IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

Case No. 4D13-_____
L.T. Case No. 50 2017 CA 010245 XXXX MB

MANFRED BRECKER,

Petitioner,

vs.

DELAIRE COUNTRY CLUB, INC., a not-for-profit Florida corporation,

Respondent.
_____/

PETITION FOR WRIT OF CERTIORARI

Petitioner Manfred Brecker ("Petitioner"), pursuant to Fla. R. App. P. 9.100(c), petitions this Court for a writ of certiorari to review a non-final order denying Petitioner's right to discovery by sustaining the Respondent Delaire Country Club, Inc.'s (the "Club") objections to written discovery and motion for protective order on the scope of future depositions.

BASIS FOR INVOKING THE JURISDICTION OF THE COURT

Petitioner invokes this Court's jurisdiction pursuant to Fla. Rs. App. P. 9.030(b)(2)(A), 9.100(c), and Article V, Section 4(b)(3) of the Florida Constitution. The order to be reviewed is an order granting Respondent's Motion for Protective Order precluding pertinent discovery, and was rendered on May 24, 2018 (the "Order

on Motion for Protective Order").A-1[1].

A district court of appeal possesses certiorari jurisdiction to review whether the trial court denied the petitioner discovery and the injury caused by the order was irreparable. *Office of Attorney General, Department of Legal Affairs, State of Florida v. Millennium Communications & Fulfillment, Inc.*, 800 So. 2d 255, 257 (Fla. 3d DCA 2001); *Beekie v. Morgan*, 751 So. 2d 694 (Fla. 5th DCA 2000); *Medero v. Florida Power and Light Co.*, 658 So. 2d 566 (Fla. 3d DCA 1995); *Sabol v. Bennett*, 672 So. 2d 93 (Fla. 3d DCA 1996); *Travelers Indemnity Co. v. Hill*, 388 So. 2d 648 (Fla. 5th DCA 1980); *Lunceford v. Florida Cent. R. Co., Inc.*, 728 So. 2d 1239 (Fla. 5th DCA 1999); *Bush v. Schiavo*, 866 So. 2d 136, 140 (Fla. 2d DCA 2004); *Towers v. City of Longwood*, 960 So. 2d 845 (Fla. 5th DCA 2007); *Shindorf v. Bell*, 207 So. 3d 371 (Fla. 2d DCA 2016); *Publix Super Markets, Inc. v. Hernandez*, 176 So. 3d 350 (Fla. 3d DCA 2015); *Marshall v. Buttonwood Bay Condo. Ass'n, Inc.*, 118 So. 3d 901 (Fla. 3d DCA 2013); *see also Power Plant Entertainment, LLC v. Trump Hotels & Casino Resorts Development Co., LLC*, 958 So. 2d 565, 566-67 (Fla. 4th DCA 2007) (this Court stating that it is receding from a position where it refused to grant certiorari review on orders denying discovery).

[1] The citations to the Appendix will be referred to as "A-_, at p. _." With the specific page being the Appendix Page No. referenced at the bottom of each page of the Appendix.

As set forth in *Giacalone v. Helen Ellis Memorial Hosp. Foundation, Inc.*, 8 So. 3d 1232, 1234 (Fla. 2d DCA 2009), "when the requested discovery is relevant or is reasonably calculated to lead to the discovery of admissible evidence and the order denying that discovery effectively eviscerates a party's claim, defense, or counterclaim, relief by writ of certiorari is appropriate." The harm, in such situations, cannot be remedied on direct appeal "because there is no practical way to determine after judgment how the requested discovery would have affected the outcome of the proceedings." *Id*., at 1234-35; *see also Bush v. Schiavo*, 866 So. 2d 136, 140 (Fla. 2d DCA 2004) (Second DCA accepting certiorari review of a protective order on discovery).

Here, as will be explained in more detail below, certiorari review is available to review the Order on Motion for Protective Order because the trial court, in entering the Order on Motion for Protective Order, departed from the essential requirements of law and caused material injury to the Petitioner through the remainder of the proceedings below as the preclusion of the discovery essentially eviscerates Petitioner's claims.

