State of FL 1400216 CFAES
vs
Curtis Reeves
SPN 00683538

West's Florida Statutes Annotated
Title VII. Evidence (Chapters 90-92)
Chapter 90. Evidence Code (Refs & Annos)

West's F.S.A. § 90.507

90.507. Waiver of privilege by voluntary disclosure

Currentness

A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person, or the person's predecessor while holder of the privilege, voluntarily discloses or makes the communication when he or she does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication. This section is not applicable when the disclosure is itself a privileged communication.

Credits

Laws 1976, c. 76-237, § 1; Laws 1978, c. 78-361, § 13. Amended by Laws 1995, c. 95-147, § 480, eff. July 10, 1995.

FILED IN OPEN COURT
THIS 10 DAY OF June, 2015
PAULA S. O'NEIL, CLERK & COMPTROLLER
PASCO COUNTY, FLORIDA
BY [redacted] D.C.

Editors' Notes

LAW REVISION COUNCIL NOTE--1976

This section provides for a waiver of a privilege by voluntary disclosure. As the Florida Supreme Court stated in the leading case of Savino v. Luciano, 92 So.2d 817, 819 (Fla.1957):

[A]s in all confidential and privileged communications, "[t]he justification for the privilege lies not in the fact of communication, but in the interest of the persons concerned that the subject matter should not become public." . . . When a party himself ceases to treat a matter as confidential, it loses its confidential character.

Recently, in Tibado v. Brees, 212 So.2d 61, 63 (Fla.2nd Dist. 1968); the defendant, voluntarily testified in a deposition to confidential communications between him and his wife. In denying the husband's objection to the introduction of the deposition during the trial, the Court stated:

It is clear that under the law of Florida that a personal privilege may be waived and when Mr. Tibado voluntarily and without objection testified on deposition to the privileged communications they lost their confidential character.

Waiver by voluntary disclosure occurs only when the substance of the privileged information is revealed. Thus, when a witness upon cross-examination testifies without objection that he has not made a certain statement to his attorney, he has not waived his attorney-client privilege since the contents of the statement have not been revealed. Seaboard Air Line R.R. v. Parker, 65 Fla. 543, 62 So. 589 (1913); see McCormick, *Evidence* § 93 (2nd ed. 1972).

For similar provisions, see Prop.Fed.Rule Evid. 511 [not enacted]; Wisc.Evid.Rule 905.11. See also Calif.Evid.Code § 912.

Commentary on 1978 Amendment

This amendment clarifies when a communication is confidential and, therefore, privileged. If a person makes a communication when there is no reasonable expectation of privacy, she does not intend it to be confidential, and, under the amendment, it is not privileged. See Proffitt v. State, 315 So.2d 461 (Fla.1975), aff'd 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Notes of Decisions containing your search terms (0)

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West's F. S. A. § 90.507, FL ST § 90.507

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148 So.3d 163
District Court of Appeal of Florida,
First District.

Tammy Lee ANTICO, Personal Representative
of the Estate of Tabitha Frances
Guyton Antico, Deceased, Petitioner,
v.
SINDT TRUCKING, INC., and
James Paul Williams, Respondents.

No. 1D14–277. | Oct. 13, 2014.

Synopsis

Background: Estate of driver, who was killed in vehicular collision with truck, brought wrongful death action against trucking company, which operated truck. Company moved for an order from the trial court permitting an expert to inspect data from driver's cellphone on day of the accident. The trial court granted motion. Driver's estate filed petition for writ of certiorari.

[Holding:] The District Court of Appeal, Osterhaus, J., held that trial court did not err by allowing company's expert to retrieve data from driver's cellphone under limited and controlled conditions.

Petition denied.

West Headnotes (3)

[1] **Certiorari**
Particular proceedings in civil actions

Petition for writ of certiorari was the correct vehicle for reviewing driver's estate's privacy-related objections to the trial court's discovery order, permitting an expert to inspect the data from driver's cellphone on day of the vehicular accident; irreparable harm could be presumed since discovery order compelled production of matters implicating privacy rights. West's F.S.A. Const. Art. 1, § 23.

Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**
Privacy in general

Where personal information is involved, the trial court's discretion to permit discovery must be balanced against the individual's competing privacy interests to prevent an undue invasion of privacy, but privacy rights do not completely foreclose the prospect of discovery of data stored on electronic devices; instead, limited and strictly controlled inspections of information stored on electronic devices may be permitted. West's F.S.A. Const. Art. 1, § 23.

Cases that cite this headnote

[3] **Pretrial Procedure**
Records and reports in general

Trial court did not err by allowing trucking company's expert to retrieve data from driver's cellphone under limited and controlled conditions in wrongful death action brought against trucking company by estate of driver, who was killed in vehicular accident with truck, which was operated by trucking company; company cited cell phone records showing that driver was texting just before the accident, two witnesses indicated that the driver might have used her cell phone at time of accident, and troopers responding to the accident lent support to the conclusion that driver was using her cell phone when the accident occurred, and court's discovery order limited the data that the expert could review to the nine-hour period immediately surrounding the accident and it gave estate's counsel a front-row seat to monitor the inspection process. West's F.S.A. RCP Rule 1.280(b)(1); West's F.S.A. Const. Art. 1, § 23.

Cases that cite this headnote

Attorneys and Law Firms

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Albert J. Wollermann and Trudy Innes Richardson, Guilday, Schwartz, Simpson, West, Hatch & Lowe, P.A., Tallahassee, for Respondents.

Opinion

OSTERHAUS, J.

The petition in this matter seeks to quash a discovery order in a wrongful death action. Citing the privacy provision, article I, section 23, of the Florida Constitution, and the rules of civil procedure, the personal representative of Tabitha Antico's estate (Petitioner) objects to an order entered by the trial court allowing Respondents' expert to conduct a limited inspection of the cell phone that Ms. Antico allegedly was using when an automobile accident caused her death. We conclude, however, that the order does not depart from the essential requirements of law and deny the petition.

I.

On September 5, 2012, a truck operated by the Respondents collided with a vehicle driven by Ms. Antico and she was killed. Six months later, the decedent's estate filed a wrongful death action, but Respondents denied liability. Respondents asserted that the decedent was either comparatively negligent or was the sole cause of the accident because she was distracted by her iPhone. Numerous times Respondents requested data from the decedent's cellphone, which has been kept unused by the Petitioner since shortly after the accident. And while Respondents received some calling and texting records from the decedent's wireless provider, 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.

Respondents moved for an order from the trial court permitting an expert to inspect the cellphone's data from the day of the accident. Petitioner objected to the cellphone inspection citing the decedent's privacy rights under the Florida Constitution. After a hearing, the trial court granted Respondents' motion.

The order allowing the inspection recognized both Respondents' discovery rights and the privacy interest asserted by the Petitioner. It stressed the relevance of the requested information, citing cell phone records showing that the decedent had been texting in the minutes preceding the accident; testimony from two witnesses indicating that the decedent may have been utilizing her cell phone at the *165 time of the accident; and testimony from the responding troopers supporting the assertion that the decedent was using her cell phone when the accident occurred.

The order also recognized the decedent's privacy interests and set strict parameters for the expert's confidential inspection. It provided that the expert could examine the cellphone, at Respondents' expense, in the presence of Petitioner's counsel at an agreed date, place, and time. Petitioner's counsel could also video the inspection. The order enumerated the following steps to be followed by the expert:

(1) Install write-protect software to ensure no alteration of the phone's hard drive would be made during the inspection;

(2) Download a copy of the cell phone's hard drive, making a master copy, a review copy, a copy for Petitioner's counsel;

(3) Return the cell phone to Petitioner's counsel immediately after copying the hard drive;

(4) Review only the data on the hard drive for the nine-hour period permitted by the Court (including call records, text messages, web searches, emails sent and received, uploads, downloads, data changes and GPS data);

(5) Prepare a summary of the data reviewed, including type of data, use of data, date/time of data, and any other information s/he deems relevant.

(6) Provide the summary to Petitioner's counsel prior to the dissemination of any more specific findings. Petitioner's counsel shall have ten (10) days from service to file a Motion for Protective Order or other form of objection to the release of all or a portion of the data, citing grounds for each objection.

(7) If no objection is interposed by the Petitioner, then Respondents' expert may release his or her findings to Respondents' counsel.

