meet "strict prerequisites," should be employed only in "very limited circumstances," and is "entirely within the discretion of the court" and "[not] available as a matter of right." *Abbey v. Patrick*, 16 So. 3d 1051, 1053 (Fla. 1st DCA 2009). This Court may issue a writ of certiorari only if the trial court's order: (i) departs from the essential requirements of law, and (ii) results in material injury that cannot be corrected on an appeal from a final judgment. *Id.* This Court must first examine the "irreparable harm" prong to determine whether certiorari jurisdiction exists. *E.g.*, *CVS Caremark Corp. v. Latour*, 109 So. 3d 1232, 1234 (Fla. 1st DCA 2013). The

other prong, a departure from the essential requirements of law, is "something that is more than just a legal error." *E.g.*, *Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344, 351 (Fla. 2012); *accord CVS Caremark Corp.*, 109 So. 3d at 1234. A district court of appeal should exercise certiorari jurisdiction "only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Williams v. Oken*, 62 So. 3d 1129, 1133 (Fla. 2011).

ARGUMENT

Plaintiffs first explain why the trial court did not depart from the essential requirements of law. *Infra* Argument I, at 5-17. Plaintiffs then explain why the Defendant cannot show irreparable harm. *Infra* Argument II, at 17-22.

I. THE TRIAL COURT'S ORDER DOES NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW.

The trial court acted within its broad discretion and in accordance with Florida Rule of Civil Procedure 1.270 by ordering separate trials on Plaintiffs' damages claims. Defendant has conceded there is no risk of inconsistent verdicts and that either party could suffer prejudice if Plaintiffs' damages claims proceed in a single trial. The trial court did not abuse its discretion, much less depart from the essential requirements of law, by permitting a separate damages trial for each plaintiff under these circumstances.

A. The trial court acted within its broad discretion in directing separate damages trials.

Rule 1.270, governing consolidation and separate trials, provides as follows:

> **(a) Consolidation.** When actions involving a common question of law or fact are pending before the court, it **may** order a joint hearing or trial of any or all the matters in issue in the actions; it **may** order all the actions consolidated; and it **may** make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.
>
> **(b) Separate Trials.** The court in furtherance of convenience **or** to avoid prejudice **may** order a separate trial of any claim, crossclaim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, crossclaims, counterclaims, third-party claims, or issues.

Fla. R. Civ. P. 1.270 (emphasis added). Ordering separate trials, or bifurcation, under this rule "is generally proper absent a specific threat of inconsistent verdicts or prejudice to a party." *Johansen v. Vuocolo*, 125 So. 3d 197, 200 (Fla. 4th DCA 2013).

The plain language of Rule 1.270 affords the trial court discretion in consolidating or separating proceedings. Fla. R. Civ. P. 1.270; s*ee also Commercial Carriers Corp. v. Kelley*, 920 So. 2d 739, 740 (Fla. 5th DCA 2006) ("may" language grants the court discretion). The trial court must "have the flexibility to manage its docket and balance the needs and expectations of the parties before it," *Commercial Carriers Corp.*, 920 So. 2d at 740, and "[w]eighing the benefits of consolidation is a determination best addressed by the trial court in its discretion, not by the appellate

court," *Pages v. Dominguez ex rel. Dominguez*, 652 So. 2d 864, 868 (Fla. 4th DCA 1995).[2] Thus, a trial court's exercise of this discretion "will not be disturbed absent a clear showing of abuse." *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 710 So. 2d 1022, 1024 (Fla. 1st DCA 1998). Further, courts have rejected the contention that a trial court "should be required to set forth factual findings supporting its order of bifurcation" because "[R]ule 1.270 requires no such findings." *Roseman v. Town Square Ass'n, Inc.*, 810 So. 2d 516, 521 (Fla. 4th DCA 2001).

1. Separate damages trials are appropriate to avoid prejudice.

The trial court acted within its broad discretion and in accordance with Rule 1.270 in directing separate trials. Under the plain language of the rule, separate trials are appropriate "to avoid prejudice." Fla. R. Civ. P. 1.270(b); *see also Johansen*, 125 So. 3d at 200 (trial court properly exercised discretion by bifurcating claims to avoid prejudice). Here, a separate trial for each plaintiff will avoid prejudice by: (1) reducing the possibility of error; (2) eliminating the risk that a jury would unfairly compare the separate and distinct injuries, diagnoses, and prognoses among plaintiffs; (3) eliminating the risk that a jury would confuse the medical testimony applicable to each plaintiff and to each category of damages; and (4) avoiding delay

[2] As Defendant points out, many of the cases addressing the propriety of a Rule 1.270 order do so in the context of consolidation, rather than bifurcation. (Pet. at 12.) Plaintiffs thus rely on both consolidation and bifurcation cases herein.

of Darryl's trial on the basis that Darian and Khayla have not yet reached maximum medical improvement in their treatment. (A13 at 2-6; A14 at 2-4; A16 at 5-9.)

