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 BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The petitioner is The Board of Trustees of the Internal Improvement Trust Fund ("Board" or "Petitioner"). The Board is the entity responsible for the disposition of state-owned property. The respondent is American Educational Enterprises, LLC ("American" or "Respondent"). The petitioner 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) (App. 1-6).

The underlying dispute arose from the Board's sale of state-owned real property to Florida National College ("FNC"). American was assigned FNC's interests in the sale. In April 2001, the Board sent a bidding package to prospective buyers advising that the property was for sale "as is" and that the tax assessed value was $4,462,063. The package announced that a minimum bid of $3,750,000 was required. FNC submitted a bid of $4,025,000 and an earnest money deposit of $402,500. In May, 2001, the Board notified FNC that its bid and contract offer were accepted. (App. 3). FNC sought financing from Citibank. An appraisal obtained by Citibank estimated the property's market value at $2,850,000. In 1999, an appraisal of the property performed for the Board estimated the property's value at $3,275,000. FNC obtained a copy of that appraisal as well. FNC asked the Board to re-negotiate the contract. The Board declined and stated that FNC would

forfeit its deposit if it did not close on the property. On June 30, 2001, FNC closed on the sale of the property. (App. 3).

After FNC assigned all of its rights under the contract to American, its affiliate, American sued the Board for reformation of the contract. American also alleged negligent misrepresentation, fraud in the inducement, and unjust enrichment. In its claim for reformation of the contract price, American alleged that it had mistakenly submitted its bid based upon misrepresentations by the Board. The Board answered the complaint and raised numerous affirmative defenses. The Board also asserted a counterclaim for fraud in the inducement, alleging that after the Board refused to reduce the purchase price, FNC misrepresented that it would irrevocably purchase the property in accordance with the contract terms. (App. 3).

During discovery, the Board obtained the financial documents that FNC submitted to Citibank in order to obtain financing. The financial documents included the following for the years 1998-2004: FNC's independent auditor's reports; balance sheets; income statements; statements of cash flow; tax returns; and American's balance sheets, income statements, statements of cash flow, and tax returns. Also included was underlying information for FNC's 2001-2008 budgets. (App. 4). The parties entered into a confidentiality agreement as to the financial disclosures and the trial court approved the agreement. (App. 4).

In March, 2009, the Board propounded to American a request for production which sought to update the financial information through the year 2007. American objected and the Board moved to compel disclosure. The trial judge granted the Board's motion to compel in part and ordered American to produce the following seven items: (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. (App. 7). American filed in the Third District a petition for writ of certiorari seeking to quash the trial court's order. (App. 3).

In pertinent part, the Board responded that the trial court's discovery order was supported by American's claim for reformation of the contract price in which American contended that its bid was a mistake, made in reliance upon the Board's representations regarding the property’s assessed value rather than American's prospective use of the property. (App. 6). The Board asserted, however, that American made no mistake at all. Rather, American's bid was a result of its

considered business decision, *i.e.*, that American factored into the bid its best and highest use of the property, and that American's projections proved to be correct. (App. 6). The Third District rejected the Board's contentions as follows:

> However, the documents evidence American's financial performance for several years far removed from American's 2001 business decision.FN5 The factors underlying American's decision were those American considered in 2001, and the requested financial documents have no relationship to its decision-making process in submitted the bid.
>
> > FN5: We note that the Board already has obtained corporate financial information for the three-year periods before and after the 2001 purchase.

(App. 6).

SUMMARY OF ARGUMENTS

I: The decision of the Third District is in express and direct conflict with the decisions of this Court holding that the governing standard for a petition for writ of common law certiorari seeking review of an order granting discovery is "irreparable harm" because the Third District did not even mention, much less hold the respondent to this standard at all.

II: Decisions of this Court, the Second District, and the Fourth District hold that a certiorari petitioner seeking to quash a discovery order on grounds of privacy or privilege cannot meet the required showing of irreparable harm where the trial court can or has fashioned confidentiality safeguards. Here, the trial court

fashioned such protection by approving the confidentiality agreement reached by both parties. Yet, in direct and express conflict with the aforementioned holdings, the Third District nevertheless granted certiorari relief and quashed the trial court's discovery order.

III: In the First District, where a party petitions for certiorari relief, the irreparable harm inquiry is an issue of jurisdiction and must be undertaken first. In direct and express conflict with the First District, the Third District in this case did not undertake that issue at all.

IV: In the Fourth District, wrongfully having to produce financial information is not the type of irreparable harm justifying certiorari relief. In direct and express conflict with the Fourth District, the Third District granted certiorari relief on the ground that the petitioner was wrongfully ordered to produce financial information.

ARGUMENTS

I.

THE DECISION OF THE THIRD DISTRICT IS IN EXPRESS AND DIRECT CONFLICT WITH *ALLSTATE INSURANCE COMPANY v. BOECHER*, 733 So. 2d 993 (Fla. 1999) AND *MARTIN-JOHNSON, INC. v. SAVAGE*, 509 So. 2d 1097 (Fla. 1987) ON THE SAME QUESTION OF LAW.

In *Allstate Insurance Company v. Boecher*, 733 So. 2d 993 (Fla. 1999) and *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097 (Fla. 1987), this Court held that

the governing standard for a petition for writ of common law certiorari seeking review of an order granting discovery is "irreparable harm." As this Court explained in *Boecher*:

> In *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1098 (Fla. 1987), this Court explained the applicable limits of the use of petitions for writs of certiorari to appeal an order granting discovery. We described certiorari relief as an "extraordinary remedy" that "should not be used to circumvent the interlocutory appeal rule which authorizes appeal from only a few types of non-final order." *Id.* at 1098. We observed that orders granting discovery had traditionally been reviewed by certiorari, because when discovery is wrongfully granted "the complaining party is beyond relief." *Id.* at 1099. **However, we concluded that not every erroneous discovery order creates certiorari jurisdiction in an appellate court, and focused on "irreparable harm" as the governing standard.** *Id.* at 1099.