STATEMENT OF FACTS

A. Relationship of the Parties

Respondent, the Club, is a mandatory membership golf community located in Delray Beach, Florida. A-9, at P. 162. Petitioner is a member of the Club. *Id*. The

Club was formed and exists for the purposes set forth in the Restated By-Laws of Delaire Country Club, Inc., revised April 17, 2016 (the "Bylaws") and the Fifth Amended and Restated Articles of Incorporation of Delaire Country Club, Inc. (the "Articles"), and is controlled by the Board of Governors. A-2, at Ex. 1, at p. 31.

Art. XIV of the Bylaws sets forth the guidelines the Club must follow when a grievance charge is brought against a member. A-2, at Ex. 1, at p. 45-47. Art. XIV details how the Club handles grievance charges against its members, and delegates the authority to conduct these disciplinary proceedings to the Club's Grievance Committee (comprised of 9 members, 5 of which establish a quorum). A-2, at Ex. 1, at p. 45-47. Art. XIV further provides that when an aggrieved member submits a written complaint alleging misconduct, the Grievance Committee will first determine the facial validity of the complaint within ten days. A-2, at Ex. 1, at p. 45. In the event the Grievance Committee determines that the facts alleged in the complaint are sufficient, a hearing is held before a quorum of the Grievance Committee. A-2, at Ex. 1, at p. 45-47. As set forth in Art. XIV, the grievance hearing shall be conducted in a manner similar to an administrative hearing. A-2, at Ex. 1, at p. 45.

B. The Grievance Process and Proceedings

On June 23, 2017, the Club's then president, Curtis Karpel ("Mr. Karpel"), brought a grievance complaint against Petitioner for Petitioner's maintenance of a website (delairegovernance.com) that was critical of some of the Club's decisions, as

well as Petitioner's separate pro-se lawsuit in small claims court seeking to recover his attorney's fees after the Club failed to comply with a statutory demand for the inspection of records (the "Karpel Grievance"). A-2, at Ex. 2, at p. 50-58. Previously, however, the Club had taken the official position that the Grievance Committee "only has jurisdiction over disputes between members that occur on Club or POA property or at events outside the confines of Delaire that are sponsored by the Club." A-2, at Ex. 3, at p. 69.

Despite its recent position that the Grievance Committee lacked jurisdiction to hear a grievance charge such as the Karpel Grievance, the Grievance Committees scheduled a grievance hearing for July 20, 2017. A-2, at ¶ 18, at p. 12. This change of position was merely a pretext as the Club was using the Karpel Grievance as a means to try and force Petitioner to shut down his website. In fact, at Richard Abbey's deposition, he admitted the same by testifying that Mr. Karpel had brought the Karpel Grievance to the Legal and Bylaws Committee to see if the committee felt it was a good idea to bring the Karpel Grievance for purposes of putting pressure on Petitioner to shut down his website. A-17, at p. 1218-1221 and 1223-1225. Notably, Richard Abbey was a member and chair of the Grievance Committee at the time of the underlying grievance hearing; therefore, Mr. Karpel actually shared his pretextual intentions with at least one of the members of the Grievance Committee that would ultimately be hearing the Karpel Grievance. A-17, at p. 1210-1211. Disturbingly,

Mr. Karpel tried to hide this fact during his deposition by stating that he never conferred with anyone before he submitted the Karpel Grievance. A-16, at p. 1096-1097. The Club went so far to bring a separate complaint against Petitioner regarding Petitioner's website via the World Intellectual Property Organization Arbitration and Mediation Center (WIPO). A-2, at ¶ 20, at p. 12. Notably, the WIPO arbitrator agreed with Petitioner, and on October 5, 2017, the arbitrator entered an order holding that the website contains legitimate non-commercial criticism, which is perfectly allowable. A-12, at Ex. K, at p. 1037-1041.

