IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-2251

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Petitioner,

v.

AMERICAN EDUCATIONAL ENTERPRISES, LLC,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

The petitioner, the Board of Trustees of the Internal Improvement Trust Fund ("Board"), is seeking review of the decision of the Third District which granted a petition for a writ of common law certiorari filed by the respondent, American Educational Enterprises, LLC ("American"). The Third District quashed the trial court's order compelling American to provide supplemental discovery.

The Board sought review in this Court, contending that the decision of the Third District conflicts with decisions of this Court and other district courts of appeal concerning a district court's review of a pretrial discovery order by common law certiorari as to the following: the governing standard and determination of jurisdiction for such review; the significance of a trial court's order fashioning confidentiality safeguards; and whether having to produce financial information warrants certiorari review.

This Court granted review and this is the Board's initial brief on the merits.

STATEMENT OF THE CASE AND FACTS

The Board seeks review of the decision of the District Court of Appeal of Florida, Third District in *American Educational Enterprises, LLC v. Board of Trustees of the Internal Improvement Trust Fund*, 45 So. 3d 941 (Fla. 3d DCA 2010) ("*AEE*"). (R. 582-590).[1] In that decision, the Third District granted a petition for writ of certiorari filed by American and quashed the trial court's order compelling American to provide supplemental discovery to the Board in a lawsuit arising from American's purchase of state-owned real property.

The Board is the entity responsible for the disposition of property owned by the State of Florida.[2] The Florida Department of Environmental Protection ("FDEP") acts as the Board's staff in the disposition process.[3] The property in question (consisting of a lot with a building and an adjacent lot) was purchased by the state for $3,750,000 in 1994 for use by the Department of Corrections primarily as a treatment facility for substance abuse offenders. The facility became known as Glenbeigh Hospital. (R. 112). The state decided to sell the property and in

[1] The symbol "R" designates the pages of the 3-volume 590-page record prepared and indexed by the clerk of the Third District.

[2] *See* § 253.03, Florida Statutes (2010).

[3] *See* 253.002(1), Florida Statutes (2010).

December of 2000, invitations to bid on the property were issued.[4] At the time, the state was prohibited by statute from selling land below its purchase price.[5]

Frank Andreu, the vice-president of Florida National College ("College"), had conducted a years-long search for a property to serve as the College's campus. Andreu visited the property at issue in February of 2001 when he learned that it was for sale. (R. 51-2). The College was informed that the initial attempt to sell the property resulted in bids which were all below the statutory minimum and therefore rejected. (R. 51, 68-9). On April 2, 2001, the College submitted an unsolicited offer to purchase the property for $4,000,000. (R. 50, 68-9, 90). That offer was not acted upon. Instead, a second bidding process commenced. On April 18, 2001, bidding packages were sent to prospective purchasers, including the College, who were informed that bids would be accepted until April 27, 2001. (R. 52, 96-104, 113).

Each bidding package disclosed that the property was being offered "as is" and at a minimum price of $3,750,000. (R. 97). The bidding package further disclosed: the property's tax assessed value ($4,642.063); the need for repairs; that the buyer was responsible for financing; that a site inspection would be arranged

[4] Sale of state-owned surplus land is by competitive bidding. *See* Florida Administrative Code R. 18-2.020(2)(b).

[5] *See* § 253.034(6), Florida Statutes (2001). *See also* R. 51 at ¶ 7.

upon request; and that each prospective buyer "should independently verify all facts related to this property." (R. 97-9). The Board was in possession of appraisals for the property but did not include them in the bidding package because they had been conducted two or more years prior to the bidding process. (R. 51). The College was afforded access to the property. Indeed, several contractors acting on behalf of the College conducted an on-site inspection. (R. 51-2).

On April 23, 2001, the College submitted a bid without first seeking its own appraisal. (R. 51-2, 71). The second bidding process resulted in only two bids: $4,025,000 from the College and $4,000,000 from Edison, another educational institution. The College's higher bid, along with its 10% deposit, were accepted and the parties executed a purchase and sale contract in the amount of the winning bid. (R. 51-2, 71, 115, 117-18). Thereafter, the College sought financing through Citibank which requested an appraisal from FDEP. After FDEP sent Citibank a 1999 appraisal which valued the property at $3,275.000 (R. 6), the College requested that FDEP modify the contract to reflect a lower purchase price. FDEP responded that the terms and conditions of the executed contract were non-negotiable and that pursuant to the contract, the College had the choice of either closing the transaction or forfeiting its 10% deposit. (R. 551B). The College

responded that it would comply with the terms of the contract and a closing took place. (R. 67). The College obtained financing through Citibank. (R. 6).

Thereafter, the College assigned its rights under the contract to American. (R. 3). American sued the Board, claiming negligent misrepresentation, fraud in the inducement, and unjust enrichment. American also sought reformation of the contract, contending that it made a "mistake" by paying $4,025,000 for the property, having relied upon the Board's misrepresentations as to the value of the property. (R. 32-47). The Board filed its answer, affirmative defenses, and counterclaim. (R. 48-118).

