DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

DENISE LAUREEN WHARRAN,

Petitioner,

v.

SUEN ANGHARA MORGAN,

Respondent.

No. 2D22-395

November 18, 2022

Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Caroline Tesche Arkin, Judge.

Jeffrey D. Jensen of Unice Salzman Jensen, P.A., Trinity, for Petitioner.

Nicholas A. Shannin and Carol B. Shannin of Shannin Law Firm, P.A., Orlando, for Respondent.

SILBERMAN, Judge.

Suen Anghara Morgan filed suit against Defendant Denise Laureen Wharran, asserting a negligence claim based on a motor vehicle collision. Wharran seeks certiorari review of a discovery order that overrules her objection to the production of her cell phone records by nonparty Verizon Wireless Services, LLC. With one exception, we conclude that the trial court departed from the essential requirements of law by allowing disclosure of Wharran's cell phone records without first determining their relevance and balancing the need for the information against Wharran's privacy rights and without conducting an in camera review of the records as necessary. This departure constitutes irreparable harm because the very broad discovery implicates Wharran's privacy interests. We note that Wharran did not object to the production of cell phone usage records for "the moments leading up to the accident" but did object to producing the substantive content of the records. Thus, we grant the petition and quash the order except to the extent that the order allows discovery regarding whether Wharran was using her cell phone close to or at the time of the accident.

BACKGROUND

Morgan filed suit against Wharran based on a rear-end collision that occurred on November 11, 2019. In her deposition, Wharran stated that on the day of the accident she had a cell phone with the carrier Verizon. She also interjected allegations of fraud concerning who was in Morgan's vehicle when the collision occurred and damage that the vehicle allegedly had prior to the collision, describing the situation as "some kind of scam basically." She admitted to posting on Facebook about "the fraud that had happened."

Morgan filed a notice of production from nonparty directed to Verizon with a subpoena duces tecum without deposition. Wharran filed an objection and memorandum of law in support of the objection. The subpoena sought records from Verizon for ten types of information. Wharran's objection contained the following assertion:

> Plaintiff is seeking the content of any communications, including but not limited to inbound calls, outbound calls, text messages, multimedia messages, data transfer, data usage, GPS usage, and any and all documents indicating the dates and times, including phone numbers of calls made and received for the said phone number and account for a period of six (6) days, which severely violates Defendant's constitutional right to privacy. Plaintiff is only entitled to the records, not the

> substantive communications, and not for such an intrusive period of time.

Wharran asserted that "[p]rivacy interests can be acknowledged and respected by setting strict parameters when it pertains to discovery related to a party's personal cellphone device." She recognized that "[w]hile Plaintiff arguably has a discovery interest in determining whether Defendant was texting at the moment when the accident occurred, Plaintiff has no further discovery interests in [Defendant's] cellular records."[1]

After a hearing, the trial court entered an order that narrowed the requested time frame to twenty-four hours before through twenty-four hours after the November 11, 2019, accident. The order permits Wharran "to set another hearing to narrow down and/or limit the requested types of information or data listed on the above-mentioned subpoena."

A second hearing was held that resulted in the order on review. First, Wharran asserted that the amended subpoena went

[1] Wharran filed a second objection after Morgan filed a notice of production with an amended subpoena that changed only (1) the nonparty name from Verizon to Verizon Wireless Services, LLC, and (2) Verizon's address.

from midnight to midnight and not an actual twenty-four hours before and after the 6:20 p.m. accident, as the trial court ordered. Morgan had no objection, and the court stated that its order would clarify the time frame.