In advance of the grievance hearing, Petitioner submitted a written response in opposition to the Karpel Grievance. A-2, at Ex. 3, at p. 60-69. Petitioner identified several deficiencies with the Karpel Grievance, including but not limited to, the lack of jurisdiction. *Id*. Over Petitioner's objections, the grievance hearing commenced as scheduled. Without going into the details because they are unnecessary for purposes of this Petition, the grievance hearing was handled inappropriately. Despite the same, on July 26, 2017, the Grievance Committee recommended a full one-year suspension against Petitioner, which is the maximum penalty the Club can levy. A-9, at Ex. F, at p. 379-381. After all appeals were exhausted, on September 13, 2017, the Club suspended Petitioner for one year, which is the maximum amount of time the Club can suspend a member. A-9, at Ex. G, at p. 383-384.

C. Underlying Dispute Leading to this Petition for Writ of Certiorari

After the Club issued its one-year suspension, Petitioner filed the underlying lawsuit against the Club for its conduct in connection with the Karpel Grievance and ultimate suspension of the Petitioner (the "Lawsuit"). A-2, at p. 9-86. At its core, the Lawsuit seeks a determination that the Club violated Section 617.0607, Florida Statutes, as the Club's suspension of the Petitioner was not pursuant to a procedure that was fair, reasonable and/or carried out in good faith against Petitioner. *Id*.

Chapter 617, Florida Statutes governs non-for-profit corporations such as the Club. Fla. Stat., § 617.0607, effective as of October 1, 2009, expressly and unambiguously provides that a member – such as the Petitioner here – may not be suspended "except pursuant to a procedure that is fair and reasonable and is carried out in good faith." Fla. Stat., § 617.0607(1). A-43, at p. 1395. Further, subsection (3) provides that any lawsuit filed challenging a suspension "must be commenced within 1 year after the effective date of the expulsion, suspension, or termination." Fla. Stat., § 617.0607(3). *Id*.

Relying on the Florida Legislature expressly allowing a member to contest a suspension on the grounds that such a suspension was not pursuant to a procedure that was fair, reasonable, or carried out in good faith, the Petitioner filed the Lawsuit against the Club (within the 1-year statute of limitations). A-2. The Petitioner's points of contention with the manner in which he was suspended include, but are not

limited to, the following: (1) Donald Snyder, a member of the Club's Grievance Committee, called Petitioner an "asshole" during the hearing casting doubt on the impartiality of the entire Grievance Committee; (2) the Club's Grievance Committee members constantly interrupted Petitioner's questioning of Mr. Karpel, and the Grievance Committee's refusal to allow Petitioner with the ability to cross examine Mr. Karpel on issues Mr. Karpel raised in the Karpel Grievance; (3) Mr. Karpel's improper participation in the private deliberations of the Club's Grievance Committee members; (4) a suspension for the complained of conduct is an infringement on Petitioner's right to free speech; and (5) a suspension for the complained of conduct is an infringement on Petitioner's right to commence litigation. A-2.

In addition to the foregoing, the Lawsuit seeks a determination that the Club's suspension of the Petitioner was not pursuant to a procedure that was fair, reasonable or carried out in good faith because: (1) the Club's Grievance Committee did not have jurisdiction to entertain the Karpel Grievance; (2) the Karpel Grievance is based on an inapplicable standard; (3) the Club's selective enforcement against Petitioner; and (4) the Club, in bad faith, using the Karpel Grievance as a means to try and force Petitioner to take down his website; and (5) the Club, in bad faith, using the Karpel Grievance as a means of retaliation against Petitioner. A-2.

After attempting to coordinate depositions, Petitioner unilaterally set five members of the Club's Grievance Committee for deposition between November 15 and November 22, 2017. A-3, at p. 87-98. The Club responded by filing a Motion for Protective Order. A-8, at p. 157-161. The gist of the Club's position in its Motion for Protective Order was that the depositions should not be allowed because Petitioner has no right to bring the claims he brought in the Lawsuit. *Id*. Likewise, the Club responded to Petitioner's written discovery requests with the same objections. A-6, at p. 112-133; A-7, at p. 134-156.

