FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-2117

CORTNEY WHITTINGTON,

Petitioner,

v.

MARK WHITTINGTON,

Respondent.

Petition for Writ of Certiorari—Original Jurisdiction.

December 15, 2021

PER CURIAM.

The Petitioner seeks a writ of certiorari quashing the trial court's order insofar as it orders production of her personnel records and mental health records without first requiring an in camera review of the records before they are turned over to the Respondent's expert and in the absence of a determination that the Petitioner waived her privilege to said records.

The records at issue are privileged and protected by statute and case law. *See Ricketts v. Ricketts*, 310 So. 3d 993, 996 (Fla. 2d DCA 2020) ("'Florida law is clear that a person's medical records enjoy a confidential status.'" (quoting *S.P. ex rel. R.P. v. Vecchio*, 162 So. 3d 75, 79 (Fla. 4th DCA 2014))); *see also Brooks v. Brooks*, 239 So. 3d 758, 761–62 (Fla. 1st DCA 2018) ("Florida law cautions

against allowing the discovery of entire personnel files, because of the potential of disclosing irrelevant information that could cause irreparable harm."); § 456.057(7)(a), Fla. Stat. (2021); § 90.503(2), Fla. Stat. (2021).

In determining whether privileged records are subject to disclosure, the inquiry is whether there is an applicable statutory exception or there has been a voluntary or involuntary waiver. *See S.P.*, 162 So. 3d at 80; *see also Ricketts*, 310 So. 3d at 997 ("Finally, before a court can order production of privileged records, even through in camera inspection, it must first determine that the party asserting the privilege has waived it."); *Miraglia v. Miraglia*, 462 So. 2d 507, 507–08 (Fla. 4th DCA 1984) (finding involuntary waiver via "calamitous event" following wife's suicide attempt). No such inquiry was conducted below.

Because the trial court failed to first determine whether the Petitioner waived her privilege to said records, it has departed from the essential requirements of the law. *See Zarzaur v. Zarzaur*, 213 So. 3d 1115, 1120 (Fla. 1st DCA 2017) (finding a departure from the essential requirements of the law where, although the parties submitted themselves to an independent psychologist, the trial court allowed disclosure of surplus records that were not produced to the independent psychologist).

Additionally, by failing to require an in camera review to ensure that only relevant records are produced, the trial court also departed from the essential requirements of law in this respect. *See Scully v. Shands Teaching Hosp. & Clinics, Inc.*, 128 So. 3d 986, 988–89 (Fla. 1st DCA 2014); *see also Smith v. Smith*, 64 So. 3d 169 (Fla. 4th DCA 2011) (requiring trial court to review wife's mental health records in camera prior to releasing them to husband if wife waived psychotherapist-patient privilege); *Barker v. Barker*, 909 So. 2d 333 (Fla. 2d DCA 2005) (quashing broad order for production of entire medical record and remanding for in camera inspection to prevent disclosure of information not relevant to litigation).

"[B]ecause the harm caused by the erroneous production of such records cannot be remedied on appeal[,]" it constitutes irreparable harm. *Scully*, 128 So. 3d at 988. Accordingly, the case

is remanded for the trial court to determine whether the Petitioner actually or involuntarily waived her privilege to the records at issue and, if such a determination is made, conduct an in camera review of the records produced to prevent disclosure of information that is not relevant to the proceedings.

Accordingly, the petition is GRANTED, the lower court order is QUASHED, and the case is REMANDED for proceedings consistent with this opinion.

ROBERTS, MAKAR, and BILBREY, JJ., concur.

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

Diane G. DeWolf of Akerman LLP, Tallahassee; Ryan D. O'Connor of Akerman LLP, Orlando, for Petitioner.

Thomas J. Schulte Jr. of Ausley McMullen, Tallahassee, for Respondent.