FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-3685

LINDSEY TALLEY, KELLI JOHNSON, MAISE LOSURE, MOLLY CARROLL, JESSICA CHOCHOON, CHRISTOPHER WELCH, and CHARLES THOMPSON,

Petitioners,

v.

CONSOLIDATED RESPONDENTS, IN RE: Heekin\St. Vincent's Litigation,

Respondents.

Petition for Writ of Certiorari—Original Jurisdiction.

November 2, 2022

WINOKUR, J.

We review a petition for writ of certiorari, challenging a trial court's discovery order. Because Petitioners have failed to demonstrate that the trial court departed from the essential requirements of law, we deny their petition.

Facts

Respondents are multiple former patients of R. David Heekin, M.D. and St. Vincent's Medical Center. In 2021, these former patients brought a consolidated medical malpractice claim against Dr. Heekin. They also asserted that St. Vincent's should be held vicariously liable for Dr. Heekin's alleged negligence.

To support their claims, Respondents sought to obtain discovery from Petitioners who are non-party employees of St. Vincent's. Specifically, they sought to obtain Petitioners' observations of Dr. Heekin's purportedly impaired behavior as communicated by text message on their personal cell phones.

Petitioners responded by moving for a protective order, in which they asserted a global right to privacy in the text messages that were sent from and received by their personal cell phones. Unpersuaded, the trial court ruled that the text messages were generally discoverable. However, the court reserved ruling on any privacy or privilege objections until a later date and directed Petitioners to compile privacy and privilege logs, containing individual text messages that they intended to argue should be excluded.

Petitioners then filed a motion to modify the trial court's discovery order to excuse them from submitting a delineated privacy log. They argued that their right to privacy in their personal cell phones was not based on the specific contents of any responsive text messages. Petitioners then submitted a privacy log withholding thousands of pages of "text messages and images" that were identified as "Private conversations on personal cellular phones re: Heekin." They also filed a privilege log that identified around twenty text messages that were subject to various other privileges and protections. Unlike the privacy log, each entry in the privilege log included a specific description of the subject matter of the text message.

After submitting their logs, Petitioners filed another motion for a protective order, in which they essentially reiterated the same global privacy argument. They also requested that the text messages, if ordered to be produced, be treated as confidential and filed under seal. Petitioners explained how costly and time

consuming the process of locating responsive text messages and redacting personal information would be for their counsel and the electronically stored information ("ESI") consultant. After running the requested search terms and compiling the text messages that each search rendered, the ESI consultant had to pull all text messages from the day to determine if the specific text message that contained the search term was included in a longer conversation or if it was a stand-alone statement. Additionally, they were likely to miss "sensitive messages" due to the fact that the potential number of responsive text messages was so large. Finally, Petitioners requested that the court shift the costs of this discovery to Respondents as the requesting party.

In response, Respondents argued that there is no specialized privacy interest in communications sent by text message and that the responsive text messages are relevant. In fact, several Petitioners confirmed that they had forwarded and received text messages concerning Dr. Heekin's behavior and could not recall exactly what had been communicated. Petitioners also conceded that St. Vincent's had paid the costs of the discovery thus far.

The trial court denied Petitioner's motion for a protective order. While Petitioners failed to identify a recognized right to privacy in their personal text messages, Respondents had demonstrated a compelling need for the discovery. The court also found that Petitioners had not met their burden of showing that the information sought was not reasonably accessible due to undue burden or cost. Thus, the court ordered Petitioners to produce the responsive text messages. Finally, the court denied Petitioners' request for a general confidentiality order without prejudice. Following the trial court's discovery order, Petitioners filed a petition for writ of certiorari in this Court.

Certiorari Review

"Certiorari is an extraordinary remedy." *Kinsale Ins. Co. v. Murphy*, 285 So. 3d 411, 412 (Fla. 1st DCA 2019). In order to demonstrate entitlement to relief, Petitioner must show that the discovery order being challenged (1) departed from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be remedied on direct appeal.