The risk of confusing the jury with a joint presentation of the evidence is especially acute. The only common issue among Plaintiffs—liability—has been conceded by Defendant. (A11.) This leaves only the highly individualized damages issues for the jury's determination. (A11.) Each plaintiff has distinct injuries, diagnoses, prognoses, and medical histories. (A13 at ¶¶ 10, 26-27; A14 at ¶¶ 10, 16-19; A16 at 6-8.) Each plaintiff is seeking compensation for past medical damages, future medical damages, a finding of permanency, past pain and suffering, future pain and suffering, and a loss of future earning capacity, and at least one plaintiff has a wage-component claim. (A2; A13 at ¶¶ 12; A16 at 7.) Although Defendant points out that the same doctors treated each plaintiff, presenting those doctors' testimonies for all Plaintiffs in a single trial would only increase the potential for confusing the jury: a juror would have to derive three distinct medical opinions from each doctor's testimony without inadvertently mixing up or comparing Plaintiffs or their claims. Even the most diligent and attentive juror could—justifiably—be unable to compartmentalize the evidence on a per-plaintiff, per-claim basis.

Issuance of a standard jury instruction would be insufficient to cure this prejudice in light of the pervasiveness of the individualized evidence and the number of discrete issues. The trial court would be required to repeat the instruction, which

would complicate the trial and diminish the efficacy of the instruction. (A13 at ¶ 11.) Presentation of the evidence in a consolidated manner is both prejudicial and, as discussed in subpart 2, *infra* at 10-12, inconvenient.

Significantly, Defendant has conceded there is a risk of prejudice—to both sides—if Plaintiffs' claims are tried together. Defendant acknowledged before the trial court that Plaintiffs' claims could rise or fall together if tried before a single jury, and that "this is just as likely to prejudice Defendant as it is to prejudice Plaintiffs." (A15 at 3; A16 at 11.) Although Defendant now tries to distance itself from this concession by arguing there is no "unfair" prejudice, this argument is unavailing. Rule 1.270(b) requires only "prejudice"– not "unfair prejudice." (*Contra* Pet. at 19-20.) Regardless, the prejudice articulated by Plaintiffs and Defendant would be "unfair" because a consolidated damages trial would preclude consideration of each plaintiff's claim on the individual merits, an indisputably unjust outcome regardless of whom it favors. *See* BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "unfair" as, among other things, "unjust").

The trial court did not abuse its broad discretion in directing separate damages trials under Rule 1.270. The rule plainly permits the trial court to do so to "avoid prejudice." Both parties informed the trial court there was a risk of prejudice. Because the rule requires a showing of either prejudice or convenience, it is

unnecessary to address whether separate trials would further convenience. Regardless, for the sake of thoroughness, the issue of convenience is discussed next.

2. Separate trials further convenience.

In addition to avoiding prejudice, a trial court may order separate trials to further convenience. Fla. R. Civ. P. 1.270(b). Convenience is not defined solely by time; it encompasses "a quality or situation that makes something easy or useful by reducing the amount of work **or** time required to do something." (A13 at ¶ 8 (citing Merriam-Webster, http://www.merriam-webster.com/dictionary/convenience (last accessed on October 31, 2016) (emphasis added)).)

Here, as Plaintiffs explained to the trial court, separate damages trials will further convenience by reducing the complications of attempting to conduct three separate and stand-alone cases during the same trial and in front of the same jury. (A13 at ¶¶ 9-15.) Because Plaintiffs are individually seeking past medical damages, future medical damages, past lost wages, loss of future earning capacity, permanency, past pain and suffering, and future pain and suffering, a single trial for three plaintiffs would require a jury to consider and compartmentalize approximately twenty discrete issues. (A2; A13 at ¶12.) Much of the evidence presented during a joint trial would be introduced for a limited purpose and would not apply to all three plaintiffs. (A13 at ¶11.) Presentation of the evidence in this manner—in addition to being prejudicial—would require the trial court to repeatedly remind the jury of its

obligation to consider the evidence for a limited purpose only. (A13 at ¶ 11.) Separate damages trials will simplify matters for the trial court and the jury.