The Board served subpoenas upon Citibank seeking production of the underlying financial information submitted by the College to obtain the financing. The parties entered into a "Stipulated Confidentiality Agreement" (R. 552-54) which was approved by order of the trial court. (R. 571). The confidentiality agreement provided in pertinent part that the financial information disclosed to the Board would be treated as confidential, could be used as needed for the defense or prosecution of the claims in this case, and would be destroyed within 30 days of termination of the case. (R. 553). Thereafter, the financial information sought was provided to the Board.[6] It is not disputed that the disclosures included what

[6] The financial information disclosed to the Board was neither submitted to or requested by the Third District.

American deemed to be its *private* financial information.[7] The financial disclosures included the following documents: for the years 1998-2004, the College's independent auditor's reports, balance sheets, income statements, statements of cash flow, tax returns; for the same years, American's balance sheets, income statements, statements of cash flow, and tax returns; and for the years 2001-08, underlying information for the College's budgets. *AEE*, 45 So. 3d at 943.

Subsequently, the Board served a request for production seeking 10 items, including supplemental discovery updating the financial information already disclosed. (R. 134-42). American filed objections (R. 143-48), claiming that the financial information sought was irrelevant and private. The matter came on for hearing before the trial judge upon the Board's motion to compel production and American's objections. (R. 191-207). The Board produced an affidavit of a CPA and an expert appraiser opining that the financial information was properly sought to defend against American's claims for economic damages. (R. 180-83; *see also AEE*, 45 So. 3d at 944). The Board also argued that American could not properly claim any harm to its alleged privacy rights because of the confidentiality agreement reached by the parties and approved by the trial court. (R. 197-98).

[7] In the Third District, American itself described its disclosure as consisting of "American's *private*, financial information, including American's income statements and statements of cash flows and federal tax returns...". (R. 574) (e.s.).

American responded that it would not be seeking general economic damages as alleged in the complaint, but would limit its damages to any difference between the contract purchase price and the alleged value of the property at the time of the purchase. (R. 198-200). The Board replied that notwithstanding American's representation to limit its damages, the Board's position that this property had a unique value to this College based upon its projected profits, that both the College and Board were aware of this value, and that the financial information sought would assist in appraising the property and supporting the Board's defenses. (R. 202-04).

At the conclusion of the hearing, the trial judge granted the Board's discovery request in part and denied it in part. (R. 205). The judge ordered American to provide items 1-7 of the Board's request for production. (R. 205).[8] The trial judge denied the Board's requests for disclosure of items 8-10.[9] *Id*.

[8] The seven items ordered produced are: (1) independent auditor's reports for Florida National College [College] for the years 2005-07; (2) the College's balance sheets, income statements and statements of cash flows for the years 2006-07; (3) the College's federal income tax returns for the years 2005-07; (4) the budgets prepared by the College for 2001-08; (5) the balance sheet, income statement and statement of cash flows for American Educational Enterprises, LLC for 2006-07; (6) the federal income tax returns for American Educational Enterprises for the years 2001, 2002, and 2005-07; and (7) all financial reports filed with the Department of Education. *See AEE*, 45 So. 3d at 943.

[9] Requests 8-10 sought the certificate of occupancy, enrollment records, and American's loan request package submitted to the lender(s). (R. 142).

American challenged the discovery order in the Third District in a petition for writ of common law certiorari. American argued that the updated financial information ordered disclosed by the trial judge was "patently overbroad, irrelevant, and unduly burdensome," as well as violative of American's right to privacy. (R. 15-16). American's petition failed to mention its prior financial disclosures or the trial court's order approving the parties' confidentiality agreement.

The Board responded that American could not make the necessary jurisdictional showing of material or irreparable injury given that American had already disclosed to the Board similar financial information and because the parties stipulated to the confidentiality of American's financial information which the trial court adopted in an order. (R. 564). The Board also contended that certiorari relief would not lie simply upon American's claim that the discovery sought was irrelevant or overbroad. (R. 562). The Board also argued that even if the merits of American's petition could be reached, the financial information sought was "relevant," as that term is broadly defined in the discovery context, because such discovery was reasonably calculated to lead to admissible evidence. (R. 568). In particular, the Board claimed that the financial information was pertinent to determining the value of the property, and would also support its defense against American's cause of action for reformation of the purchase and sale agreement by

showing that American's successful bid was not a "mistake" made in reliance upon alleged misrepresentations as to the value of the property, but was the product of an informed business decision based upon historical and projected budgetary and other financial information which proved to be correct. (R. 568-69).