The order suggested that the hard drive copying process would take between ten minutes and two hours. And only if Petitioner's counsel did not object could the expert make findings available to Respondents' counsel.

After the court granted Respondents' motion, Petitioner filed a timely petition for writ of certiorari.

II.

A.

[1] As a threshold matter, a petition for writ of certiorari is the correct vehicle for reviewing Petitioner's privacy-related objections to the trial court's discovery order. We have noted previously that certiorari relief involving an order compelling discovery is available "when the order departs from the essential requirements of law, causing irreparable harm that cannot be remedied on plenary appeal." *Poston v. Wiggins,* 112 So.3d 783, 785 (Fla. 1st DCA 2013) (quoting *Heekin v. Del Col,* 60 So.3d 437, 438 (Fla. 1st DCA 2011)). The irreparable harm part of this analysis is jurisdictional. *Id.* It is satisfied in this case because irreparable harm can be presumed where a discovery order compels production of matters implicating privacy rights. *Rasmussen v. S. Florida Blood Serv., Inc.,* 500 So.2d 533, 536–37 (Fla.1987); *see also Holland v. Barfield,* 35 So.3d 953, 956 (Fla. 5th DCA 2010) (having to disclose a computer hard drive and a cellphone SIM card demonstrates irreparable harm).[1] And so, Petitioner will be ***166** entitled to relief if the order below departs from the essential requirements of law.

B.

Petitioner argues that the cellphone inspection order violates the decedent's privacy rights and doesn't comport with the rules of civil procedure because it permits inspection of "all data" on the decedent's cellphone. Petitioner considers the inspection "an improper fishing expedition in a digital ocean."

[2] Generally speaking, Florida Rule of Civil Procedure 1.280 allows for the discovery of matters that are relevant and admissible, or reasonably calculated to lead to admissible evidence, including electronically stored information. *See* Fla. R. Civ. P. 1.280(b)(1), (b)(3), 1.350 (2013); *see also* Fla. R. Civ. P. 1.280(d) (addressing limitations on the discovery of electronically stored information). But where personal information is involved as in this case, the trial courts' discretion to permit discovery "must be balanced against the individual's competing privacy interests to prevent an undue invasion of privacy." *McEnany v. Ryan,* 44 So.3d 245, 247 (Fla. 4th DCA 2010). Courts have reversed rulings for not adequately accounting for privacy interests in the inspection of electronic storage devices. *See, e.g., Holland,* 35 So.3d at 955 (reversing an order allowing the inspection of a computer hard drive and cellphone SIM card); *Menke v. Broward Cnty. Sch. Bd.,* 916 So.2d 8, 12 (Fla. 4th DCA 2005) (reversing an order allowing the inspection of all computers in a household).

But, contrary to Petitioner's argument, privacy rights do not completely foreclose the prospect of discovery of data stored on electronic devices. Rather, limited and strictly controlled inspections of information stored on electronic devices may be permitted. *See Menke,* 916 So.2d at 11 ("[Rule 1.350 is] broad enough to encompass requests to examine [electronic information storage devices] but only in limited and strictly controlled circumstances"); *cf. Friedman v. Heart Inst. of Port St. Lucie, Inc.,* 863 So.2d 189, 194 (Fla.2003) (finding that privacy rights limit compelled disclosure to that which is necessary to determine contested issues). Both *Holland* and *Menke,* for instance, would have allowed for inspections of the devices involved (computers and cellphones) if: (1) there was evidence of destruction of evidence or thwarting of discovery; (2) the device likely contained the requested information; and (3) no less intrusive means existed to obtain the requested information. *Holland* 35 So.3d at 955; *Menke,* 916 So.2d at 12.

C.

[3] Which brings us to this case. The record here indicates that the trial court closely considered how to balance Respondents' discovery rights and the decedent's privacy rights. The order highlighted the relevance of the cellphone's data to the Respondents' defense and it set forth strict procedures controlling how the inspection process would proceed.