Further, it is likely three separate trials will take no more time and require no more judicial resources than a single trial. (A14 at ¶ 7.) Although Defendant focuses heavily on the fact that Plaintiffs were treated by the same doctors, the doctors' testimony is unique to each plaintiff because each plaintiff has distinct injuries with distinct diagnoses, treatments, and prognoses. (A13 at ¶¶ 10-12.) Thus, whether the doctors testify in a single trial or in separate trials should take a similar amount of time. There are also, as Defendant recognizes, distinct before-and-after witnesses for each plaintiff. (A15 at 3.) Because of the individualized nature of the issues and evidence, this is not a case where a joint trial would be substantially more convenient than separate trials.

Although Defendant has highlighted this Court's preference for a single trial (Pet. at 11-13), this preference does not stand if "a proper showing of prejudice or inconvenience has been made." *Yost v. Am. Nat. Bank*, 570 So. 2d 350, 352 (Fla. 1st DCA 1990). Indeed, "the trial court retains complete discretion to sever certain claims from others" so long as severance "can be done without trying intertwined issues of responsibility and causation twice and running the resulting risk of inconsistent verdicts." *ACT Services, Inc. v. Sch. Bd. of Miami Dade County*, 29 So. 3d 450, 451 (Fla. 3d DCA 2010). Here, the parties agreed there was a risk of

prejudice but no risk of inconsistent verdicts. The trial court did not abuse its complete discretion in ordering separate trials under these circumstances.

Finally, because of Defendant's heavy focus on the issue of convenience (Pet. 13-18), it bears reminding that separate trials may be ordered to avoid prejudice regardless of whether they further convenience. Fla. R. Civ. P. 1.270(b). Where, as here, the parties agreed that a joint trial could cause prejudice to either side, there is simply no basis to invade the trial court's exercise of discretion in managing its own docket.

B. Certiorari relief is not appropriate on these facts.

Even assuming *arguendo* this Court were to disagree with the trial court's exercise of its discretion, certiorari relief is not appropriate on these facts. This Court "may not review a decision under the guise of certiorari simply because it is dissatisfied with the results." *Mariner Health Care v. Griffith*, 898 So. 2d 982, 984 (Fla. 5th DCA 2005). A departure from the essential requirements of law is "something that is more than just a legal error," *Citizens Property Ins. Corp.*, 104 So. 3d at 351, and only in "rare" cases have courts found it appropriate to grant certiorari relief on Rule 1.270 orders, *Y.H. v. F.L.H.*, 784 So. 2d 565, 568 (Fla. 1st DCA 2001).

The rare cases granting certiorari relief from a Rule 1.270 order generally do so to avoid a risk of inconsistent verdicts. This principle is apparent from reviewing

the cases cited by Defendant. *See, e.g.*, *U-Haul Co. of Northern Fla., Inc. v. White*, 503 So. 2d 332, 333 (Fla. 1st DCA 1986) (granting certiorari to avoid risk of inconsistent verdicts); *Rocket Grp., LLC v. Jatib*, 174 So. 3d 576, 576 (Fla. 4th DCA 2015) (same); *Kavouras v. Mario City Restaurant Corp.*, 88 So. 3d 213, 214-15 (Fla. 3d DCA 2011) (same); *ACT Servs.*, 29 So. 3d at 453 (same); *Maharaj v. Grossman*, 619 So. 2d 399, 400 (Fla. 4th DCA 1993) (same); *Tommie v. LaChance*, 412 So. 2d 439, 441 (Fla. 4th DCA 1982) (same). Of course, Defendant has conceded there is no risk of inconsistent verdicts here. (A15 at 4; Pet. at 12 n.4.) Defendant instead contends certiorari relief is appropriate because the facts and evidence are "intertwined" and because Plaintiffs are family members who were injured in the same accident. (Pet. at 10, 14.) Defendant is wrong.