The Third District granted the petition for writ of certiorari and quashed the trial court's discovery order. In its factual recitation, the Third District acknowledged the existence of the confidentiality agreement and the trial court's approval thereof, *AEE*, 45 So. 3d at 943, but did not discuss the agreement thereafter. Nor did the Third District address American's burden to demonstrate irreparable injury. Instead, the Third District proceeded to the merits of American's petition on the basis that "... certiorari is the proper remedy for overbroad discovery orders...". *AEE*, 45 So. 3d at 944. The Third District reasoned that the trial court's order was overbroad for two reasons, first, by compelling disclosure of financial documents dated from 2005 to 2007 that "do not fall within the time frame of the subject matter of the case," and second, by requiring "disclosure of corporate financial documents without regard to the issues involved in the case." *AEE*, 45 So. 3d at 944-45.

The Third District also rejected the Board's contention that the discovery was pertinent to its defense of American's reformation claim, ruling that the financial information sought was "several years far removed" from American's

decision to purchase the property in 2001. Finally, the Third District concluded that the discovery was not relevant to damages because American was only seeking out-of-pocket damages and that the discovery ordered was not relevant to that issue. *AEE*, 945 So. 3d at 945-46.

SUMMARY OF THE ARGUMENT

During pretrial discovery, the parties entered into a confidentiality agreement to protect American's alleged privacy rights with regard to financial discovery. The trial court approved the agreement. Thereafter, American provided to the Board its private, financial information, primarily for the years 1998-2004 (but also underlying budgetary information through 2008). Subsequently, the Board requested updated financial information, primarily for the years 2005-07, but this time, American objected, claiming the request was overbroad, irrelevant, and a violation of American's right to privacy. The Board moved to compel production. Following a hearing, the trial court ordered American to provide the updated discovery.

American filed in the Third District a petition for writ of common law certiorari seeking review of the discovery order. The Board responded that the Third District lacked jurisdiction to reach the merits of American's petition because there could be no showing of material injury resulting in irreparable harm, particularly in view of the trial court's order of confidentiality and the previous voluntary disclosures by American of its private financial information. The Board also argued that a mere claim of lack of relevance or overbreadth could not support certiorari relief. Nevertheless, the Third District granted certiorari relief and quashed the trial court's order on the grounds that the order was overbroad and that

the updated financial discovery was not relevant. The Third District did not address the Board's claim of lack of jurisdiction.

A party seeking certiorari review of a nonfinal order must show material injury resulting in irreparable harm in order to invoke the jurisdiction of the appellate court. In fact, in reviewing a petition for writ of certiorari, the appellate court must first address this jurisdictional issue. Where the petitioner fails to make the required jurisdictional showing, the appellate court must dismiss the petition without reaching the merits.

The Third District should have dismissed the petition for lack of jurisdiction without reaching the merits for two reasons. First, American had already voluntarily disclosed to the Board the bulk of its private financial information and the trial court's order merely ordered American to update that prior disclosure. Second, American voluntarily entered into a confidentiality agreement with the Board which was approved by the trial court, thereby protecting American's claimed privacy interests. Thus, American could not show material injury resulting in irreparable harm and the Third District therefore lacked jurisdiction.

Moreover, certiorari relief is not available for mere allegations, such as those made by American, that a discovery order is overbroad or that the information sought is not relevant. Furthermore, the petitioner must demonstrate a departure

from the essential requirements of law resulting in a miscarriage of justice. No such showing was made here by American.

Finally, even if the merits of American's certiorari petition could have been reached, nothing about the ordered disclosure was overbroad. American had already disclosed private financial information, primarily for the years 1998-2004. The trial court's order merely required a supplemental updated disclosure of similar information for the few years thereafter. Furthermore, American's relevancy argument fails because the financial information ordered disclosed was reasonably calculated to lead to evidence admissible as to the Board's defenses.

This Court's decisions have repeatedly emphasized that common law certiorari is an extraordinary remedy with a narrow scope. In square conflict with this Court's pronouncements, the decision of the Third District improperly broadens the scope of common law certiorari and if allowed to stand, will undoubtedly encourage the filing of petitions seeking review of pretrial discovery orders based solely upon claims of overbreadth or irrelevance and in the absence of irreparable harm, even where the trial court has fashioned protections against any harm.

ARGUMENT

I.

THE DECISION OF THE THIRD DISTRICT EXCEEDS THE SCOPE OF COMMON LAW CERTIORARI BY GRANTING AMERICAN'S PETITION AND QUASHING THE TRIAL COURT'S ORDER COMPELLING DISCOVERY WHERE: AMERICAN FAILED TO ESTABLISH CERTIORARI JURISDICTION BY SHOWING MATERIAL INJURY RESULTING IN IRREPARABLE HARM; THE FINANCIAL DISCOVERY ORDERED DOES NOT RISE TO THE LEVEL OF MATERIAL HARM THAT PERMITS CERTIORARI REVIEW; THE TRIAL COURT FASHIONED SAFEGUARDS TO PREVENT ANY HARM TO AMERICAN; AMERICAN'S MERE CLAIMS OF OVERBREADTH AND IRRELEVANCE DO NOT WARRANT CERTIORARI RELIEF; AND THE FINANCIAL DISCOVERY APPEARS REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE.

