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 REPLY BRIEF ON THE MERITS

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REPLY ARGUMENT

In *Martin-Johnson v. Savage*, 509 So. 2d 1097 (Fla. 1987), this Court held that "not every erroneous discovery order creates certiorari jurisdiction in an appellate court." *Id*. at 1100. Rather, the petitioner bears the burden of showing material injury of an irreparable nature. *Id*.[1] The petitioner must meet this burden as a condition precedent to invoking a district court's certiorari jurisdiction. *Jaye v. Royal Saxon, Inc*., 720 So.2d 214, 215 (Fla.1998).

The decision of the Third District in this case[2] squarely conflicts with *Martin-Johnson*, as well as its progeny, by granting American's petition for writ of certiorari and quashing the trial court's discovery order merely upon the finding that the order was erroneously overbroad and in the absence of any showing that the order could result in irreparable harm to American. Instead, the Third District should have followed the controlling precedent of this Court by dismissing the petition for lack of jurisdiction without addressing the merits of American's claim

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[1] In *Martin-Johnson*, 509 So. 2d at 1100, this Court cited two district court decisions as examples of irreparable injury: *Bridges v. Williamson*, 499 So. 2d 400 (Fla. 2d DCA 1984) (possible republication of libelous statement); and *City of Miami Beach v. Town*, 375 So. 2d 866 (Fla. 3d DCA 1979) (ongoing police investigation could be compromised or risk of physical danger posed to those involved).

[2] The decision sought to be reviewed is *American Educational Enterprises, LLC v. Board of Trustees of the Internal Improvement Trust Fund*, 45 So. 3d 941 (Fla. 3d DCA 2010) ("*AEE*").

that the discovery order was erroneous. In its Answer Brief on the Merits ("Answer Brief"), American makes several arguments in an unsuccessful attempt to defend the decision below and avoid the rule of *Martin-Johnson*. Each of American's arguments is without merit.

A. THIS COURT HAS NOT "RETREATED" FROM ITS DECISION IN *MARTIN-JOHNSON*; RATHER, THIS COURT HAS REPEATEDLY REAFFIRMED *MARTIN-JOHNSON*, WHICH THE THIRD DISTRICT FAILED TO FOLLOW.

The decision of the Third District in this case cannot be squared with the decision of this Court in *Martin-Johnson*. In apparent recognition of same, American argues that the Third District was not bound by *Martin-Johnson*, claiming that in *Allstate v. Langston*, 655 So. 2d 91 (1995), this Court "retreated" from *Martin-Johnson*.

Contrary to American's argument, this Court did not beat a retreat from *Martin-Johnson* in *Langston*. Rather, this Court reaffirmed the principle recognized in *Martin-Johnson* that the jurisdiction of district courts of appeal to review pretrial discovery orders by certiorari is limited to cases where there is irreparable harm. In no uncertain terms, this Court in *Langston* disapproved "decisions from the appellate courts to the extent they could be interpreted as automatically equating irrelevant discovery requests with irreparable harm." *Langston*, 655 So. 2d at 95.

The restrictive scope of the writ of certiorari for review of discovery orders was reaffirmed yet again by this Court in *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993 (Fla. 1999) in which the holding of *Langston* was quoted with approval. *Boecher*, 733 So. 2d at 999. Furthermore, any doubt about the continuing vitality of *Martin-Johnson* was put to rest in *Boecher* when this Court expressly approved *Eberhardt v. Eberhardt*, 666 So. 2d 1024 (Fla. 4th DCA 1996) as follows: "We agree with Judge Klein's analysis in *Eberhardt* and reiterate that *Martin-Johnson* properly sets forth the parameters for certiorari relied in pretrial discovery." *Id*. at 999.

In *Eberhardt*, the Fourth District dismissed a petition for writ of certiorari challenging a discovery order requiring production of income tax returns. Judge Klein, writing for the court, reached the following conclusion which is directly applicable to the case at bar:

> 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). And, as we noted earlier, *Martin-Johnson* was adhered to in *Allstate* [*v. Langston*], 655 So.2d at

> 94. We therefore dismiss the petition for certiorari for lack of jurisdiction.