On January 26, 2018, the day before the hearing on the Club's objections to written discovery and Motion for Protective Order, the Club filed its Motion for Final Summary Judgment. A-11, p. 418-641. The following day, at the hearing on the Club's objections to written discovery and Motion for Protective Order, the trial court felt it was premature to rule because of the pending Motion for Final Summary Judgment. A-10, at p. 407. As the trial court put it, "…because look, if I grant their motion for protective order, I'm essentially granting their motion for final summary judgment. If I deny their motion for protective order in whole or in part, I'm ruling on their motion for final summary judgment indirectly." *Id*.

Petitioner filed his Response in Opposition to the Motion for Final Summary Judgment (A-12), and on March 9, 2018, a hearing was held on the Club's Motion for Final Summary Judgment. On May 22, 2018, the trial court entered its Order on the

Club's Motion for Final Summary Judgment ("Order on Motion for Final Summary Judgment"). A-14, at p. 1076-1078. As set forth therein, the trial court granted in part and denied in part the Club's Motion for Final Summary Judgment. *Id*. Specifically, the trial court ruled in pertinent part that: (1) the Club's motivations behind its decision to suspend Petitioner are subject to judicial review; (2) the Club's interpretation of its Bylaws, even if in bad faith, is not subject to judicial review; (3) Petitioner's claims of selective enforcement are not subject to judicial review; and (4) the Club's representation that it did not have jurisdiction over this type of grievance is not subject to judicial review. *Id*.

Then, on May 24, 2018, the trial court entered its Order on Motion for Protective Order. A-1, at p. 6-8. Notably, the trial court, in its Order on Motion for Protective Order, relied on its reasoning in the Order on Motion for Final Summary Judgment in support of his rulings. *Id*. Specifically, the trial court's rulings as to the written discovery requests were "for the reasons set forth and consistent with this Court's Order on Defendant's Motion for Final Summary Judgment entered on May 22, 2018." A-1, at p. 6-7. The trial court similarly limited the scope of the all depositions within "the terms and limitations set forth in the Court's Order on Defendant's Motion for Final Summary Judgment." A-1, at p. 7.

Based on these limitations and rulings, Petitioner timely moved for a Writ of Certiorari challenging the trial court's Order on Motion for Protective Order.

NATURE OF THE RELIEF SOUGHT

The nature of the relief sought by this petition is the issuance of a writ of certiorari quashing the Order on Motion for Protective Order which limits the nature and the scope of discovery sought by Petitioner because whether the trial court ultimately excludes certain evidence at trial should not preclude Petitioner from seeking discovery that could lead to the discovery of admissible evidence.

ARGUMENT

A. Permissible Discovery

Florida law is clear that a "part[y] may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party." Fla. R. Civ. P. 1.280(b)(1). Further, "[i]t is not grounds 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." *Id*. As the Florida Supreme Court has stated, "[t]he concept of relevancy is broader in the discovery context than in the trial context." *Amente v. Newman*, 653 So. 2d 1030, 1032 (Fla. 1995). Because of the broad scope of discovery, "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." *Id*.

B. Petitioner's Right to Challenge the Club's Suspension

Section 617.0607, effective as of October 1, 2009, expressly provides that a member of a non-for-profit corporation, such as the Club, cannot suspend a member "except pursuant to a procedure that is fair and reasonable and is carried out in good faith." Fla. Stat., § 617.0607(1). Section 617.0607 goes further by expressly providing a member, such as Petitioner, has a right to bring a claim challenging the suspension within one year from the date of such suspension. Fla. Stat., § 617.0607(3).