See Williams v. Oken, 62 So. 3d 1129, 1132 (Fla. 2011). Because the last two elements are jurisdictional, this Court must first find that Petitioners suffered irreparable harm before determining whether the trial court departed from the essential requirements of the law. *See Saints 120, LLC v. Moore*, 292 So. 3d 1209, 1211 (Fla. 1st DCA 2020). Non-parties may be more likely to demonstrate entitlement to certiorari review by virtue of the fact that they are generally unable to obtain adequate relief on direct appeal. *Kinsale Ins. Co.*, 285 So. 3d at 412. Moreover, certiorari review is particularly applicable to discovery orders because, once discovery has been produced, a privacy interest "has been invaded which cannot be remedied on direct appeal." *Wal-Mart Stores E., L.P. v. Endicott*, 81 So. 3d 486, 490–91 (Fla. 1st DCA 2011).

Petitioners claim that the order directing production of personal text messages violates their right to privacy as set out in article I, section 23 of the Florida Constitution, resulting in irreparable harm, and that the trial court's denial of a general confidentiality order was a departure from the essential requirements of law and causes them irreparable harm.* We address these two arguments in turn.

I. General Right to Privacy in Personal Text Messages

The right to privacy is independently and explicitly protected in the Florida Constitution, which provides, "Every person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." Art. I, § 23, Fla. Const. The supreme court has determined that this section was intended to protect "informational privacy." *See Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So. 2d 533, 536 (Fla. 1987) ("[T]here can be no doubt that the Florida [privacy] amendment was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others."). However,

* Petitioners' remaining argument is moot as they concede that Respondents have covered the costs associated with the discovery order thus far and St. Vincent's has paid Petitioners' attorney's fees in connection with the review of the text messages for potential objections.

the supreme court has also held that our state constitution's privacy right is not absolute. *See City of N. Miami v. Kuntz*, 653 So. 2d 1025, 1027 (Fla. 1995) (recognizing that Florida's right to privacy "was not intended to be a guarantee against all intrusion into the life of an individual"). "The potential for invasion of privacy is inherent in the litigation process." *Rasmussen*, 500 So. 2d at 535; *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30 (1984) (noting that the discovery process often allows "extensive intrusion into the affairs of both litigants and third parties").

Under Florida's broad discovery rules, any non-privileged information, including ESI, is discoverable so long as it is relevant to the subject matter of the action. *See* Fla. R. Civ. P. 1.280(b)(1), (b)(3). However, if there were error, once the private records have been disclosed, no post-judgment appeal can fully remedy the harm. In this way, irreparable harm can exist where a discovery dispute involves otherwise private cellphone records. *See Antico v. Sindt Trucking*, 148 So. 3d 163, 165 (Fla. 1st DCA 2014). Petitioners here have demonstrated that the records sought are private phone communications for which improper discovery would result in a harm irreparable on post-judgment appeal. We therefore turn our attention to the essential requirements of the law.

Discovery is governed primarily by the Florida Rules of Civil Procedure. Our inquiry here turns on whether the trial court reasonably concluded that a protective order was not necessary to protect Petitioners "from annoyance, embarrassment, oppression, or undue burden or expense." Fla. R. Civ. P. 1.280(c). The supreme court has explained that this Rule 1.280(c) analysis is informed by Article I, Section 23 and includes balancing the need for discovery with affected privacy interests. *Rasmussen*, 500 So. 2d at 535 (recognizing "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").

In *Saints 120, LLC v. Moore*, this Court considered a petition for writ of certiorari seeking review of two discovery orders in a wrongful death action that was brought by the decedent's estate against a nursing home. *See* 292 So. 3d at 1211. The first order compelled the nursing home to disclose "'all documents' reflecting

the names, addresses, and next of kin *of all* of the nursing home's residents who were present in the facility" on the day of the incident. *Id.* The second order sought "patient information intended to aid the estate's expert witness or witnesses in forming an opinion concerning the estate's allegation of understaffing in the nursing home" at the time of the incident. *Id.* at 1214–15. This Court found that the discovery orders could cause irreparable harm by infringing "on the privacy rights of the non-party nursing home residents in the confidentiality of their medical information." *Id.* at 1212. Having found the possibility of irreparable harm, we considered whether there was a violation of a clearly established principle of law, finding that the first order not only sought irrelevant information, but the information was protected under two independent provisions in the Florida Statutes. *See id.* at 1212–14. The trial court thus departed from the essential requirements of law with regards to the first order. On the other hand, the second discovery order did not depart from the essential requirements of law because it was narrowly tailored to target relevant information and allowed the nursing home to redact confidential information. *See id.* at 1214–15.