A. THE REQUIREMENTS FOR COMMON LAW CERTIORARI RELIEF

In *Reeves v. Fleetwood Homes of Florida, Inc*., 889 So. 2d 812 (Fla. 2004), this Court reiterated the familiar requirements for common law certiorari relief:

> It 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."

Id. at 822 (*quoting Bd. of Regents v. Snyder*, 826 So. 2d 382, 387 (Fla. 2d DCA 2002)) (*citing Brooks v. Owens*, 97 So. 2d 693 (Fla. 1957)). This Court went on to discuss the limited availability and extraordinary nature of certiorari relief as follows:

> Florida Rule of Appellate Procedure 9.030(b)(2)(A) provides: "The certiorari jurisdiction of district courts of appeal may be sought to

review non-final orders of lower tribunals other than as prescribed by rule 9.130....” Fla. R.App. P. 9.030(b)(2)(A). This Court has held that “common law certiorari is an extraordinary remedy and should not be used to circumvent the interlocutory appeal rule which authorizes appeal from only a few types of non-final orders.” *Martin-Johnson, Inc. v. Savage*, 509 So.2d 1097, 1098 (Fla.1987); *see also Belair v. Drew*, 770 So.2d 1164, 1166 (Fla.2000); *Jaye v. Royal Saxon, Inc*., 720 So.2d 214, 214-15 (Fla.1998). Further, we have written: “A non-final order for which no appeal is provided by Rule 9.130 is reviewable by petition for certiorari only in limited circumstances.” *Martin-Johnson, Inc*., 509 So.2d at 1099; *see also Brooks v. Owens*, 97 So.2d 693, 695 (Fla.1957) (“This court will review an interlocutory order in law only under exceptional circumstances.”). Limited certiorari review is based upon the rationale 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. As the appellate rules committee commented on the interaction of rules 9.030 and 9.130:

> The advisory committee was aware that the common law writ of certiorari is available at any time and did not intend to abolish that writ. However, because that writ provides a remedy only if the petitioner meets the heavy burden of showing that a clear departure from the essential requirements of law has resulted in otherwise irreparable harm, it is extremely rare that erroneous interlocutory rulings can be corrected by resort to common law certiorari. It is anticipated that because the most urgent interlocutory orders are appealable under this rule, there will be very few cases in which common law certiorari will provide relief.

Fla. R.App. P. 9.130 (Committee Notes, 1977 Amendment).

Reeves, 889 So. 2d at 822. As this Court noted in *Jaye*, the petitioner’s burden of showing a clear departure from the essential requirements of law which has resulted in irreparable harm is an essential jurisdictional prerequisite for certiorari

relief: "[A]s 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.

Because the element of "irreparable harm" is a jurisdictional requirement, it should be considered first by the district court. *See Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011) (holding that question of jurisdiction must be analyzed first). *See also West Florida Medical Center, Inc. v. See*, 18 So. 3d 676, 682 (Fla. 1st DCA 2009) ("The irreparable harm inquiry is an issue of jurisdiction, and thus, must be undertaken first.").[10] *Accord, Lakeland Regional Medical Center, Inc. v. Allen*, 944 So. 2d 541, 543 (Fla. 2d DCA 2006) (noting that the jurisdictional issue "must be analyzed *before* the court may even consider" whether there has been a departure from the essential requirements of the law) (e.s.); *Bared & Co. v. McGuire*, 670 So. 2d 153, 156 (Fla. 4th DCA 1996) (noting that the "very first consideration underlying a petition for common law certiorari review of nonfinal

[10] Prior to 1939, a petition for writ of certiorari was a two-stage proceeding. First, the reviewing court determined whether it had jurisdiction to review the challenged order. Second, the court received additional briefing and determined whether the order departed from the essential requirements of the law. *See Parkway Bank v. Fort Myers Armature Works, Inc*., 658 So. 2d 646 (Fla. 2d DCA 1995). "Although the separate briefing stages have been eliminated, it 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...". *Id*. at 649 (also noting that the reviewing court should dismiss rather than deny a petition that fails on the jurisdictional requirement).

orders in civil cases is, of necessity, an assessment of jurisdiction."); *Holden Cove, Inc. v. 4 Mac Holding, Inc.*, 948 So. 2d 1041 (Fla. 5th DCA 2007) ("It is settled law that, as a condition precedent to invoking this court's certiorari jurisdiction, the petitioning party must establish that it has suffered an irreparable harm that cannot be remedied on direct appeal.").