In interpreting a statute, the court must give effect to the Florida Legislature's intent and is guided by the rules of statutory interpretation. *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000). The court should begin the process by looking at the statute's actual language. *Id*. In instances, such as here, where the statute's language is clear and unambiguous, "courts need not employ principles of statutory construction to determine and effectuate legislative intent." *Trinidad v. Fla. Peninsula Ins. Co*., 121 So. 3d 433, 439 (Fla. 2013) citing *Fla. Dep't of Children & Family Servs. v. P.E.*, 14 So. 3d 228, 234 (Fla. 2009). Instead, in instances where the statute is clear and unambiguous, "the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent." *Daniels v. Florida Dep't of Health*, 898 So. 2d 61, 64-65 (Fla. 2005) citing *State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004); *see also A.R. Douglass*,

Inc. v. McRainey, 137 So. 157, 159 (1931) ("[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statue must give its plain and obvious meaning."); *see also Fla. State Racing Comm'n v. McLaughlin*, 102 So. 2d 574, 576-77 (Fla. 1958) ("[a]dministrative construction of a statute, the legislative history of its enactment, and other extraneous matters are properly considered only in the construction of a statute of doubtful meaning.").

Section 617.0607 clearly and unambiguously provides that the Club can only suspend Petitioner pursuant to a procedure that is fair, reasonable, and carried out in good faith. Fla. Stat., § 617.0607(1). If there is any confusion as to whether Section 617.0607 would allow Petitioner to bring a claim against the Club for suspending him pursuant to a procedure that was not fair, reasonable, or carried out in good faith, the Florida Legislature made it clear that Petitioner does have such a right by clearly and unambiguously stating in subsection (3) that Petitioner has the absolute right to bring such a claim.

To the extent this Court is not convinced by the foregoing, it is also worth noting that where a statute is remedial in nature, the statute should be liberally construed "to preserve and promote access to the remedy intended by the Legislature." *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So. 2d 1, 7 (Fla. 2004) quoting *Joshua*, at 435. Section 617.0607 is remedial in nature in that it provides a litigant

with access to the courts. Therefore, even if there is hesitation or further inquiry into the Legislative intent, Section 617.0607 must be liberally construed to promote Petitioner with the remedy (i.e., access to challenge the suspension) intended by the Legislature in enacting Section 617.0607.

Moreover, the Florida Supreme Court has held that when a court construes a statute, the court may not question the "substantial legislative policy reasons" underlying the statute nor exercise any "prerogative to modify or shade" the "clearly expressed legislative intent" of the statutory enactment "in order to uphold a policy favored by the court." *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). The *Holly* court reaffirmed the fundamental principle that courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." *Id*., at 219 quoting *American Bankers Life Assurance Co. of Florida v. Williams*, 212 So. 2d 777, 778 (Fla. 1st DCA 1968). In line with the foregoing, and as the 2nd DCA stated in *Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc.*, 693 So. 2d 602 (Fla. 2d DCA 1997):

> Accordingly, so long as a statutory enactment pass constitutional scrutiny, the judicial branch, in construing the enactment, has no prerogative to alter or limit the legislative policy clearly expressed in the enactment in order to further a different policy or view preferred by the courts, including one favored by the Florida Supreme Court.

Id., at 609.

Relying on the clear and unambiguous language of Section 617.0607, Petitioner filed the underlying Lawsuit challenging the suspension within the one-year statute of limitations period. A-2. As alleged therein, Petitioner asserted three claims against the Club. The first two claims - Breach of Contract and Declaratory Judgment - both challenge the suspension on the grounds alleged therein (and discussed above) and based on the premise that Petitioner was suspended pursuant to a procedure that was not fair, reasonable or carried out in good faith, contrary to Section 617.0607. A-2. The third claim – Estoppel – is more limited in nature and based solely on the premise that the Club should be estopped from stating that it has jurisdiction over the Karpel Grievance when it previously made representations to the contrary. A-2.

C. Scope of Petitioner's Discovery Requests and Trial Court's Limitations

On October 6, 2017, Petitioner propounded his First Set of Interrogatories (A-4, at p. 99-106) and First Request for Production of Documents (A-5, at p. 107-111) (together referred to herein as the "Discovery Requests"). As set forth therein, Petitioner was requesting information relating to the issue of whether the Club suspended Petitioner pursuant to a procedure that was fair, reasonable, and carried out in good faith against him. A-4; A-5. Following up on the Discovery Requests, in November 2017, Petitioner requested to take six depositions, including the deposition of five members of the Club's Grievance Committee. A-9, at Ex, B, at p. 252-256. The goal being that the deposition testimony of these witnesses would provide further

evidence that the Club suspended Petitioner pursuant to a procedure that was not fair, reasonable, or carried out in good faith against him. Based on the express language of Section 617.0607 and the Florida Legislature expressly allowing a member to contest his/her suspension where the procedures were not fair, reasonable, or carried out in good faith, all of the Discovery Requests were within the bounds of relevant evidence (or at the very least, evidence that is reasonably likely to lead to the discovery of admissible evidence).