1. The facts and evidence are not intertwined.

Defendant does not identify the common questions of law or fact[3] it considers "intertwined" for Rule 1.270 purposes. (*See generally* Pet.) Admittedly, many issues related to Defendant's liability for the collision would be common to all Plaintiffs and thus "intertwined." But Defendant's liability for the accident will not be litigated

[3] The "common question of law or fact" language is found in Rule 1.270(a), which governs the appropriateness of consolidation. The consolidation language is relevant here because, to conclude the trial court departed from the essential requirements of law by ordering separate trials, this Court would necessarily have to conclude that consolidation was mandatory.

because Defendant has stipulated that its employee was negligent in causing the accident and that it is responsible for that negligence. (A11.)

Only the highly individualized damages issues will be presented to a jury. (A11.) As such, "[t]his is not a case that cries out for a joint trial for the very reason that the major issue to be tried is that of damages." *Pages*, 652 So. 2d at 868. The damages-only aspect of this case distinguishes it from those where courts have determined a consolidated trial is appropriate to resolve intertwined facts and issues. *See, e.g.*, *Rooss v. Mayberry*, 866 So. 2d 174, 176 (Fla. 5th DCA 2004) (granting writ because "the liability and damages issues are necessarily intertwined"); *Maris Distrib. Co.*, 710 So. 2d at 1024 (granting writ because improper to sever counterclaim and affirmative defenses from plaintiff's claim when all share common factual basis); *Yost*, 570 So. 2d at 353 (trial court abused its discretion in severing compulsory counterclaim from plaintiff's claim because the same evidence applied to both).[4]

Significantly, most of the cases granting certiorari relief due to "intertwined" facts or issues have done so precisely because of the risk of inconsistent verdicts, a non-issue here. *See, e.g., Kavouras*, 88 So. 3d 213 ("Certiorari is an appropriate remedy for orders severing or bifurcating claims which involve interrelated factual

[4] *Yost* involved an appeal from a final judgment, not a petition for certiorari. 570 So. 2d at 351.Thus, the Court had no occasion to address whether the trial court's decision departed from the essential requirements of law.

issues because severance risks inconsistent outcomes."). Thus, even if Defendant had identified a common question of law or fact, certiorari relief would not be appropriate because there is no possibility of "repugnant and inconsistent verdicts" resulting in "a manifest injustice and a material injury" to Defendant. *See Friedman v. DeSota Park N. Condo. Ass'n*, 678 So. 2d 391, 392–93 (Fla. 4th DCA 1996) (denying certiorari relief on a denial-of-consolidation order despite a common factual question because "the majority of the disputed facts and issues [were] disparate").

In sum, the trial court did not abuse its discretion, much less depart from the essential requirements of law, by ordering separate damages trials where there is no risk of inconsistent verdicts and where the only issue common to Plaintiffs—liability—has been stipulated to by Defendant. *See, e.g.*, *Philogene v. ABN AMRO Mortg. Grp. Inc.*, 948 So. 2d 45, 45 (Fla. 4th DCA 2006) (finding trial court did not abuse its discretion in denying motion to consolidate where there "was no danger of inconsistent verdicts and the existence of common questions of law or fact did not mandate consolidation"). This is not one of the "very limited circumstances" for which certiorari relief is appropriate. *Abbey*, 16 So. 3d at 1053.

2. The mere fact that separate actions arise out of the same collision does not mandate a consolidated trial.

Nor is certiorari relief appropriate simply because Plaintiffs are family members injured in the same collision and treated by the same doctors. "Florida has

no rule of procedure establishing compulsory consolidation for distinct claims arising from a single accident." *Pages*, 652 So. 2d at 867. Nor is there any "rule of procedure or principle of law which requires separate plaintiffs with distinct causes of action to file their lawsuits arising out of a single automobile accident simultaneously." *Id.* Thus, "the mere fact that separate actions arise out of the same motor vehicle accident does not mandate a consolidation." *Commercial Carriers Corp.*, 920 So. 2d at 740; *accord Friedman*, 678 So. 2d at 392 ("The fact that both lawsuits arise out of the same core event does not mandate consolidation and a joint trial.").

Florida's case law is clear: plaintiffs injured in the same accident may pursue their claims in separate trials. *E.g.*, *Pages*, 652 So. 2d at 867; *Commercial Carriers Corp.*, 920 So. 2d at 740. Defendant has not cited any authority that would categorically preclude separate trials for plaintiffs' damages claims under these circumstances. Although Defendant has cited a Fourth District case suggesting that "claims of family members arising out of one accident" should normally be combined in a single lawsuit (Pet. at 14), that case is easily distinguished because it granted certiorari relief to avoid the risk of inconsistent verdicts. *See Maharaj*, 619 So. 2d at 400 (granting certiorari where parties argued that "without consolidation there could be inconsistent verdicts").

