NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

THE ESTATE OF GRACE QUINN, by and through BARBARA ECK, Personal Representative, Petitioner, v. CCRC OPCO FREEDOM SQUARE LLC; BKD TWENTY-ONE MANAGEMENT; BROOKDALE SENIOR LIVING, INC.; and SHELLY CRADDOCK, ADMINISTRATOR, (AS TO THE INN AT FREEDOM SQUARE), Respondents.	)	Case No. 2D20-2305

Opinion filed May 5, 2021.

Petition for Writ of Certiorari to the Circuit Court for Pinellas County; Patricia Ann Muscarella, Judge.

Michael J. Fuller, Jr., James B. McHugh, John R. Cummings, and Kathleen Knight of McHugh Fuller Law Group, PLLC, Hattiesburg, Mississippi, for Petitioner.

Amy L. Dilday, E. Patrick Buntz, and Kimberly A. Potter of McCumber, Daniels, Buntz, Hartig, Puig & Ross, P.A., Tampa, for Respondents.

KHOUZAM, Chief Judge.

The Estate of Grace Quinn seeks certiorari review of an order granting a motion to compel it to select an arbitrator in its action against CCRC OPCO Freedom Square LLC and various other entities associated with The Inn at Freedom Square (collectively, Freedom Square). Because the Estate has failed to establish irreparable harm, we dismiss the petition.

BACKGROUND

The decedent was a resident at The Inn at Freedom Square, an assisted living facility owned, operated, and managed by Freedom Square. After she passed away, her Estate sued Freedom Square alleging negligence and wrongful death.

Relying on the terms of its Residency Agreement, Freedom Square moved to compel arbitration. The Residency Agreement provides that the parties have twenty days after a demand for arbitration to either agree on a sole arbitrator or to each choose a nominator who would thereafter choose the sole arbitrator. In that regard, Freedom Square's Residency Agreement provides:

> The arbitration panel shall be composed of one (1) arbitrator. . . . If the parties cannot reach an agreement on an arbitrator within twenty (20) days of receipt of the Demand for Arbitration, then each party will select an arbitrator. These arbitrators will act only for the purpose of appointing a sole arbitrator to hear the case . . . . If either party fails to select their arbitrator within the (20) days mentioned above, they effectively forfeit their right to choose an arbitrator.

Near the end of this selection period, the Estate proposed two potential arbitrators. On the last day of the selection period, Freedom Square responded, rejecting both of the Estate's proposed arbitrators and suggesting three others "to serve as the lone Arbitrator." Before the close of business on the same day, the Estate

replied, rejecting Freedom Square's three suggestions and selecting one person, James Wardell, "to serve as Arbitrator pursuant to the agreement." Freedom Square did not respond until the following day—after the expiration of the selection period. In that response, Freedom Square's counsel stated his "opinion" that the parties had not "reasonably exhausted" the discussions to select an arbitrator.

Months later, Freedom Square moved to compel the Estate to select an arbitrator, contending that although "each counsel timely suggested proposed arbitrators," they "could not agree on the selection of a sole arbitrator." Without specifying when, Freedom Square asserted that it had already "identified its chosen 'nominator.' " But it represented that the Estate had "yet to complete the selection process." The Estate responded, asserting that it had timely selected the arbitrator under the agreement when it selected Mr. Wardell, and that "[i]n fact, it is [Freedom Square] that did not select their arbitrator within the twenty (20) day period." Accordingly, the Estate contended that Freedom Square had forfeited its right to select any arbitrator under the plain language of its own Residency Agreement.

At the hearing on Freedom Square's motion to compel the Estate to select an arbitrator, Freedom Square conceded that its motion to compel arbitration had constituted a demand for arbitration that "started the 20-day process" under the above-quoted provision of its Residency Agreement. It also conceded that it did not select an arbitrator within the period, whereas the Estate had done so. Nonetheless, Freedom Square asserted that because the parties had not "reasonably exhausted . . . discussions of selecting a lone arbitrator" by the deadline, the trial court should require the Estate to propose another nominator.

In response, the Estate contended it was the only one who had complied with the terms of Freedom Square's Residency Agreement. In particular, when the parties failed to reach agreement by the deadline in the agreement, only the Estate selected an arbitrator. "The defendants were required to do the same. They failed to do so." Accordingly, the Estate argued that by failing to select an arbitrator within twenty days, Freedom Square had forfeited its right to do so.