On May 22, 2018, the trial court entered is Order on the Motion for Final Summary Judgment. A-14, at p. 1076-1078. In doing so, the trial court granted in part and denied in part the Club's Motion for Final Summary Judgment. *Id*. In granting the Club's Motion for Final Summary Judgment, the trial court made the following pertinent findings which directly contradict the express language of Section 617.0607:

- "[The Club's] motivation for the suspension or for hearing the grievance are not properly subject to judicial review";
- "[Section 617.0607] also does not impose any requirement that a private club's interpretation of its bylaws or rules are subject to judicial review";
- Petitioner's claim "of selective enforcement goes to the merits of the suspension decision," and is not subject to judicial review; and

- "The claims in Count III – Estoppel of [Petitioner's] Complaint as to [the Club's] jurisdiction to hear the grievance charge are also not subject to judicial review."

A-14, at p. 1076-1078. Relying on these limitations, the trial court held, in pertinent part, as follows in its Order on Motion for Protective Order:

- "[The Club's] Objections to [Petitioner's] First Request for Production of Document Nos. 1-4, 7, 9-13, 15-18 are SUSTAINED for the reasons set forth and consistent with this Court's Order on [the Club's] Motion for Final Summary Judgment entered on May 22, 2018."
- "[The Club's] Objections to [Petitioner's] First Set of Interrogatories Nos. 7-21 are SUSTAINED for the reasons set forth and consistent with this Court's Order on [the Club's] Motion for Final Summary Judgment entered on May 22, 2018."
- "[T]he inquiries at the depositions shall be limited in scope and discovery that comports with the terms and limitations set forth in the Court's Order on [the Club's] Motion for Final Summary Judgment."

A-1, at p. 6-8.

D. Trial Court Departed From the Essential Requirements of Law by Limiting the Scope of Discovery

By the trial court fashioning the Order on the Motion for Protective Order in

the way he did, the trial court departed from the essential requirements of the law. As discussed above, Section 617.0607 expressly provides that the Petitioner cannot be suspended "except pursuant to a procedure that is fair and reasonable and is carried out in good faith." Fla. Stat., § 617.0607(1). By enacting Section 617.0607, the Florida Legislature is allowing Petitioner to contest matters such as selective enforcement, bringing grievances or suspending him on pretextual/bad faith grounds, bringing the grievance or suspending him as a retaliatory measure, and lack of jurisdiction. If, as Petitioner intends on proving, the Club did engage this way, the suspension could not be considered to be pursuant to a procedure that was fair, reasonable or carried out in good faith, and the Club's actions violate Section 617.0607.

Specifically, the trial court's ruling that the Club's "motivation for the suspension or for hearing the grievance are not properly subject to judicial review" is not an accurate representation of the law. Based on the express language of Section 617.0607, Petitioner, as a member, has the right to challenge the Club's *motivations* for his suspension. Petitioner anticipates that through discovery, it will be made clear that the Club had bad faith motivations for bringing the Karpel Grievance against him and ultimately suspending him – precisely what Section 617.0607 allows Petitioner to challenge via a lawsuit. Under those circumstances, the Club would be in violation of Section 617.0607.

An example of the Club's bad faith motivations has already been uncovered in discovery, as Mr. Abbey, the chair of the Grievance Committee at the time of the underlying grievance hearing, testified at his deposition that Mr. Karpel admittedly was bringing the Karpel Grievance in an attempt to pressure Petitioner to take down his website. A-17, at p. 1218-1221 and 1223-1225. A fact that Mr. Karpel lied about during his deposition in an effort to hide the obvious bad faith motivations behind bringing the Karpel Grievance. A-16, at p. 1096-1097. By sustaining the objections to the Discovery Requests and limiting the scope of the depositions, the trial court is not allowing Petitioner to extract/uncover additional relevant evidence going to the bad faith motivations behind the Club's decision to bring the Karpel Grievance and ultimately suspend him.