Eberhardt, 666 So. 2d at 1025. In the case at bar, the Third District should have followed *Martin-Johnson* and ruled, as did the Fourth District in *Eberhardt*, that American, in its opposition to disclosure of the same type of financial information at issue in *Martin-Johnson* and *Eberhardt*, could not show the type of irreparable harm required to invoke the certiorari jurisdiction of the appellate court.

Although this Court did point out in *Langston* that a litigant is not entitled to carte blanche discovery of irrelevant materials, that does not mean, as American seems to argue, *see* Answer Brief at 18, that in *Langston*, this Court retreated from the irreparable harm requirement. American appears to confuse two separate matters: the petitioner's burden of showing irreparable harm required for invoking the jurisdiction of a district court of appeal to grant certiorari relief; and the role of the trial court in the exercise of its broad discretion in pretrial discovery matters. As to the standard governing the trial judge, this Court in *Langston* reiterated the well-settled principle that "[d]iscovery in civil cases must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence." *Langston*, 655 So. 2d at 94 (citing Fla. R. Civ. P. 1.280(b)(1)). This determination is made by the trial judge who afforded broad discretion to order disclosures. *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.").

American's view is that an erroneous determination by the trial judge results in irreparable harm. However, this Court in *Langston* disapproved several district court of appeal decisions – which had granted certiorari relief upon findings that the trial judges in those cases ordered the disclosure of irrelevant materials – to the extent those decisions could be read as automatically equating orders to disclose irrelevant materials with irreparable harm. *Langston*, 655 So. 2d at 95. Here, in conflict with *Langston*, the Third District and American are automatically equating overbreadth with irreparable harm and according no deference to the trial court's broad discretion. The result is that the Third District failed to hold American to its jurisdictional burden. American's petition for writ of certiorari should have been dismissed for lack of jurisdiction.

B. THE THIRD DISTRICT DID NOT FIND IRREPARABLE HARM.

The Third District relied upon its decision in *Redland Co. v. Atl. Civil, Inc*., 961 So. 2d 1004 (Fla. 3d DCA 2007) as grounds for granting certiorari relief in this case. *See AEE,* 45 So. 3d at 944. From that reliance, American leaps to the following conclusion: "[I]n finding that this case was analogous to *Redland*, the

Third DCA expressly found ipso facto the presence of irreparable harm here, which justified its certiorari jurisdiction. The harm is irreparable because once confidential information is disclosed, it cannot be taken back." Answer Brief at 14. There are several flaws in American's position.

First, the decision of the Third District in *Redland* is also in conflict with the controlling decisions of this Court with regard to the requirement of irreparable harm. The Third District in *Redland* did not concern itself with the jurisdictional requirement of irreparable harm. Instead, as in the case at bar, the Third District in *Redland* found that the discovery order compelling the production of financial information resulted in irreparable harm simply because it was overbroad. Indeed, at the very outset of *Redland*, the Third District stated: "Because we find that the order compelling production is overbroad, we grant the writ." *Redland*, 961 So. 2d at 1005. Similarly, at the end of that decision, the Third District concluded: "The trial court's order departs from the essential requirements of the law by requiring overbroad discovery that will cause material injury to Redland and leave them with no adequate remedy on appeal" because, as the Third District went on to conclude, the discovery order was overbroad in two respects: first, the time frame for the discovery requested was "unreasonably broad"; and second, the order required "wholesale turnover" without regard to the issues and "as such we find that the

order is overbroad in that respect as well." *Id*. at 1006-07. Thus, the decision of the Third District in *Redland* suffers from the same infirmity as its decision in the case at bar by granting certiorari relief based solely upon a finding that a discovery order was erroneously overbroad.[3]

Second, the decision of the Third District in this case is devoid of any express mention of irreparable harm. Therefore, it logically follows that the Third District's reliance upon *Redland* does not "expressly" or "ipso facto" constitute a finding of irreparable harm. Nor can it be argued that the decision of the Third District impliedly finds irreparable harm simply by referencing *Redland* because the Third District relied upon *Redland* solely as to the issue overbreadth.