Focusing on the fact that the Estate's correspondence selecting Mr. Wardell was transmitted at 4:40 p.m. on the day of the deadline, the trial court told the Estate, "I don't think you get to do a gotcha." The court criticized the Estate for sending the correspondence "at 4:40 on the day . . . the deadline for the day you are tasked with coming to agreement or not, in the days of coronavirus and not everybody's working from their office." Freedom Square's counsel clarified that these September 2019 exchanges preceded the pandemic and thus occurred "before we were all at home," but nonetheless conceded that it did not respond until the following day—after the deadline.

The trial court expressly ruled that "4:40 the day of the drop-dead deadline in the contract is insufficient," and gave Freedom Square the unilateral choice between either selecting a nominator or letting the court pick an arbitrator. After Freedom Square stated that it preferred the former, the trial court entered an order directing the parties to each select a nominator. This petition followed.

ANALYSIS

In order to obtain certiorari relief, the petitioner must establish (1) a departure from the essential requirements of the law (2) resulting in material injury for the remainder of the case (3) which cannot be corrected on postjudgment appeal. See,

e.g., Shindorf v. Bell, 207 So. 3d 371, 372 (Fla. 2d DCA 2016). "Of these three elements, the latter two—material injury and a lack of an adequate appellate remedy—constitute the jurisdictional threshold for our certiorari review; the first element concerns the merits of the petition." Id. Although we ultimately conclude that the petition must be dismissed for lack of irreparable harm, we discuss the departure prong first.

With respect to the departure prong, the Estate contends that the trial court impermissibly rewrote the parties' agreement in Freedom Square's favor, allowing it to choose a nominator despite having forfeited its right to do so by missing the express deadline set forth in its own Residency Agreement. Freedom Square responds that the trial court merely exercised its authority to order a provisional remedy to protect the effectiveness of the arbitration proceeding.[1] On this point, we agree with the Estate.

The contractual analysis in this case is very clear. Freedom Square's own Residency Agreement required the parties to agree to a sole arbitrator within twenty days or, failing that, to each select a nominator within that period who would then determine the sole arbitrator to hear the Estate's claims. The Estate timely selected a nominator; Freedom Square did not. Thus, pursuant to the terms of its own agreement, Freedom Square "effectively forfeit[ed] [its] right to choose an arbitrator."

The trial court's contrary conclusion that the Estate's selection was

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[1]Freedom Square also now contends that the Estate's selection was untimely. But it did not dispute its timeliness below, instead conceding that the Estate's selection occurred "within the required timeframe." Further, the trial court repeatedly stated that the day the Estate made its selection was the "deadline" for doing so, which Freedom Square never challenged or suggested was incorrect. Under these circumstances, we decline to consider this new argument that is contrary to Freedom Square's express representations and conspicuous omissions below. Cf. Holt v. Keetley, 250 So. 3d 206, 209 (Fla. 2d DCA 2018) ("declin[ing] to consider those arguments . . . raise[d] for the first time in this [certiorari] proceeding").

somehow impermissible because it was transmitted near the end of the business day—before the close of business, on the day it was due—is not supported by the agreement or any legal authority. There was no basis to characterize the Estate's timely selection as a "gotcha," to invalidate it, or to give Freedom Square a mulligan after missing the express deadline it created in its own agreement. The trial court ignored the forfeiture term of the selection clause, rendering the language meaningless.

Moreover, we reject Freedom Square's contention that this relief was appropriate under sections 682.031 and 682.04, Florida Statutes (2020), which allow the court, under certain circumstances, to order provisional remedies and appoint an arbitrator. Section 682.031(1) requires "good cause shown" before any relief may be granted, and Freedom Square presented no legal basis to rewrite the agreement, much less good cause to do so. And section 682.04(1) expressly requires the parties' chosen method for appointing arbitrators to be followed "unless the method fails." Here the *method* for selection did not fail; Freedom Square simply did not timely select a nominator and, under the express terms of its own contract, thereby forfeited the right to do so. Thus, these statutory sections provided neither cause nor authority to rewrite the parties' agreement.