The trial court further erred in its ruling that Section 617.0607 "also does not impose any requirement that a private club's interpretation of its bylaws or rules are subject to judicial review." A-14, at p. 1078. If, as Petitioner contends, the Club is selectively enforcing its Bylaws or manipulating its interpretation of the same in bad faith as a means to an end to justify the suspension of the Petitioner, that again would violate Section 617.0607. Petitioner anticipates that through discovery, he will uncover further evidence of the Club's bad faith in its interpretation of the Bylaws.

The trial court also erred by ruling that Petitioner's claim "of selective enforcement goes to the merits of the suspension decision," and is not subject to

judicial review. A-14, at p. 1078. As Petitioner alleges in the Complaint, the Club has refused to bring similar charges against other members of the Club. A-2, at ¶¶ 33-46, at p. 14-16. Assuming these facts to hold true, the Club, at the very least, acted in bad faith (or in an unfair and unreasonable manner) in bringing the Karpel Grievance and ultimately suspending the Petitioner. Once again, Section 617.0607 allows Petitioner to challenge the suspension on these grounds; thus, the trial court erred by limiting Petitioner's attempts to obtain discovery as it relates to the Club's selective enforcement against him.

Lastly, the trial court erred by ruling that Petitioner's claim relating to the Club previously stating that it did not have jurisdiction to entertain this type of grievance charge is not subject to judicial review. Specifically, the trial court ruled that "[t]he claims in Count III – Estoppel of [Petitioner's] Complaint as to [the Club's] jurisdiction to hear the grievance charge are also not subject to judicial review." A-14, at p. 1078. If, however, as Petitioner contends, the Club previously made an express representation that it did not have jurisdiction to entertain this type of grievance charge that it brought against Petitioner via the Karpel Grievance, the Club would be acting in a manner that was anything but fair, reasonable or in good faith. And, pursuant to Section 617.0607, Petitioner has the right to challenge the suspension on these grounds.

As to the Discovery Requests, the trial court erroneously sustained the Club's objections to Interrogatory Nos. 7-21, and Request for Production Nos. 1-4, 7, 9-13, and 15-18. These Discovery Requests, however, all go directly to the ultimate issue of whether the Club suspended Petitioner pursuant to a procedure that was fair, reasonable, and carried out in good faith. A-4; A-5. As way of example, in Interrogatory No. 9, Petitioner asked the Club to "[l]ist all instances in which a grievance complaint was made, but the Grievance Committee determined that the member's conduct did not rise to the level of 'misconduct' as set forth in Art. XIV of the Bylaws." A-6, at p. 120-121. In response, the Club raised its various boilerplate objections – which pattern its position why Petitioner has no right to bring his claims in the first place. *Id*. This information, however, is relevant (or at least reasonably calculated to lead to the discovery of admissible evidence) insofar as if the Club has a pattern of declining to hear similar grievances, Petitioner's claim of selective enforcement or bad faith would be bolstered.

Another example of the trial court's error as it relates to sustaining the Discovery Requests is Request for Production No. 7. In Request for Production No. 7, Petitioner asks the Club to produce "[a]ll documents exchanged amongst [the Club] relating to the delairegovernance.com website." A-7, at p. 143-144. In response, the Club raised its same boilerplate objections which mirror its argument that Petitioner has no right to bring his claims. *Id*. These documents, however, are relevant (or at

least reasonably calculated to lead to the discovery of admissible evidence) insofar as these documents most likely further bolstering Petitioner's claim that the Club was merely using the Karpel Grievance as a pretext to try and force Petitioner to take down his website.