Third, American incorrectly argues that the harm in *Redland* was the disclosure of confidential information which cannot be taken back, suggesting that the same harm is present here. However, the Third District made no finding in *Redland* that the discovery sought in that case was confidential. Indeed, had the financial discovery at issue in *Redland* been deemed confidential, the Third District would not have permitted its discovery at all. Yet, the Third District in *Redland* granted the petition without prejudice to the requesting party to fashion its

[3] Review of *Redland* was not sought in this Court.

discovery request more narrowly to avoid overbreadth. *Id*. at 1007. Moreover, in this case, the Third District made no finding concerning confidentiality.

Thus, American's argument that irreparable harm was expressly and properly found by virtue of the Third District's reliance upon *Redland* should be rejected.

C. THERE IS NO PRIVACY VIOLATION RESULTING IN IRREPARABLE HARM TO AMERICAN

American also contends that the Third District correctly granted its petition for writ of certiorari because the trial court's order to update the financial discovery is violative of American's right to privacy. However, the Third District did not find any privacy right or violation.

Nor would the disclosure of the updated financial items result in irreparable harm warranting certiorari relief. At issue in *Martin-Johnson* was the same type of financial information ordered disclosed in this case. This Court noted that such financial information is not "material protected by any privilege" and does not rise to the level of "trade secrets, work product, or information about a confidential informant." *Id*. at 1100. American has not shown that this type of financial information warrants certiorari protection.

Also, certiorari does not lie here because there is no risk of improper disclosure and therefore no showing of irreparable harm. American has never contended, and there is no supporting evidence for a contention, that the Board is

the type of "unscrupulous litigant" who would injure American with improper dissemination so as to give rise to the type of "cat out of the bag" irreparable harm recognized by this Court in *Boecher*, 733 So. 2d at 999. That might be a concern, for example, if the parties were business competitors. But this case concerns a one-time real property sale between the Board, as the seller and entity responsible for the disposition of property owned by the State of Florida, and American, as the buyer. There is no reason to believe and no evidence to support any claim that the Board would or could use the financial information against American outside the confines of this litigation.

Furthermore, this is precisely the type of case envisioned by this Court in *Martin-Johnson* where the protective measures available in the trial court are more than sufficient to prevent any irreparable harm. As this Court explained in *Martin-Johnson*:

> We 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. *See* Fla. R. Civ. P. 1.280(c) (for good cause shown, trial court may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense): *East Colonial Refuse Service, Inc. v. Velocci*, 416 So. 2d 1276 (Fla. 5th DCA 1982) (order compelling production of corporate records included caveat that certain items were to be viewed only by respondent's counsel).

Id. at 1100-01. Similarly, in *Rasmussen v. South Florida Blood Service, Inc*., 500 So. 2d 533 (Fla. 1987), this Court stated:

> In deciding whether a protective order is appropriate in a particular case, the court must balance the competing interests that would be served by granting discovery or by denying it. *North Miami General Hospital v. Royal Palm Beach Colony, Inc*., 397 So.2d 1033, 1035 (Fla. 3d DCA 1981); *Dade County Medical Association v. Hlis*, 372 So.2d 117, 121 (Fla. 3d DCA 1979). Thus, the discovery rules provide a framework for judicial analysis of challenges to discovery on the basis that the discovery will result in undue invasion of privacy. This framework allows for broad discovery in order to advance the state's important interest in the fair and efficient resolution of disputes while at the same time providing protective measures to minimize the impact of discovery on competing privacy interests.

Id. at 535. *See also Friedman v. Heart Institute of Port St. Lucie, Inc*., 868 So. 2d 189, 195 (Fla. 2003) (recognizing that "the substance of the Florida Rules of Civil Procedure, buttressed by litigant-protecting caselaw, strikes the proper balance between allowing appropriate discovery and protecting litigants' privacy and equitable interests).

The protective measure available here is a confidentiality agreement and trial court order approving the agreement. American entered into such an agreement with the Board wherein the parties agreed not to disclose the financial information initially disclosed to American. The trial court approved the parties' agreement in an order. That same protection is available as to the updated financial information ordered disclosed. The parties can agree to remain bound by the

confidentiality order in place. Or if American is truly concerned, as it claims, that the original confidentiality order might not cover the updated discovery, the parties can amend the agreement accordingly and obtain a new order of approval. Thus, there is no merit to American's claim of irreparable harm based upon a privacy interest.