The context of Respondents' discovery request is quite important. The trial court didn't allow the inspection simply because Respondents made assertions that decedent was on her cellphone, or because the decedent happened to possess a cellphone in her car. This case does not involve an unanchored fishing expedition as Petitioner alleges. Rather, Respondents supported their motion to inspect the cellphone with specific evidence. Respondents cited cell phone records showing that the decedent was texting just before the accident; two witnesses indicated ***167** that the decedent may have used her cell phone at the time of the accident; and troopers responding to the accident lent support to the conclusion that the decedent was using her cell phone when the accident occurred. Additionally, no one has disputed that the decedent's smartphone may contain very relevant information. As Respondents put it below:

> With GPS enabled phones, such as [the decedent's] iPhone, there is a very high probability that if the GPS feature were enabled, we can look at the data and figure out conclusively what happened in the moments leading up to the accident, i.e. whether she stopped at the stop sign or not and whether she was texting, Facebooking, Tweeting, or nothing at the time of the accident.

It's long been true that "[t]he more relevant and necessary the desired information is to a resolution of the case, the greater the state's interest in allowing discovery of the information." *S. Florida Blood Serv., Inc. v. Rasmussen,* 467 So.2d 798, 803 (Fla. 3d DCA 1985), *approved,* 500 So.2d 533 (Fla.1987). And here, we agree with the trial court that Respondents' discovery request comports with the rules allowing for discovery of relevant information, including information from devices like cellphones, *see* Fla. R. Civ. P. 1.280(b)(1), and that their interest in the discovery of this particular data is quite substantial.

The other side of the equation—the countervailing privacy interest involved with the discovery of data on a cellphone —is also very important. *See S. Florida Blood Serv., Inc.,* 467 So.2d at 803 (recognizing the court's obligation to minimize the impact on competing interests). But we are satisfied that the order adequately safeguards privacy interests under the circumstances here where Petitioner was given the opportunity, but advanced no alternative plan. As detailed above, the trial court's order strictly controls how the confidential inspection must proceed: it limits the data that the expert may review to the nine-hour period immediately surrounding the accident; it gives Petitioner's counsel a front-row seat to monitor the inspection process; and it allows Petitioner the opportunity to interpose objections before Respondents can obtain any of the data. This certainly isn't a case like *Holland,* for example, where the trial court's order allowed a respondent "to review, without limit or time frame, all of the information on [a] mobile phone SIM card without regard to [privacy rights and privileges]." *Holland,* 35 So.3d at 956. *See also Root v. Balfour Beatty Constr.,* 132 So.3d 867, 870 (Fla. 2d DCA 2014) (warning against "carte blanche discovery").

We don't agree with Petitioner that the trial court erred by allowing Respondents' expert to first inspect the cellphone. *See, e.g., Menke,* 916 So.2d at 12. Petitioner did not offer or argue to the trial court below to use its own expert. In fact, Petitioner remained silent at the hearing when the trial court openly stated its uncertainty about "who looks at [the cellphone], what they do with the information, who they report it to, [and] how we protect the privacy interest of the person [and provide] a chance to object to the dissemination, ... I haven't got this all formed in my head yet." Though the trial court expressly invited Petitioner "to submit ... language that you think would work that protects the privacy and interest," the order notes that Petitioner didn't propose "any less intrusive manner to obtain the requested data." The trial court was left ultimately to accept the representation of Petitioner's counsel that he was "unable to obtain some of the requested information ... from Plaintiff." Under these circumstances, where Petitioner 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 Respondents' expert ***168** retrieve the cellphone's data under limited and controlled conditions.

Finally, we find no error with the order having allowed the expert to review "all data" on the cellphone for the nine-hour period surrounding the time of the accident. While Petitioner has apparently possessed the cellphone since the accident, the trial court's order noted that she didn't "indicate the quantity, nature or type of any information on plaintiff's decedent's cell phone, or if any such information was, in fact, privileged." Nor did the Petitioner proffer "any less intrusive manner to obtain the requested data." It would appear that the only way to discover whether the decedent used her

cellphone's integrated software at the time of the accident, or drafted a text, dialed a number, searched for contact information, reviewed an old message, or used any other of the smartphone's many features, is by broadly inspecting data associated with all of the cellphone's applications. Or, at least, if an effective and superior privacy-respecting plan for segregating inspection-permissible from -impermissible data exists, it hasn't been presented to the court. And so, we cannot conclude that the trial court violated the essential requirements of law by permitting a thorough inspection of the cellphone for the nine-hour period on the day of the accident.[2]

III.