These are just two examples as Interrogatory Nos. 7-21 and Request for Production Nos. 1-4, 7, 9-13, and 15-18 are all relevant or reasonably likely to lead to the discovery of admissible evidence, as each such request goes directly to whether the Club suspended Petitioner pursuant to a procedure that was fair, reasonable, and carried out in good faith. Therefore, the trial court in sustaining the Club's objections to these Discovery Requests.

E. Petitioner Faces Material Injury for the Remainder of the Case, and The Order on Motion for Protective Order Cannot be Corrected on Postjudgment Appeal

Courts have, in many instances, allowed certiorari review of trial court orders denying or limiting discovery. *Beekie*; *Medero*; *Sabol*; *Travelers Indemnity Co.*; *Lunceford*; *Bush*; *Towers*; *Shindorf*; *Publix Super Markets, Inc.*; *Marshall*; *see also Power Plant Entertainment, LLC*, at 566-67 (this Court stating that it is receding from a position where it refused to grant certiorari review on orders denying discovery). In the aforementioned cases (aside from *Power Plant Entertainment*), the courts determined that the petitioner would suffer material injury for the remainder of the case if the petitioner is unable to obtain the discovery.

In line with the foregoing cases, the trial court's error here is not remediable on appeal because there would be no practical way to determine, after a judgment is entered, what the testimony at trial would have been had Petitioner had access to the answers to the Discovery Requests and been able to conduct a full inquiry at the depositions in advance of trial. Moreover, there is no way of knowing how the denial of Petitioner's access to this discovery will affect the outcome of the trial.

The bottom line here is that the limitations the trial court placed on the Petitioner's access to discoverable information forecloses Petitioner's ability to pursue his claims which he is lawfully entitled to bring pursuant to Section 617.0607. As stated by the Second District Court of Appeal in *Giacalone*, "when the requested discovery is relevant or is reasonably calculated to lead to the discovery of admissible evidence and the order denying that discovery effectively eviscerates a party's claim …, relief by writ of certiorari is appropriate." *Giacalone*, 8 So. 3d at 1234. The same can be said here, that is, as a result of the trial court's Order on the Motion for Protective Order, Petitioner's claims have been eviscerated. And, in such instances, the harm "is not remediable on appeal because there is no practical way to determine after judgment how the requested discovery would have affected the outcome of the proceedings." *Id*., at 1234-35.

CONCLUSION

By enacting Section 617.0607, the Florida Legislature clearly and unambiguously afforded Petitioner the right to bring his claims against the Club challenging his suspension as being pursuant to a procedure that was unfair, unreasonable, and not carried out in good faith. As such, Petitioner should be afforded the right to prove that, amongst other things, that: (1) the Club had improper motivations (e.g., pretextual or retaliatory) behind its decision to bring Petitioner up on and suspend him for the Karpel Grievance; (2) the Club's interpretation of its bylaws, under these circumstances, were not fair, reasonable, or in good faith; (3) the Club made a concerted effort to selectively enforce its Bylaws against Petitioner; and (4) the Club's previously stated position that it did not have jurisdiction over this type of grievance acts as an estoppel to suspend Petitioner. Even if this evidence is ultimately excluded at trial, at the very least, Petitioner should not be excluded from seeking such discovery as it could very well lead to the discovery of admissible evidence.

The trial court, in entering the Order on Motion for Protective Order, has essentially eviscerated Petitioner's ability to make these claims in the underlying proceeding. As such, the trial court has departed from the requirements of Section 617.0607 and Florida law governing discovery, the injury Petitioner will suffer as a result is material, and cannot be corrected on appeal from final judgment. Based on

the foregoing, this Court should grant the Petition for Writ of Certiorari quashing the trial court's Order on Motion for Protective Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by the Florida Courts E-Filing Portal via **Email kberglin@boydlawgroup.com** to: **Kyle T. Berglin, Esquire**, Boyd Richards Parker & Colonnelli, P.L., 100 SE Second Street, Suite 2600, Miami, Florida 33131, on this 25th day of June, 2018.

By: /s/ Stephen J. Padula
STEPHEN J. PADULA

CERTIFICATE OF TYPEFACE COMPLIANCE

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By: /s/ Stephen J. Padula
STEPHEN J. PADULA