Finally, American, as a business entity, cannot even make a claim that its financial information is protected by the right to privacy. *See Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002) (noting that the constitutional right to privacy "... is a personal one, inuring solely to individuals."). *Cf. Capco Properties, LLC v. Monterey Gardens of Pinecrest Condominium*, 982 So. 2d 1211 (Fla. 3d DCA 2008) (quashing order allowing discovery of business entities' "personal" financial information).[4]

[4] In *Capco*, the majority granted a petition for writ of certiorari and quashed orders permitting pretrial discovery of financial information. In her dissenting opinion, Judge Rothenberg remarked upon the majority's finding that irreparable harm resulted from the order compelling discovery of personal financial information in violation of the petitioners' privacy interests. This finding was mistaken, Judge Rothenberg reasoned, because the disputed discovery requests were directed to *Capco*, a business entity. Judge Rothenberg stated: "While the Florida Constitution clearly creates a distinct right of privacy for 'natural persons,' Art. I, § 23, Fla. Const., the majority articulates no compelling reason to extend that right to a limited liability company." *Id*. at 1216. Similarly here, the disputed discovery request seeks a business entity's financial information. American cites *Capco*, along with *Universal Engineering Testing Co. v. Israel*, 707 So. 2d 900 (Fla. 5th DCA 1998), as authority for its claim that a corporation has a right to privacy in Florida. Answer Brief at 15-6.

D. EVEN IF AMERICAN HAD ESTABLISHED JURISDICTION IN THE THIRD DISTRICT, ITS PETITION FOR WRIT OF CERTIORARI LACKED MERIT BECAUSE THE TRIAL COURT'S ORDER DIRECTING THAT AMERICAN UPDATE ITS PREVIOUS FINANCIAL DISCOVERY WAS NOT ERRONEOUS.

For all of the reasons stated above, as well as those advanced in the Board's initial brief, the Third District was without jurisdiction to reach the merits of American's petition for writ of certiorari due to the absence of irreparable harm. However, even if the merits of American's petition could have been reached, American failed to show an abuse of the trial court's discretion in ordering the updated financial discovery.

The trial court's order did not suffer from overbreadth as found by the Third District. To the contrary, the financial information ordered disclosed was limited in both time and scope. Indeed, in many respects, the discovery order at issue was either duplicative of what was already disclosed, or narrower in scope than the initial discovery order. *See AEE*, 45 So. 3d at 945 n. 3 (noting that although the challenged order compels discovery of documents from 2001 through 2008, the majority date from 2005-2007; furthermore, several items dated from 2001 through 2008 listed in the discovery request at issue were previously disclosed).

Nor did the discovery order grant to the Board the type of "carte blanche" access to irrelevant materials which trial courts should protect against. *See*

Langston, supra. Rather, the trial judge tailored the discovery order to require only the disclosure of materials which would update the previously disclosed extensive financial information.

Also, American failed to show that the information was not relevant in the context of this case. "The concept of relevancy is broader in the discovery context than in the trial context." *Amente v. Newman*, 653 So. 2d 1030 (Fla. 1995). The information sought need not be admissible. It is discoverable, pursuant to rule 1.280(b)(1), if it appears reasonably calculated to lead to the discovery of admissible evidence. For the reasons stated in the Board's Initial Brief on the Merits at 30-2, there is no showing that the trial court abused its broad discretion in ruling upon the relevance of this pretrial discovery. Furthermore, by including in its complaint a count for reformation of the purchase and sale contract, American placed at issue its true intent in making its successful bid on the property. *See Providence Square Assoc., Inc. v. Biancardi*, 507 So. 2d 1366, 1370 (Fla. 1987). The financial information is reasonably calculated to lead to the discovery of admissible evidence on the issue of American's true intent by showing that American correctly projected that its future profits would soar after locating its business upon this property and that American intended to pay the price it did by having factored those profits into its bid.

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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I HEREBY CERTIFY that a copy of this brief was mailed to Elio F. Martinez, Jr. and Scott A. Burr, Counsel for American, Concepcion Sexton & Martinez, 255 Aragon Avenue, 2nd Floor, Coral Gables, FL 33134 this _____ day of February, 2012.

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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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