For the foregoing reasons, the PETITION IS DENIED.

LEWIS, C.J., and THOMAS, J., concur.

Parallel Citations

39 Fla. L. Weekly D2149

Footnotes

1 *See also Riley v. California,* —— U.S. ——, 134 S.Ct. 2473, 2489–91, 189 L.Ed.2d 430 (2014) (recognizing privacy interests in electronic information stored on a cellphone).

2 We needn't resolve Respondents' additional contention that Petitioner lacks standing in this case to assert the decedent's constitutional privacy rights. The trial court didn't pass on this question. And, as discussed above, relief isn't warranted even if we assume (as this opinion does) that Petitioner can assert the decedent's privacy rights.

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827 So.2d 936
Supreme Court of Florida.

ALTERRA HEALTHCARE CORPORATION, etc., et al., Petitioners,
v.
ESTATE OF Francis SHELLEY, etc., Respondent.

No. SC01-709. | Sept. 12, 2002.

Resident's estate sued assisted living facility, alleging negligence, breach of statutory rights, and wrongful death. Estate filed motion to compel facility to produce its employee personnel files. The trial court granted motion to compel, and facility filed petition for writ of certiorari. The District Court of Appeal, 779 So.2d 635, denied petition, but certified direct conflict of decisions. On petition for review, the Supreme Court, Lewis, J., held that assisted living facility lacked standing to deny discovery request by asserting constitutional right of privacy of its employees, disapproving *Beverly Enterprises-Florida, Inc. v. Deutsch*, 765 So.2d 778.

So ordered.

Pariente, J., filed a concurring opinion.

West Headnotes (12)

[1] **Constitutional Law**
Records or Information

The state constitutional privacy right may, under certain circumstances, extend to personal information contained in nonpublic employee personnel files. West's F.S.A. Const. Art. 1, § 23.

4 Cases that cite this headnote

[2] **Records**
Access to Records or Files in General

Absent an applicable statutory exception, pursuant to Public Records Act, public employees, as a general rule, do not have privacy rights in personnel records. West's F.S.A. § 119.01 et seq.

1 Cases that cite this headnote

[3] **Constitutional Law**
Right to Privacy

Even where a constitutional right to privacy is implicated, that right is a personal one, inuring solely to individuals. West's F.S.A. Const. Art. 1, § 23.

7 Cases that cite this headnote

[4] **Action**
Persons Entitled to Sue

Under traditional jus tertii jurisprudence, in the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.

3 Cases that cite this headnote

[5] **Constitutional Law**
Right to Privacy

Assisted living facility lacked standing to assert the constitutional right of privacy of its employees, as grounds for failing to disclose employees' personnel files in response to discovery request in action brought against it by resident's estate for negligence, breach of statutory rights, and wrongful death; disapproving *Beverly Enterprises-Florida, Inc. v. Deutsch*, 765 So.2d 778. West's F.S.A. Const. Art. 1, § 23.

3 Cases that cite this headnote

[6] **Constitutional Law**
Right to Privacy

Pretrial Procedure
Employment Records

Privileged Communications and Confidentiality
Employment Relationships; Personnel Records

Application of the three-part jus tertii analysis militates against recognizing third-party

standing for nonpublic employers involved in requests for production of personnel records to assert their employees' privacy rights in those records; this does not necessarily mean, however, that such important nonparty rights should not be considered, or that the right to privacy and the right to know should not be weighed, during the discovery process. West's F.S.A. Const. Art. 1, § 23.

7 Cases that cite this headnote

[7] **Pretrial Procedure**
Relevancy and Materiality
Pretrial Procedure
Probable Admissibility at Trial

Discovery in civil cases must be relevant to the subject matter of the case, and must be admissible or reasonably calculated to lead to admissible evidence. West's F.S.A. RCP Rule 1.280(b)(1).

1 Cases that cite this headnote

[8] **Pretrial Procedure**
Objections and Protective Orders

In deciding whether a protective order is appropriate in a particular case, the court must balance the competing interests that would be served by granting discovery or by denying it.