Further, Defendant's statement that "certiorari is often granted where a court refuses consolidation of cases 'brought by different plaintiffs against one defendant, as a result of a single accident'" is misleading. (Pet. at 12 (quoting *Hickey v. Pompano K of C, Inc.*, 647 So. 2d 270, 270 (Fla. 4th DCA 1994).) Defendant cites only a portion of the Court's statement, but the remainder is pertinent. The Court stated, in full, that:

> We have previously granted certiorari where a trial court has refused to consolidate cases brought by different plaintiffs against one defendant, as a result of a single accident, **on the grounds that there could be inconsistent verdicts**.

Hickey, 647 So. 2d at 270 (emphasis added). Once more, there is no risk of inconsistent verdicts and thus no grounds for certiorari relief here.

II. THE TRIAL COURT'S ORDER DOES NOT RESULT IN IRREPARABLE HARM.

The trial court's order directing separate damages trials does not result in a material injury to Defendant that cannot be corrected on an appeal from a final judgment. Defendant's employee injured three individuals. Defendant cannot logically complain that separate trials for these three individuals will afford each a fair shake on his or her individual claims for damages. Regardless, even if Defendant's grievances were legitimate, it has not presented the type of irreparable harm necessary for certiorari review.

A. Defendant will suffer no material injury from separate trials.

Defendant cannot show material harm, as it must to invoke this Court's certiorari jurisdiction. The prejudice alleged by Defendant is simply not sufficient for certiorari purposes.

Defendant first claims it will be prejudiced by separate trials in "the form of basic inefficiency" and "duplicative expenditures of resources," including the potential for separate appeals. (Pet. at 20, 23.) But it is well-established that "the time, trouble, and expense of going through an unnecessary trial are not the type of material injuries sufficient" to invoke a court's certiorari jurisdiction. *Pages*, 652 So. 2d at 868; *accord Cont'l Equities, Inc. v. Jacksonville Transp. Auth.*, 558 So. 2d 154, 155 (Fla. 1st DCA 1990); *State Farm Fla. Ins. Co. v. Bonham*, 886 So. 2d 1072, 1075 (Fla. 5th DCA 2004); *Royal Caribbean Cruises, Ltd. v. Sinclair*, 808 So. 2d 231, 232 (Fla. 3d DCA 2001).

This principle holds true for bifurcation and consolidation orders. *See Mariner Health Care*, 898 So. 2d at 984 (denying petition for certiorari review of trial court's order to bifurcate); *Bonham*, 886 So. 2d at 107 (denying certiorari review of trial court's order on consolidation); *Pages*, 652 So. 2d at 868 (same). For example, in *Smithers v. Smithers*, the Fourth District declined to grant certiorari review of an order denying bifurcation even though the court was "inclined to agree that such a procedure would not only serve judicial economy, but would also dramatically limit

the parties' litigation costs, already in six figures." 743 So. 2d 605, 606 (Fla. 4th DCA 1999). The Court declined review because, even if the order was erroneous, it did not cause irreparable harm warranting certiorari jurisdiction. *Id.* Likewise, that separate damages trials might result in inefficiency and expenditures for Defendant does not justify review here.

Defendant also claims it will suffer prejudice because Plaintiffs are getting "three bites at the apple." (Pet. at 21- 22). Defendant's analogy does not hold up. Each plaintiff has a distinct and independent claim and therefore it is permissible—and prudent to avoid the risk of prejudice—for each plaintiff to get one "bite" in the form of a separate and fair damages trial, and an appeal of that trial if warranted. And, to the extent Defendant complains Plaintiffs will be able to "refine their case and work toward the greatest damage award" (Pet. at 21), Defendant will likewise have the same opportunity to refine its defense and work toward the least amount of damages awarded. Further, Defendant engages in pure speculation when it suggests Plaintiffs would "be potentially entitled" to three separate awards of attorney's fees under proposals for settlement. This is not the type of harm suitable for certiorari review. *See Wal-Mart Stores E., L.P. v. Endicott*, 81 So. 3d 486, 490 (Fla. 1st DCA 2011) ("Generally speaking, irreparable harm cannot be speculative, but must be real and ascertainable.").