Thus, where irreparable harm is absent, the district court must not, indeed cannot, reach the merits of the petition. *See, e.g., Richardson v. Gyves*, 874 So. 2d 658 (Fla. 4th DCA 2004). Consequently, even where a trial court has ordered discovery of materials that are irrelevant, or burdensome, or overbroad, the district court must dismiss the petition where there is no irreparable harm. *See Cotton States Mut. Ins. Co. v. AFO Imaging, Inc.*, 46 So. 3d 140 (Fla. 2d DCA 2010).

It is well settled that where the alleged harm can be remedied upon appeal, the harm is not irreparable and certiorari relief will not lie. *See Hock v. Legacy Bank of Florida*, 2011 WL 1485398 (Fla. 4th DCA April 20, 2011). It is equally well-settled that the irreparable-harm requirement is not satisfied by a petitioner's claim that disclosure would violate its privacy rights where the trial court either can or has fashioned appropriate safeguards, such as placing restrictions upon the dissemination of the private matters. *See, e.g., Martin-Johnson*, 509 So. 2d at 1100. *See also Amente v. Newman*, 653 So. 2d 1030, 1032-33 (Fla. 1995) (finding that

medical records were discoverable over an objection based upon the patients' constitutional right of privacy where trial judge required redaction of identifying information and noting that trial judge could also allow only the parties' attorneys and medical experts to have access to the records).

As noted, the petitioner in a certiorari proceeding must also prove that the irreparable harm resulted from a "departure from the essential requirements of law." A mere showing of legal error is insufficient. The petitioner must show the violation of a well-settled rule of law resulting in a miscarriage of justice, as this Court explained in *Combs v. State*, 436 So.2d 93 (Fla.1983):

> In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.

Id. at 95-6.

B. STANDARDS FOR CERTIORARI CHALLENGES TO PRETRIAL DISCOVERY ORDERS

The pertinent guidelines for reviewing a petition for writ of common law certiorari challenging a pretrial discovery order are found in *Martin-Johnson* and

Eberhardt v. Eberhardt, 666 So. 2d 1024 (Fla. 4th DCA 1996). *See Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 999 (Fla. 1999) ("We agree with Judge Klein's analysis in *Eberhardt* and reiterate that *Martin-Johnson* properly sets forth the parameters for certiorari relief in pretrial discovery."). In *Martin-Johnson, Inc.*, the issue was whether a district court of appeal should review, by a petition for writ of certiorari, an order denying a motion to dismiss or strike a claim for punitive damages -- an order ensuring the relevance of the petitioner's financial condition. The defendant argued that the erroneous refusal to strike an invalid punitive damage claim could result in irreparable injury by permitting the plaintiff to inquire into confidential financial information of the defendant. This Court rejected that argument, holding: "[W]e do not believe the harm that may result from discovery of a litigant's finances is the type of 'irreparable harm' contemplated by the standard of review for certiorari." *Id*. at 1099. This Court explained:

> [I]f we permitted review at this stage, appellate courts would be inundated by petitions to review orders denying motions to dismiss such claims, and trial court proceedings would be unduly interrupted. Even when the order departs from the essential requirements of the law, there are strong reasons militating against certiorari review. For example, the party injured by the erroneous interlocutory order may eventually win the case, mooting the issue, or the order may appear less erroneous or less harmful in light of the development of the case after the order. Haddad, *The Common Law Writ of Certiorari in Florida*, 29 U.Fla.L.Rev. 207, 227-28 (1977).

Id. at 1100.

This Court went on to recognize that the "discovery of certain types of information may reasonably cause material injury of an irreparable nature," such as the so-called "cat out of the bag" material, because it "could be used by an unscrupulous litigant to injure another person or party outside the context of the litigation." *Id*. at 1100. But the financial information at issue in *Martin-Johnson, Inc*. was found to be materially different:

> We are not dealing with material protected by any privilege. Nor can we say petitioner's privacy interest rises to the level of trade secrets, work product, or information about a confidential informant. We cannot view the harm suffered by this disclosure as significantly greater than that which might occur through discovery in any case in which it is ultimately determined that the complaint should have been dismissed.

Id. *Accord*, *Globe Newspaper Co. v. King*, 658 So. 2d 518, 520 (Fla. 1995) (holding that an appellate court lacks certiorari jurisdiction to review a trial court's decision to grant or deny leave to amend a complaint to include a punitive damages claim once the statutory procedural requirements have been followed and finding that a petitioner's claim of irreparable harm from having to defend a claim for punitive damages and produce financial worth discovery "does not rise to the level of material harm that permits certiorari review," citing *Martin-Johnson*); *See also Gaché v. First Union National Bank of Florida*, 625 So. 2d 86, 87 (Fla. 4th DCA 1993) (denying petition for writ of certiorari seeking to quash discover order,

holding that "..wrongfully having to produce financial information is not the type of irreparable harm to justify granting certiorari.").

