FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-2397

PAMELA ANDREATTA and GARY WALTERS,

Petitioners,

v.

ERIC A. BROWN, individually and derivatively on behalf of Metrics Medicus, Inc.,

Respondent.

Petition for Writ of Certiorari—Original Jurisdiction.

November 17, 2021

PER CURIAM.

Petitioners seek review of the trial court's order granting Respondents' discovery request and finding that Petitioners had waived attorney-client privilege for failing to file a privilege log. We quash that portion of the trial court's order, concluding that a finding of waiver was unjustified.

Certiorari relief requires the jurisdictional threshold of material, irreparable harm. *Bd. of Trs. of Internal Improvement Tr. Fund v. Am. Educ. Enters., LLC*, 99 So. 3d 450, 454–55 (Fla. 2012); *CQB, 2010, LLC v. Bank of N.Y. Melon*, 177 So. 3d 644, 645–

46 (Fla. 1st DCA 2015). Those thresholds are met where an order requires disclosure of information protected by a privilege because, once disclosed, there is no remedy on appeal for destruction of the privilege. *Lender Processing Servs., Inc. v. Arch Ins. Co.*, 183 So. 3d 1052, 1058 (Fla. 1st DCA 2015). Thus, we have jurisdiction because irreparable harm will result if the finding of waiver is insupportable.

Certiorari relief then requires a departure from the essential requirements of law. *See Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995). We find the court departed from the essential requirements of law in finding Petitioners waived the attorney-client privilege by failing to provide a privilege log.

First and foremost, rule 1.280(b)(6) does not use the word "log" or require any specific form for a "privilege log." Fla. R. Civ. P. 1.280(b)(6). Instead, a party must only "make the [privilege] claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that . . . will enable other parties to assess the applicability of the privilege or protection." *Id.* The information provided need only permit the parties and the trial court to assess and rule on the claim. *See Kaye Scholer LLP v. Zalis*, 878 So. 2d 447, 449 (Fla. 3d DCA 2004); *Bankers Sec. Ins. Co. v. Symons*, 889 So. 2d 93, 95–96 (Fla. 5th DCA 2004); *see also Nevin v. Palm Beach Cnty. Sch. Bd.*, 958 So. 2d 1003, 1008 (Fla. 1st DCA 2007) (explaining "the arguments Petitioner presented in her motions for protective orders and at the corresponding hearings where [sic] sufficient to permit the JCC to rule on the applicability of the privilege" and satisfy "the purpose of the rule requiring the filing of a privilege log").

If a party fails to supply adequate information, the court may find a waiver of attorney-client privilege. *See Sedgwick Claims Mgmt. Servs., Inc. v. Feller*, 163 So. 3d 1252, 1254 (Fla. 5th DCA 2015). Waiver is within the court's discretion, but a waiver finding is not favored. *Century Bus. Credit Corp. v. Fitness Innovations & Techs. Inc.*, 906 So. 2d 1156, 1156 (Fla. 4th DCA 2005); *Metabolife Int'l, Inc. v. Holster*, 888 So. 2d 140, 141 (Fla. 1st DCA 2004) (explaining court possesses discretion to find waiver on failure of a privilege log); *TIG Ins. Corp. Am. v. Johnson*, 799 So. 2d 339, 341 (Fla. 4th DCA 2001). In fact, "Florida's courts generally recognize

that an implicit waiver of an important privilege as a sanction for a discovery violation should not be favored, but resorted to only when the violation is serious." *Feller*, 163 So. 3d at 1254 (quoting *Symons*, 889 So. 2d at 95).

Here, Petitioners' counsel repeatedly e-mailed Respondents' counsel that he redacted attorney-client communications, explaining that Petitioners had forwarded e-mails to him that were responsive to the discovery requests and apparently included discussion about those e-mails when they forwarded them. Respondents' counsel complained that the forwarded e-mails were from 2015—prior to Petitioners obtaining legal counsel—and thus the redactions could not be attorney-client material. Respondents moved to compel and requested "a privilege log for any documents redacted on privilege grounds (excluding transmittals to opposing counsel)." After a hearing, but no in-camera inspection of the e-mails, the trial court found the lack of a privilege log constituted waiver of the attorney-client privilege. This was an abuse of discretion and departure from the essential requirements of law.

Petitioners' counsel's e-mail explanations were sufficient to expressly claim attorney-client privilege and describe the nature of the redacted communications. *See Progressive Am. Ins. Co. v. Lanier*, 800 So. 2d 689, 691 (Fla. 1st DCA 2001) (explaining "conversations with defense counsel" and "summary of conversation with defense counsel" were adequate, and appropriately asserted a privilege); *see also Las Olas River House Condo. Ass'n, Inc. v. Lorh, LLC*, 181 So. 3d 556, 557, 559 (Fla. 4th DCA 2015) (finding log entries adequate where they stated "E-mail correspondence from counsel regarding condominium association representation"). If Respondents' counsel wanted the header lines (e.g., "From," "Sent," "To," and "Subject") from those attorney-client communications unredacted to better assess applicability of the privilege and ensure the block redactions were not something else, this is not what was asserted; Petitioners' counsel did not offer this solution. Respondents' counsel instead maintained that the prior e-mails could not be attorney-client communications. The dates of the underlying e-mails, however, do not foreclose the possibility that Petitioners included protected communications in them when sent to their legal counsel. The trial court did not conduct an in-camera review of the documents thereby providing

no basis to conclude that protected communications did not exist. *See Feller*, 163 So. 3d at 1253–54 (noting error where the court did not review the contested documents in-camera to assess applicability of attorney-client privilege); *Alliant Ins. Servs., Inc. v. Riemer Ins. Grp.*, 22 So. 3d 779, 781–82 (Fla. 4th DCA 2009) (finding departure from essential requirements of law where court did not conduct in-camera inspection of contested documents); *see also Symons*, 889 So. 2d at 95–96 (discussing "narrow" applicability of waiver, distinguishing instances where no log was ever filed, and explaining claim of work-product privilege with attendant late log was sufficient for court to conduct in-camera review to assess applicability).

Under these circumstances, waiver was too harsh a remedy. Petitioners' counsel provided information pursuant to rule 1.280(b)(6) that was sufficient to permit Respondents' counsel and the trial court to assess the claim of attorney-client privilege, or at least allow for in-camera review. Plus, Respondents' motion to compel merely requested a privilege log, not waiver.

Accordingly, we GRANT the Petition and QUASH the court's waiver finding.*

MAKAR, JAY, and NORDBY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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* Petitioners do not challenge the portion of the court's order that required them to categorize documents to correspond with each of Respondents' numbered documents requests. Nor do they challenge the court's order they pay Respondents' attorney's fees. Those portions of the order, therefore, stand.

Christopher J. Iseley of Franson, Iseley & Associates, P.A., Jacksonville, for Petitioners.

James W. Middleton of James W. Middleton, PLLC, Jacksonville Beach, for Respondent.