Second, Wharran argued that Morgan was requesting overly intrusive and private information regarding Wharran's cell phone records. Wharran stated that she did not object to all the items requested but that many of them would violate her right to privacy under the federal Constitution and article I, section 23, of the Florida Constitution. Wharran did not object to usage records that showed whether "she was using her phone[] or sending text messages in the moments leading up to the accident"; however, she objected to production of the substantive content in those records or information on her "whereabouts before and after the accident" and mentioned "cell phone tower locations," along with "GPS and maps usage." She further objected that the request for "all application activity" was intrusive into her private life and could include banking and healthcare information. She argued that these items were also irrelevant, that Morgan was engaged in a fishing expedition, and that Morgan "ha[d] not put forth any evidence at all

that would warrant such a broad and intrusive subpoena into the defendant's cell phone records."

After Wharran argued that there was no allegation in the complaint that she was using her phone at the time of the collision, Morgan asserted, "The defendant actually testified that she was phoning a friend, said she wasn't distracted during her deposition."[2] Morgan acknowledged at the hearing that she did not want to look at Wharran's "bank or her health insurance, any of that kind of application."

Instead, Morgan asserted that Wharran was very active on social media and posted on Facebook about the alleged fraudulent activity. Morgan was looking for "text messages, cell phone records, including [Wharran's] call registry, showing any calls she made before and after" that would aid Morgan's position. Morgan also sought any photos or anything Wharran told friends or family about the collision and what she said about "what actually happened."

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[2] We have found no reference to Wharran stating in her deposition that she was phoning a friend. However, in Morgan's deposition, she referred to another driver using a phone during a different accident that happened after the collision at issue.

Except as to the time frame that it had already ruled upon, the trial court overruled Wharran's objection and let the amended subpoena stand. The court told Wharran that at some point she may want to file a motion for a protective order. Wharran made an ore tenus motion to stay an order on this issue while she appealed. The trial court denied the motion.[3] Wharran did not file a motion for protective order or seek an in camera review in the trial court. The trial court's challenged order of February 7, 2022, narrowed the time frame to "6:20 p.m. on November 10, 2019, to 6:20 p.m. on November 12, 2019." The court otherwise overruled the objection.

ANALYSIS

To obtain relief on certiorari review of a discovery order, the petitioner must establish: "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case[,] (3) that cannot be corrected on postjudgment appeal." *Zawistowski v. Gibson*, 337 So. 3d 901, 904 (Fla. 2d DCA 2022) (alteration in original) (quoting *Hett v. Barron-Lunde*, 290 So. 3d 565, 569 (Fla. 2d DCA 2020)). Elements two and

[3] This court disapproved the trial court's order denying the stay, and a stay is currently in effect.

three constitute irreparable harm and must be determined first because they are jurisdictional. *See Tanner v. Hart*, 313 So. 3d 805, 807 (Fla. 2d DCA 2021).

Florida's discovery rules allow for the liberal production of records that "are reasonably calculated to lead to the discovery of admissible evidence." *Hett*, 290 So. 3d at 570 (citing *Amente v. Newman*, 653 So. 2d 1030, 1032 (Fla. 1995)); *see also* Fla. R. Civ. P. 1.280(b)(1) (permitting discovery of any nonprivileged matter "that is relevant to the subject matter of the pending action"); Fla. R. Civ. P. 1.280(b)(3) (allowing for the "discovery of electronically stored information"). Florida Rule of Civil Procedure 1.351(a) allows for the production of "documents or things within the scope of rule 1.350(a) from a" nonparty via "a subpoena directing the production of the documents or things when the requesting party does not seek to depose the custodian or other person in possession of the documents or things." When a "party serves an objection to production under this rule within 10 days of service of the notice, the documents or things shall not be produced pending resolution of the objection." Fla. R. Civ. P. 1.351(b). "[T]he party desiring production may file a motion with the court seeking a ruling on the

objection or may proceed pursuant to rule 1.310" with a deposition. Fla. R. Civ. P. 1.351(d).