Accordingly, the trial court departed from the essential requirements of the law by ignoring the contract's express terms and creating new ones that are contrary to the parties' agreed-upon terms for the arbitration. See, e.g., Intervest Constr. of Jax, Inc. v. Gen. Fid. Ins. Co., 133 So. 3d 494, 497 (Fla. 2014) ("Courts may not 'rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties.' " (quoting Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co., 913

So. 2d 528, 532 (Fla. 2005))); 4927 Voorhees Rd., LLC v. Tesoriero, 291 So. 3d 668, 672 (Fla. 2d DCA 2020) ("Courts must honor contractual rights manifested by the language agreed to by the parties."); Andersen Windows, Inc. v. Hochberg, 997 So. 2d 1212, 1214 (Fla. 3d DCA 2008) ("Courts, without dispute, are not authorized to rewrite clear and unambiguous contracts.").

However, before certiorari relief may be granted, the petitioner must also establish irreparable harm resulting from the departure. In that regard, the Estate acknowledges that "[t]he fact that a petitioner will incur litigation expenses is normally not enough to meet the irreparable harm test." AVCO Corp. v. Neff, 30 So. 3d 597, 601 (Fla. 1st DCA 2010); cf. Rodriguez v. Miami-Dade County, 117 So. 3d 400, 405 (Fla. 2013) ("reiterat[ing] that the continuation of litigation and any ensuing costs, time, and effort in defending such litigation does not constitute irreparable harm"). Even so, the Estate contends that the prospect of having to arbitrate its claims twice—first, under the erroneous selection procedure ordered by the trial court, and again, after "[a] successful plenary appeal" challenging the selection—satisfies this prong of the certiorari standard. We disagree. Because the Estate has an adequate appellate remedy, it cannot establish irreparable harm.

At oral argument, the Estate conceded that it could challenge the ultimate arbitration award on the basis that the arbitrator had exceeded its authority by deciding issues without having been properly selected.[2] That is consistent with the considerable body of federal law holding that "[c]ourts do not hesitate to vacate an award when an

[2]By contrast, Freedom Square contended that this error is *not* correctable on postjudgment appeal. If that position were correct, then it would establish that the harm *was* irreparable and thereby support granting the Estate's petition.

arbitrator is not selected according to the contract-specified method." Ray v. Longhi, No. 3:20-cv-213-J-32JRK, 2021 WL 307373, at *4 (M.D. Fla. Jan. 29, 2021) (quoting Bulko v. Morgan Stanley DW Inc., 450 F.3d 622, 625 (5th Cir. 2006)). "Because Florida's arbitration statute is modeled after the Federal Arbitration Act, federal decisions are highly persuasive." RDC Golf of Fla. I, Inc. v. Apostolicas, 925 So. 2d 1082, 1091 (Fla. 5th DCA 2006).

Florida courts have also suggested that the decision of an improperly appointed arbitrator can be challenged. See Della Penna v. Zabawa, 931 So. 2d 155, 164 (Fla. 5th DCA 2006) (accepting without deciding "that arbitrators appointed outside the method outlined in the parties' contract exceed their authority by deciding issues which the parties have agreed to arbitrate" (citing R.J. O'Brien & Assocs., v. Pipkin, 64 F.3d 257 (7th Cir. 1995))); Austin v. Stovall, 475 So. 2d 1014, 1015 (Fla. 3d DCA 1985) (reversing judgment confirming arbitration award where, among other deficiencies, party unilaterally dismissed arbitrator selected pursuant to parties' agreement and presented claims to new "arbitrator" instead).

Accordingly, because the Estate will be able to challenge the eventual arbitration award, we lack jurisdiction to grant certiorari relief due to the absence of irreparable harm. See, e.g., Damsky v. Univ. of Miami, 152 So. 3d 789, 792 (Fla. 3d DCA 2014) ("Mere legal error without irreparable harm, even a departure from the essential requirements of law, while appealable at the end of the case, is not a basis for the issuance of a writ of certiorari. Unless the petitioner establishes irreparable harm, the court must dismiss the petition for lack of jurisdiction."). But the parties can, of course, avoid the prospect of arbitrating the Estate's claims twice on this basis by

cooperating in the selection process. We encourage them to do so.

Petition dismissed.

SMITH and STARGEL, JJ., Concur.