Boecher, 733 So. 2d at 999.

Here, the Third District quashed the trial court's order granting discovery without holding the petitioner to its burden of demonstrating irreparable harm. In fact, the word "irreparable" does not appear anywhere in the decision of the Third District below because the Third District did not apply the governing standard of irreparable harm. The Third District simply disagreed with the trial court's order compelling discovery and concluded, based upon a relevancy analysis, that the discovery information ordered disclosed was too far removed from the date of the respondent's decision to buy the property at issue and therefore lacked a "relationship" to American's decision to submit its bid. (App. 6). Consequently,

the decision of the Third District is in express and direct conflict with the decisions of this Court in *Boecher and Savage* by failing to apply (or even acknowledge) the applicable standard of "irreparable harm." Such an improper expansion of the scope of certiorari by a district court affords yet another basis for invoking this Court's conflict jurisdiction. *See, e.g., Custer Medical Center v. United Automobile Ins. Co*., 2010 WL 4340809 (Fla. November 4, 2010).

Additionally, had the Third District properly analyzed and applied the standard of irreparable harm, certiorari relief would have been denied because: (1) the trial court's order merely directed American to update financial information already disclosed to the Board; and (2) the parties entered a confidentiality agreement that was approved by the trial court.

II.

THE DECISION OF THE THIRD DISTRICT IS IN EXPRESS AND DIRECT CONFLICT WITH *MARTIN-JOHNSON, INC. v. SAVAGE*, 509 So. 2d 1097 (Fla. 1987), *CAPITAL ONE, N.A. v. FORBES*, 34 So. 3d 209 (Fla. 2d DCA 2010), AND *CROCKER CONSTRUCTION CO. v. HORNSBY*, 562 So. 2d 842 (Fla. 4th DCA 1990) ON THE SAME QUESTION OF LAW.

A trial judge can prevent irreparable harm in ordering the disclosure of allegedly private or privileged matters by fashioning safeguards to limit the use of the discoverable information. Thus, in *Savage*, 509 So. 2d at 1100, this Court rejected the petitioner's claim that irreparable harm would result from the disclosure or private matters on the following basis:

> [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.

Similarly, in *Capital One, N.A. v. Forbes*, 34 So. 3d 209, 213 (Fla. 2d DCA 2010), where the petitioner sought review of an order requiring the disclosure of trade secrets, the Second District found irreparable harm lacking where the trial court entered an order directing that "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."

The Fourth District similarly held in *Crocker Construction Co. v. Hornsby*, 562 So. 2d 842, 843 (Fla. 4th DCA 1990) that the petitioner did not meet its burden of showing irreparable harm as to the information ordered disclosed in discovery where: "As to any alleged confidential or classified traded 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."

Here, the trial court entered an order approving the parties' agreement to maintain the confidentiality of American's financial disclosures to the Board. The

decision of the Third District pays lip service to that order but nevertheless quashes the trial court's discovery order without any discussion whatsoever of the petitioner's failure to show irreparable injury in view of the safeguard fashioned by the parties and the trial court. As a result, the decision is in conflict with the aforementioned decisions of this Court, the Second District, and the Fourth District on the same question of law.

III.

THE DECISION OF THE THIRD DISTRICT IS IN EXPRESS AND DIRECT CONFLICT WITH *WEST FLORIDA MEDICAL CENTER, INC. v. SEE*, 18 So. 3D 676 (Fla. 1st DCA 2009) ON THE SAME QUESTION OF LAW.

In *West Florida Medical Center, Inc. v. See*, 18 So. 3d 676, 682 (Fla. 1st DCA 2009), the First District held that where a party petitions for certiorari relief: "The irreparable harm inquiry is an issue of jurisdiction, and thus, must be undertaken first." In direct and express conflict with the First District, the Third District in this case did not first undertake that issue.

IV.

THE DECISION OF THE THIRD DISTRICT IS IN EXPRESS AND DIRECT CONFLICT WITH *GACHÉ v. FIRST UNION NATIONAL BANK OF FLORIDA*, 626 So. 2d 86 (Fla. 4th DCA 1993) ON THE SAME QUESTION OF LAW.

In *Gaché v. First Union National Bank of Florida*, 625 So. 2d 86, 87 (Fla. 4th DCA 1993), the Fourth District denied a petition for writ of certiorari seeking

to quash a discovery order on the ground that "...wrongfully having to produce financial information is not the type of irreparable harm to justify granting certiorari." In direct and express conflict therewith, the Third District in the case at bar granted certiorari relief on the ground that the petitioner was wrongfully ordered to produce financial information.

CONCLUSION

Based upon the foregoing, the petitioner respectfully requests that this Court grant review of the decision of the Third District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief of petitioner on jurisdiction was mailed to Barbara Viniegra, Counsel for Respondent, Concepcion Sexton & Belledo, 255 Aragon Avenue, 2nd Floor, Coral Gables, FL 33134 this ____ day of December, 2010.

_____
PAUL MORRIS

CERTIFICATE OF COMPLIANCE

This brief complies with the font requirements of Fla. R. App. P. 9.210.

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PAUL MORRIS