Although the discovery rules are liberal, the Florida Constitution contains an express right to privacy: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." *Weaver v. Myers*, 229 So. 3d 1118, 1125 (Fla. 2017) (quoting art. I, § 23, Fla. Const. (1980)). The "fundamental right to privacy" in the Florida Constitution "is much broader in scope than that of the Federal Constitution." *Id.* at 1125-26 (quoting *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985)). Florida's right to privacy affords protection to personal financial information, *Hett*, 290 So. 3d at 570-71, and medical records, *Tanner*, 313 So. 3d at 807; *see also Barker v. Barker*, 909 So. 2d 333, 337 (Fla. 2d DCA 2005) ("Court orders compelling discovery of personal medical records constitute state action that may impinge on the constitutional right to privacy." (citing *Berkeley v. Eisen*, 699 So. 2d 789, 790 (Fla. 4th DCA 1997))).

The right to privacy also protects cell phone data. *See Antico v. Sindt Trucking, Inc.*, 148 So. 3d 163, 165 (Fla. 1st DCA 2014)

(citing *Holland v. Barfield*, 35 So. 3d 953, 956 (Fla. 5th DCA 2010), for the proposition that "having to disclose a computer hard drive and a cellphone SIM card demonstrates irreparable harm"). The jurisdictional prong for certiorari relief was satisfied in *Antico* "because irreparable harm can be presumed where a discovery order compels production of matters implicating privacy rights." *Id.* (citing *Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So. 2d 533, 536–37 (Fla. 1987)); *see also Zawistowski*, 337 So. 3d at 904 ("A finding of irreparable harm not curable on appeal is justified when an opposing party to a lawsuit seeks medical or other records implicating one's constitutional right to privacy." (citing *James v. Veneziano*, 98 So. 3d 697, 698 (Fla. 4th DCA 2012))); *Root v. Balfour Beatty Constr. LLC*, 132 So. 3d 867, 869 (Fla. 2d DCA 2014) ("An order compelling the production of discovery that implicates privacy rights demonstrates irreparable harm." (citing *Fla. First Fin. Grp., Inc. v. De Castro*, 815 So. 2d 789, 791 (Fla. 4th DCA 2002)).

Thus, because the right to privacy is implicated by the production of a broad sweep of Wharran cell phone records, the jurisdictional prong for certiorari relief is met. What remains is to

determine whether the trial court departed from the essential requirements of law.

Wharran contends that the trial court failed to balance her privacy rights with Morgan's discovery rights. Wharran also asserts that the trial court failed to mandate protective measures when the court allowed discovery of her cell phone records without limiting the production's scope, other than as to the time frame.

With respect to the fact that Wharran did not file a motion for protective order, that was not necessary. As has been explained:

> A challenge to all or part of a request to produce often takes the form of a motion for protective order. That is an acceptable procedure but it is not necessary inasmuch as Rule 1.350(b) contains its own mechanism for challenging the opposing party's right to production. All that is required to preserve an argument that certain items are not subject to production is to object to the production of those items in the response.

Philip J. Padovano, *5 Fla. Prac., Civil Practice* § 10:10 (2022 ed.).

When a "person raising the privacy bar establishes the existence of a legitimate expectation of privacy, the party seeking to obtain the private information has the burden of establishing need sufficient to outweigh the privacy interest." *Nucci v. Target Corp.*, 162 So. 3d 146, 153 (Fla. 4th DCA 2015) (citing *Berkeley*, 699 So.

2d at 791-92). If a case involves personal information, "the trial courts' discretion to permit discovery 'must be balanced against the individual's competing privacy interests to prevent an undue invasion of privacy.' " *Antico*, 148 So. 3d at 166 (quoting *McEnany v. Ryan*, 44 So. 3d 245, 247 (Fla. 4th DCA 2010)).