Regardless, Defendant is mistaken that Plaintiffs would receive "a considerable and undeserved windfall" of three separate awards of attorney's fees for "prosecution of the same case." In multi-party litigation, proposals for settlement may be made individually or jointly. *See* Fla. R. Civ. P. 1.442(c)(3) ("A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal."). The possibility arises, then, that one, two, all, or none of Plaintiffs could recover attorney's fees, whether the damages trials proceed jointly or separately.[5] And, in any event, Plaintiffs would be entitled only to a "reasonable" award of attorney's fees and costs under the proposals. *See* § 768.79(6)(b), Fla. Stat. (2016); *see also* Fla. R. Civ. P. 1.442(h) (providing criteria for the trial court to consider in determining the reasonableness of attorney's fees awarded).

Defendant's remaining argument—that it will be unable to effectively present its defense in separate trials—is unavailing. (Pet. at 20-21.) Defendant never mentioned this potential prejudice to the trial court. (*See generally* A15, A16.) *See Sunset Harbour Condo. Ass'n v. Robbins,* 914 So. 2d 925, 928 (Fla. 2005) ("In order to be preserved for further review by a higher court, an issue must be presented to

[5] For that matter, Defendant may likewise rely on proposals for settlement directed to Plaintiffs, thereby creating the possibility of "three separate awards of attorneys' fees under proposals for settlement" for its defense of Plaintiffs' claims.

the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved.").

Further, Defendant's alleged harm is both vague and speculative. Defendant relies on a comment by Plaintiffs' counsel, during the hearing, that "one of the motions in limine that we were going to hear, but the defense conceded, was a motion in limine to prevent mention of the girls in Mr. Waters' car." (Pet. at 20-21; A16 at 19.) Aside from the questionable relevance (A16 at 19-20) of Defendant's proposed defense,[6] if Defendant believes Plaintiffs' counsel has somehow misinterpreted the scope of the agreed-upon motion in limine, the defense may raise this issue with Plaintiffs' counsel—or the trial court—before trial. Any perceived unfairness or error at trial could be addressed by Defendant on appeal of a final judgment and thus is not irreparable. *See, e.g., Cummins Ala., Inc. v. Albritten*, 548 So. 2d 258, 264 (Fla. 1st DCA 1989) (addressing on appeal whether cross-examination testimony violated order in limine); *Giordano v. Ramirez*, 503 So. 2d 947, 950 (Fla. 3d DCA 1987) (addressing on appeal whether counsel violated ruling in limine).

[6] *See* Pet. at 21 ("Should that [limitation of evidence] occur, it would then be impossible for Spa Crest to effectively cross-examine the individual Plaintiffs regarding their impression of the other Plaintiffs' injuries as the jury would not be provided with context regarding their involvement in the accident.").

B. Any errors may be corrected on appeal.

Finally, Defendant is wrong that there are no means to effectively review the trial court proceedings. This Court, and other district courts of appeal, have reviewed Rule 1.270 orders on appeal of a final judgment. *See Yost*, 570 So. 2d at 352 (reversing final judgment because trial court abused its discretion in severing counterclaim); *Johansen*, 125 So. 3d at 198 (affirming final judgment on appeal because trial court did not abuse its discretion in ordering bifurcation).

Notably, Defendant cites only *Tommie v. LaChance*, 412 So. 2d 439 (Fla. 4th DCA 1982), to support its contention that there are no means to review the trial court's severance order. (Pet. at 23-24.) But *Tommie* is inapposite because, like so many of the other cases cited by Defendant, it is concerned with the potential for inconsistent verdicts—which is not an issue here. 412 So. 2d at 441. Defendant quotes *Tommie* selectively and fails to point out that the "anomalies" with which the Fourth District was concerned were those stemming from the potential for "repugnant and inconsistent verdicts" if the two actions proceeded separately. *Id.* (Pet. at 23-24.) Try as it may, Defendant simply cannot avoid the fact that the cases granting certiorari review of consolidation and bifurcation orders primarily do so to avoid the potential for inconsistent verdicts. Defendant has not suffered harm, much less irreparable harm, as a result of the trial court's separation of Plaintiffs' damages claims.

CONCLUSION

Therefore, for all the reasons argued above, this Court should dismiss the petition for lack of jurisdiction or deny the petition on the merits.

Respectfully Submitted,

CREED & GOWDY, P.A.

/s/*Rebecca Bowen Creed*

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that the foregoing response is in Times New Roman 14-point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.100(*l*).

/s/ Rebecca Bowen Creed