Like the second order in *Saints 120*, the order under review is narrowly tailored to certain search terms that are likely to render relevant information. Discovery is also directed at non-parties. However, that is the extent of the similarities between *Saints 120* and the instant case. Here, there is no reasonable question that the text messages contain relevant information. Moreover, apart from asserting a global right to privacy, Petitioners could not point to any additional basis for protecting the information. Under *Saints 120*, it would not seem that Petitioners are entitled to relief.

Petitioners' reliance on *Staman v. Lipman*, 641 So. 2d 453 (Fla. 1st DCA 1994), and *Gomillion v. State*, 267 So. 3d 502 (Fla. 2d DCA 2019), is similarly misplaced. In *Staman*, the trial court ordered disclosure of the names of non-party patients in connection with a medical malpractice claim against a private physician. *See* 641 So. 2d at 454. Our holding that the disclosure violated the non-parties' privacy rights turned on the information's lack of relevance. *See id.* at 455 (explaining that the general rule against disclosure of patient names in medical malpractices claims is predicated in part "on the recognition that such information is

irrelevant to the question of whether the doctor used a standard of care commensurate with community standards"). In *Gomillion*, the State sought discovery of Gomillion's toxicology records for impeachment purposes in connection with his criminal prosecution. *See* 267 So. 3d at 504. The Second District held that the trial court departed from the essential requirements of law in ordering disclosure of the toxicology records in light of the case law holding that medical records are protected by our state constitution. *See id.* at 506 (citing cases).

Since Petitioners are employees of St. Vincent's, not patients, and Respondents have not sought disclosure of their medical records, neither *Staman* nor *Gomillion* apply. The discovery order under review here was narrowly tailored to what Petitioners concede to be relevant information. Moreover, there is no issue of "unfettered access" to Petitioners' cell phones. *Menke v. Broward Cnty. Sch. Bd.*, 916 So. 2d 8, 12 (Fla. 4th DCA 2005); *see also Holland v. Barfield*, 35 So. 3d 953, 956 (Fla. 5th DCA 2010) (expressing concern that "wholesale access" to a personal computer could "expose confidential communications and matters extraneous to the litigation").

Under the particular facts of this case, Petitioners have failed to show that they have a clearly established global right to privacy in the personal text messages that is sufficient to outweigh the tailored need for discovery. Certiorari review should not be used to create new law where the law at issue is not clearly established. *See Nader v. Fla. Dep't of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 723 (Fla. 2012). No Florida court has ever recognized an absolute right to privacy in text messages. While "'clearly established law' can derive from a variety of legal sources," Petitioners have not pointed to—and the trial court did not find—any statutory provision or court rule to support such a right. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003). Accordingly, the trial court could not have departed from the essential requirements of law, especially when Petitioners concede that the text messages contain relevant information and the trial court has gone to great lengths to ensure that any specific privacy or privilege concerns may still be addressed in the future.

II. Confidentiality Order

Next, Petitioners submit that the trial court's refusal to file the disclosed text messages under seal was a departure from the essential requirements of law and causes irreparable harm, because their personal text messages could contain sensitive information that would be subject to public disclosure. However, Petitioners have not explained why personal text messages, regardless of their content and relevance to the litigation, should be entitled to blanket confidentiality.

We reject Petitioners' reliance on cases that concern the disclosure of trade secrets. *See, e.g.*, *Laser Spine Inst., LLC v. Makanast*, 69 So. 3d 1045, 1046 (Fla. 2d DCA 2011); *Columbia Hosp. (Palm Beaches) Ltd. P'ship v. Hasson*, 33 So. 3d 148, 150 (Fla. 4th DCA 2010). Unlike text messages, "protective measures" are mandated by section 90.506, Florida Statutes, when a trade secret is the subject of a discovery order. *See Makanast*, 69 So. 3d at 1046; *Hasson*, 33 So. 3d at 150 n.2. There is no such statutory protection for personal text messages.

Though Petitioners submit that confidentiality is required under the Florida Rules of Judicial Administration, they failed to comply with the procedure set out in the rule. *See* Fla. R. Gen. Prac. & Jud. Admin. 2.420(c)(9), (e). As a result, Petitioners have not demonstrated that the trial court's refusal to grant a general confidentiality order with regards to the responsive text messages amounted to a departure from the essential requirements of law.

Petitioners have not demonstrated that, where there is a narrowly tailored discovery order, a "clearly established" blanket right to privacy prevents the disclosure of relevant, albeit personal, text messages. As a result, their petition is DENIED.

OSTERHAUS and LONG, 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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