As to relevancy, information sought in discovery must be relevant to the issues to be litigated, as framed by the pleadings. *Diaz-Verson v. Walbridge Aldinger Co.*, 54 So. 3d 1007, 1011 (Fla. 2d DCA 2010). By conducting an in camera inspection, a trial court can segregate irrelevant documents from relevant documents. *See Muller v. Wal-Mart Stores, Inc.*, 164 So. 3d 748, 750 (Fla. 2d DCA 2015) (quashing discovery order and remanding for the trial court to conduct an in camera review of a military personnel file and medical records to "segregate any private documents that are not relevant to Muller's negligence action from the relevant documents"). "[W]hen a party challenges a discovery order concerning material to which the party asserts his or her constitutional right to privacy, the trial court *must* conduct an in camera examination to determine the relevance of the materials to the issues raised or implicated by the lawsuit." *Zawistowski*, 337

So. 3d at 904–05 (alteration in original) (quoting *James*, 98 So. 3d at 698); *see also Tanner*, 313 So. 3d at 808 (same); *Muller*, 164 So. 3d at 750 (same). The failure to conduct an in camera inspection can result in a discovery order that departs from the essential requirements of law. *See Barker*, 909 So. 2d at 338 ("By failing to provide for an in camera inspection of Hugh's medical records to prevent disclosure of information that is not relevant to the litigation, the discovery order departed from the essential requirements of the law."); *see also Walker v. Ruot*, 111 So. 3d 294, 295-96 (Fla. 5th DCA 2013) (reiterating that an in camera inspection of a personnel file is necessary to segregate discoverable relevant documents from irrelevant documents that are not discoverable).

In her response, Morgan contends that Wharran's failure to specifically argue in the trial court for the protective measure of an in camera review waives the argument in this court. We recognize that often an objecting party may request an in camera review, such as in *Zawistowski* and *Muller*. *See* 337 So. 3d at 904; 164 So. 3d at 750. Morgan relies upon *Antico* in contending that Wharran waived

her right, but the situation in *Antico* is distinguishable from the present case.

In *Antico*, a wrongful death action was filed by the decedent's estate as the result of a vehicle collision. 148 So. 3d at 164. The defendants asserted comparative negligence or that the decedent was the accident's sole cause because she was distracted by her cell phone. *Id.* The defendants sought production of data from the decedent's cell phone, and some calling and texting records were provided by the decedent's wireless carrier; however, "other cellphone data was not disclosed, such as use and location information, internet website access history, email messages, and social and photo media posted and reviewed on the day of the accident." *Id.* The defendants sought an order allowing their expert to review the data on the cell phone from the accident date, and the plaintiff objected and raised the decedent's privacy rights. *Id.*

In its order, the trial court recognized the decedent's privacy interests and the relevance of the requested information that showed that the decedent was using her cell phone at the time of the accident. *Id.* at 164-65. The court ordered an inspection of the cell phone by the defendants' expert with "strict parameters for the

expert's confidential inspection" which, among other things, allowed the plaintiff's counsel to file a motion for protective order or objections before any information was released to the defendants' counsel. *Id.* at 165. The appellate court noted that there was no dispute "that the decedent's smartphone may contain very relevant information," such as if the decedent "stopped at the stop sign" and if "she was texting, Facebooking, Tweeting, or nothing at the time of the accident." *Id.* at 167.

The plaintiff contended that the trial court erred in allowing the defendants' expert to first examine the cell phone. *Id.* The appellate court explained that "where [the plaintiff] offered nothing in response to the court's privacy concerns and open invitation to propose a different process, we cannot conclude that the trial court erred by allowing [the defendants'] expert [to] retrieve the cellphone's data under limited and controlled conditions." *Id.* at 167-68. The appellate court denied certiorari relief. *Id.* at 168.

Here, Wharran cited *Antico* in her memorandum of law for the proposition that "setting strict parameters" on discovery can respect a party's privacy interests related to a cell phone. *See id.* at 166.