In *Eberhardt*, 666 So. 2d at 1025, a petition for writ of common law certiorari was dismissed for lack of jurisdiction based upon the following analysis by Judge Klein (which, as noted, was approved by this Court in *Martin-Johnson*):

> In the present case, the trial court required production of income tax returns by the defendant/counterclaimant in a case involving claims for accounting, fraud, breach of contract, constructive trusts and recision of a deed, among other things. While it cannot be determined with any certainty at this point whether the tax returns will be admissible, or whether their production will lead to admissible evidence, the harm that might result from production of this information is indistinguishable from the harm which would have resulted from production of the financial information involved in *Martin-Johnson*, 509 So.2d at 1099 (holding that discovery of financial information was not, in and of itself, the type of irreparable harm necessary for certiorari review).

C. THE THIRD DISTRICT LACKED JURISDICTION

Contrary to the above-cited authorities, the Third District in this case did not first determine whether American properly invoked the certiorari jurisdiction of the court by showing that the trial court's discovery order constituted a departure from the essential requirements of law resulting in irreparable harm. Consequently, the

Third District exceeded its authority by granting certiorari.[11] A proper determination of the jurisdictional issue requires review of the type of information ordered disclosed, along with consideration of the trial court's confidentiality order and American's voluntary prior disclosure of its private financial information. Such an analysis shows that the Third District lacked jurisdiction.

The trial court ordered American to disclose the same type of financial information addressed in *Martin-Johnson* and *Eberhardt.* As in those cases, there is no showing that this financial information is protected by any privilege, or that American has any privacy claim rising to the level of trade secrets, work product, or information about a confidential informant. *See also Crocker Construction Co. v. Hornsby*, 562 So. 2d 842 (Fla. 4th DCA 1990) (denying petition for writ of certiorari seeking to quash order requiring disclosure of several years of party's financial information and noting that such information did not fall into "cat-out-of-the-bag" type information). Accordingly, consistent with *Martin-Johnson* and *Eberhardt*, the Third District should have dismissed American's petition.

[11]"A common-law writ of certiorari rests in the sound discretion of the court to which the application was made, and thus, a court's grant of certiorari is subject to an abuse of discretion standard of review." *Williams v. Oken*, 62 So. 3d at 1132 (holding that First District exceeded the scope of certiorari review by granting relief upon claim of mere legal error).

Moreover, the trial court's confidentiality order sufficiently protects whatever privacy rights American might have in the financial information ordered disclosed so as to defeat any claim of irreparable injury.[12] In *Martin-Johnson, Inc*., 509 So. 2d at 1100, this Court rejected the petitioner's claim that irreparable harm would result from the disclosure of private matters on the following ground:

> [W]e do not ignore petitioner's valid privacy interest in avoiding unnecessary disclosure of matters of a personal nature. We believe, however, that our discovery rules provide sufficient means to limit the use and dissemination of discoverable information via protective orders.

Indeed, even where a party has been ordered to disclose trade secrets, certiorari jurisdiction is not created to challenge the order where the trial court has fashioned sufficient protections. For example, in *Capital One, N.A. v. Forbes*, 34 So. 3d 209 (Fla. 2d DCA 2010), Forbes sought discovery which included trade secrets of Capital One ("the Bank") and the Bank objected. T he trial court ordered the disclosure of the trade secrets but pursuant to the conditions of a confidentiality

[12] The Board questions whether American, as a corporation, has any valid privacy rights at all in the financial information sought. *See Capco Properties, LLC v. Monterey Gardens of Pinecrest Condominium*, 982 So. 2d 1211 (Fla. 3d DCA 2008) (Rothenberg, J., dissenting) (reasoning that a corporation cannot allege that compelled disclosure of financial information violates privacy rights and therefore results in irreparable harm because the right to privacy accorded individuals under the Constitution of the State of Florida does not extend to a business entity). *See also Arnold v. Pennsylvania, Dep't of Transp*., 477 F.3d 105, 111 (3d Cir.2007) (citing *United States v. Morton Salt Co*., 338 U.S. 632, 652, 70 S.Ct. 357, 94 L.Ed. 401 (1950) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy.")).

order. The Bank filed a petition for writ of certiorari which included a challenge to the ordered disclosure of trade secrets to Forbes' consultants and experts. The Second District rejected the Bank's challenge based upon consideration of the confidentiality order as follows:

> The Bank argues that the trial court departed from the essential requirements of law by requiring the disclosure of trade secrets without providing adequate protective measures. An order requiring disclosure of trade secrets may cause irreparable injury that cannot be corrected on appeal; the disclosure lets the "cat out of the bag." *Id*. Here, the trial court did not err. Its order sufficiently protects the Bank. *See Allstate Ins. Co. v. Langston*, 655 So.2d 91, 94 (Fla.1995). The Bank is concerned that experts or consultants retained by Mr. Forbes will misuse the materials. The order does not ignore that concern; only specified individuals may have access to the materials for the stated and limited purposes of assisting counsel in the litigation. No other use is contemplated. Further, the order requires that designated confidential materials, and any copies, be returned or destroyed at the end of the litigation.
>
> Perhaps the order could have been clearer. However, we understand it to limit experts' and consultants' access to confidential information. Paragraph 4 of the order provides a blanket protection that documents may not be disclosed to " any person," with enumerated exceptions. Importantly, the identification of people to whom access is granted is drawn narrowly to include only the parties and their employees, court employees, and outside consultants and experts. As for the consultants and experts, the order allows access only for a limited time and for the limited purposes of assisting counsel in this litigation. [footnote omitted] The trial court did not depart from the essential requirements of law by entering the order proposed by Mr. Forbes's counsel. As to this issue, the petition for certiorari is denied.

Capital One, N.A., 34 So. 3d at 212-13. *See also Crocker Construction Co.*, 562

So. 2d at 843 (denying certiorari petition challenging discovery order compelling disclosure of allegedly private financial information claimed to contain trade secrets, noting that "[a]s to any alleged confidential or classified trade secrets of the petitioner or the non-parties, the trial court, upon appropriate motion, can easily fashion safeguards to prevent dissemination of this information to other entities which are not involved in the litigation.").

Similarly here, the confidentiality order, which adopted the stipulated agreement of both American and the Board, sufficiently protects American's alleged privacy rights. Pursuant to the agreement, the financial information remains confidential, cannot be disclosed, and must be destroyed upon termination of the action. The case for finding no certiorari jurisdiction here is even more compelling than in the cases cited above because American is merely being ordered to disclose financial information rather than trade secrets.

There is no irreparable harm here for the additional reason that American previously disclosed its private financial information to the Board. As noted, in the Third District, American acknowledged that its prior voluntary disclosures to the Board included *private* financial information. Thus, American's claim that the challenged order to update the financial discovery would let the "cat out of the

bag" is without merit.[13] American made no showing that the updated discovery would somehow implicate a new and different privacy interest. To put it another way, certiorari does not lie to put the cat back into the bag.

In sum, the Third District improperly failed to address the threshold issue of jurisdiction and a review of the undisputed facts shows that American's petition should have been dismissed for lack of jurisdiction.

D. CERTIORARI DOES NOT LIE TO REVIEW AMERICAN'S OVERBREADTH OR RELEVANCE CLAIMS

The Third District exercised certiorari jurisdiction on the ground that the trial court's discovery order was overbroad. The Third District stated: "Although not every erroneous discovery order creates certiorari jurisdiction, certiorari is the proper remedy for overbroad discovery orders 'because once discovery is wrongfully granted, the complaining party is beyond relief.' " *AEE*, 45 So. 3d at 944 (citations omitted). But mere overbreadth is not a basis for certiorari relief. There must be material injury, such as where the discovery request is so overbroad

[13] Furthermore, American's prior voluntary disclosure to the Board of private financial information identical to that ordered updated by the trial court constitutes a waiver of American's belated privacy objection under traditional waiver-by-disclosure principles. *See, e.g.*, § 90.507, Florida Statutes (providing that a voluntary disclosure of a confidential matter constitutes a waiver of any privilege against disclosure). *See also H.J.M. v. B.R.C.*, 603 So. 2d 1331 (Fla. 1st DCA 1992) (finding waiver of a privilege as to discovery of information where part of the information was disclosed prior to raising an objection based upon the privilege).

as to be oppressive or encompass privileged material. *See, e.g., Surror Bin Mohammed Al Nahyan v. First Investment Corp*., 701 So. 2d 561 (Fla. 5th DCA 1997) (finding that petitioner's complaint that scope of discovery was overbroad was meritorious but nevertheless denying the petition, finding that "nothing privileged is demanded and we do not find the requests so overbroad or oppressive that this court should interfere through issuance of an extraordinary writ.").

At the hearing on American's objection and the Board's motion to compel, American claimed that the discovery requested was overbroad. But American made no evidentiary showing of overbreadth in the trial court. Consequently, American could not meet the test for overbreadth in its petition for writ of certiorari by showing, for example, that the trial court issued an order "requiring patently overbroad discovery so extensive that compliance with the order will cause material injury to the affected party throughout the remainder of the proceeding, effectively leaving no adequate remedy on appeal." *Life Care Centers of America v. Reese*, 948 So. 2d 830, 832 (Fla. 5th DCA 2007) (cases cited). In fact, the prior voluntary financial disclosures by American covered a greater time span than the discovery order challenged below. In the absence of the required evidentiary showing, the trial court acted well within its discretionary authority in overruling American's objection and ordering the discovery, and certiorari relief

will not lie to challenge such an order. *See, e.g., Topp Telecom, Inc. v. Atkins*, 763 So. 2d 1197 (Fla. 4th DCA 2000) (denying petition for writ of certiorari, holding: "At the initial hearing on the objections, the trial judge was faced with a claim of undue burden in responding to discovery requests. Yet there was no evidence in the record to support the objectors' claim of unwarranted discovery. There is obviously no error in overruling this kind of objection when it is not supported by record evidence...".). For the same reasons, in the case at bar, the trial judge cannot be said to have departed from the essential requirements of the law by overruling American's objection.