Antico also sets forth the need to balance discovery rights against privacy rights. *Id.*

At the hearing, Wharran objected to the production of her cell phone records except as to whether she was using her phone or texting at the time of the accident. She specifically objected to producing the substantive content of calls, texts, or the use of any applications (which would include social media posts), and to any GPS information about her location before and after the accident. Wharran argued her privacy rights and the lack of relevance. She asserted that Morgan "ha[d] not put forth any evidence at all that would warrant such a broad and intrusive subpoena into the defendant's cell phone records." The parties agreed at the hearing that no financial information or healthcare information would be disclosed. Despite that, the trial court's order allowed all information sought in the very broad subpoena to be released to Morgan's counsel.

In *Tanner*, an automobile accident case dealing with a request for all of the defendant's medical records, the defendant objected based on her constitutional right to privacy and lack of relevance. 313 So. 3d at 806. The trial court, without any in camera review,

ordered production of records from December 2011 through April 2020 and directed the parties to execute a confidentiality agreement. *Id.* Nothing in the opinion indicates that the plaintiff sought an in camera inspection in the trial court.

The plaintiff argued that the defendant's medical records became relevant after she was unable to be deposed due to dementia. *Id.* at 806, 808. The defendant relied upon her son's deposition which indicated that the defendant's memory problems did not begin until two years after the 2014 accident. *Id.* at 807.

This court determined that while "[s]ome subset of the records may be relevant to" the issues of the defendant's mental capacity at the time of the accident and her current ability to be deposed, "requiring disclosure of 'any and all' records from 2011 through the present casts too wide a net." *Id.* at 808. This court concluded, "The trial court departed from the essential requirements of law by compelling disclosure of nearly ten years' worth of categorically inclusive medical information without first determining its relevance and balancing the need for such information against [the defendant's] constitutionally-protected privacy interests." *Id.*

Similarly, the trial court here departed from the essential requirements of law by compelling disclosure of a sweeping range of information from Wharran's cell phone records without first determining their relevance and balancing the need for the information against Wharran's privacy rights and conducting an in camera review of the records as necessary.[4] The trial court's ruling to allow discovery of all of the requested information is particularly troubling in light of Morgan's concession that she was not interested in banking or healthcare information. *See Allstate v. Langston*, 655 So. 2d 91, 95 (Fla. 1995) ("[W]e do not believe that a litigant is entitled carte blanche to irrelevant discovery.").

Wharran acknowledges in her petition that one of the issues to be determined is the extent of damages. Morgan asserted at the

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[4] To the extent that Wharran claims her Facebook posts are protected by her right to privacy, postings such as photographs on a social networking site generally "are neither privileged nor protected by any right of privacy, regardless of any privacy settings that the user may have established." *Nucci*, 162 So. 3d at 153–54 (citing *Davenport v. State Farm Mut. Auto. Ins.*, No. 3:11–CV–632–J–JBT, 2012 WL 555759, at *1 (M.D. Fla. Feb. 21, 2012)). However, a party seeking discovery from a social networking site "must make a threshold showing that such discovery is reasonably calculated to lead to admissible evidence." *Id.* at 154 (citing *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Cal. 2012)).

second hearing that Wharran's deposition included assertions of fraud. These assertions included that Morgan's vehicle had damage to it before the accident. Thus, it appears that there may be some relevance concerning damages as to information on Wharran's cell phone after the accident, such as social media posts. But this cannot be determined without an in camera review.

CONCLUSION

The trial court departed from the essential requirements of law by compelling disclosure of a sweeping range of information from Wharran's cell phone records without first determining their relevance and balancing the need for the information against Wharran's privacy rights and conducting an in camera review of the records as necessary. This departure constitutes irreparable harm because the very broad discovery requested implicates Wharran's privacy interests. Thus, we grant the petition and quash the order except to the extent that the order allows discovery regarding whether Wharran was using her cell phone close to or at the time of the accident, whether for calls, texts, or other applications. However, as to the substance of communications by call, text, or other applications, the trial court must determine the relevance

balanced against Wharran's privacy rights, including by in camera review if necessary.

Petition granted in part, order quashed in part, and petition denied in part.

LUCAS and SMITH, JJ., Concur.

Opinion subject to revision prior to official publication.