Nevertheless, the Third District made a *de novo* finding of overbreadth, essentially second-guessing the trial judge's ruling on a discovery/evidentiary matter. The Third District came to this conclusion for apparently one reason, namely, that the financial information sought was for a time period beyond when American made its decision to purchase the property. Upon the same reasoning, the Third District also granted certiorari relief upon a finding that the financial information was irrelevant. Neither ground can support certiorari relief in this case for a variety of reasons.

As noted, American failed to make any showing of irreparable harm and the Third District did not find any. Thus, even if the Third District had jurisdiction,

American was not entitled to certiorari relief because, as this Court has clearly stated: "[W]e do not believe that discovery of irrelevant materials necessarily causes irreparable harm." *Langston*, 655 So. 2d at 94. The decision of the Third District is in square conflict with *Langston* by granting American's petition where there was a showing, at best, of mere irrelevance (or overbreadth) without more.

Moreover, American's case for irrelevance fails on its merits. In pretrial discovery, a trial judge is afforded broad discretion to order disclosures deemed to be relevant. *See, e.g., Young Circle Garage LLC v. Koppel*, 916 So. 2d 22, 24 (Fla. 4th DCA 2006) ("The trial court's determination of relevancy was within its broad discretion so that certiorari relief is not appropriate."). Furthermore, the scope of "relevancy" in pretrial discovery is even broader than in trial matters. A party is permitted to discover evidence that would be inadmissible at trial, so long as it may lead to the discovery of admissible evidence. In *Amente*, this Court explained why as follows:

> The concept of relevancy is broader in the discovery context than in the trial context. Rule 1.280(b)(1), Florida Rules of Civil Procedure, which delineates the proper scope of discovery, provides:
>
> > Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to a claim or a defense of the party seeking discovery or the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of

> any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> Thus, a party may be permitted to discover relevant evidence that would be inadmissible at trial, so long as it may lead to the discovery of admissible evidence.

Amente, 653 So. 2d at 1032.

Applying the proper standards, it cannot be said that the trial court abused its broad discretion or that this financial information would not lead to admissible evidence. There are several reasons why this discovery would prove useful to the Board's defenses and might lead to admissible evidence. For example, American has invoked the equitable jurisdiction of the trial court by suing the Board for reformation of the contract. (R. 38-9). Reformation is an equitable remedy. This Court summarized the doctrine in *Jacobs v. Parodi*, 50 Fla. 541, 39 So. 833 (1905) as follows:

> Where an agreement has been actually entered into, but the contract, deed, or other instrument in its written form does not express what was really intended by the parties thereto, equity has jurisdiction to reform the written instrument so as to conform to the intention, agreement, and understanding of all the parties.

In response to American's reformation claim, the Board alleged that American bid $4,025,000 as a result of its "considered business decision." (R. 57). The Board contents that American factored into its valuation of the property the

property's unique, highest and best use to American, employing its budgets and projected profits expected from locating its business upon this highly visible property with a ready market of students. American is likely to deny same. The financial information ordered disclosed is reasonably calculated to lead to admissible evidence such as: the value of the property to American based upon projected profits which the discovery will show proved to be accurate; expert opinion as to the validity of the budgets used by American at the time of the purchase; American's intention to outbid Edison based upon financial projections which were borne out by the financial information ordered disclosed; and an expert valuation of the property employing an income method or other appraisal method which employs all financial information available up to the time of trial. The financial information at issue is also discoverable because it could reasonably be employed to impeach any attempt by American to claim that it would be inequitable not to reduce the purchase price based upon American's losses. *See Allstate Ins. Co. v. Boecher,* 705 So. 2d 106, 107 (Fla. 4th DCA 1998) (denying petition for writ of certiorari seeking to quash order compelling discovery, rejecting petitioner's claim of irrelevance where "the information sought is indisputably relevant and meaningful to impeaching the witness."), *approved, Boecher, supra*. But again, the merits of American's relevance and overbreadth

claims should not be at issue because, for the reasons stated, the Third District was without certiorari jurisdiction to have reached them.

CONCLUSION

Based upon the foregoing, the Board respectfully requests that the Court quash the decision of the Third District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was mailed to Elio F. Martinez, Jr. and Barbara Viniegra, Counsel for American, Concepcion Sexton & Martinez, 355 Alhambra Circle, Suite 1250, Coral Gables, FL 33134 this _____ day of September, 2011.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is submitted in Times New Roman 14-point font.

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