Cases that cite this headnote

[9] **Pretrial Procedure**
Objections and Protective Orders

In the context of considering a relevancy objection to a discovery request, the trial court can consider the constitutional rights of third parties who would be substantially affected by the outcome of the litigation.

2 Cases that cite this headnote

[10] **Constitutional Law**
Discovery
Privileged Communications and Confidentiality
In Camera Review
Privileged Communications and Confidentiality
Privacy in General

As appropriate, a trial court may conduct an in-camera inspection of third-party records that are subject of discovery request; in that context, the trial court may balance, on an ad hoc basis, the right to privacy and the right to know. West's F.S.A. Const. Art. 1, § 23.

4 Cases that cite this headnote

[11] **Privileged Communications and Confidentiality**
In Camera Review

As a predicate to a court's in-camera review of third-party records that are subject of discovery request, the record custodian should direct the trial court's attention to the allegedly private information.

2 Cases that cite this headnote

[12] **Pretrial Procedure**
Protective Orders

Given the broad scope of discovery, if private and confidential information that is not relevant is redacted or withheld from the documents produced, it would be appropriate to require the records custodian to provide to the requesting party details concerning the information withheld, to enable the parties to fully address the issue at the trial level and to challenge the trial court's ruling, if necessary. West's F.S.A. RCP Rule 1.280.

5 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

LEWIS, J.

We have for review *Alterra Health Care Corp. v. Estate of Shelley,* 779 So.2d 635 (Fla. 1st DCA 2001), which expressly and directly conflicts with the opinion in *Beverly Enterprises-Florida, Inc. v. Deutsch,* 765 So.2d 778 (Fla. 5th DCA 2000). We have jurisdiction. *See* art. V, § 3(b)(3), Fla. Const.

MATERIAL FACTS

The executor of the Estate of Frances Shelley filed an action against Alterra Health Care Corporation (a/k/a Alternative Living Services, Inc., d/b/a Sterling House of Tallahassee) and Sterling House Corporation (d/b/a Sterling House of Tallahassee) (collectively "Sterling House"), an assisted living facility, alleging negligence, breach of statutory rights, and wrongful death. The decedent, Mrs. Shelley, legally blind and a person over sixty years of age who suffered infirmities to the extent that her ability to provide for her own care and protection was impaired, was a resident of Sterling House from April 1998 until August 10, 1999. The executor alleged that, during the evening or early morning hours of August 9 or 10, 1999, Mrs. Shelley caught her leg in the footboard of her bed and was not found by Sterling House staff until six to eight hours later, when she was discovered hanging from the footboard upside down. It was alleged that it was known by the staff that Mrs. Shelley had an unsteady gait, was at risk for falls, and was incontinent, requiring regular, periodic observation. The executor alleged that, during the course of the six-to eight-hour period, Mrs. Shelley suffered trauma to her left leg, which ultimately required surgery resulting in the amputation of Mrs. Shelley's leg above the knee. The executor asserted, among many allegations, that Sterling House did not employ or maintain sufficient staff (particularly during evening shifts) to properly supervise and assist its residents; that it failed to properly train staff; and that it improperly retained staff. The executor further alleged that the staff at Sterling House failed to check on Mrs. Shelley, failed to provide her with access to adequate and appropriate health care, protective, and support services, and failed to protect her from foreseeable harm.

During the course of discovery, the executor requested Sterling House to produce certain documentation pertaining to each employee who provided any care or service to Mrs. Shelley while she resided at the facility. [1] While the executor acknowledged that most of the information ***939** sought could likely be found within an employee's personnel file, he asserted that he did not seek production of allegedly confidential materials, and agreed to redaction of purely private and confidential information such as home telephone numbers and social security numbers from the employee documentation. Sterling House objected to the request, in part, on the basis that it violated the employees' constitutional rights to privacy.

The executor moved to compel the production of the requested material, arguing that the information was relevant because it would help him determine (i) whether the employees were qualified; (ii) the extent of Sterling House's knowledge of its employees' qualifications based upon any disciplinary information in their files; and (iii) whether the employees were certified or licensed. He also argued that, because Sterling House might seek to impeach its former employees who were witnesses in the case with information from their personnel files, he was entitled to review the documentation from which such impeachment could be drawn to "weigh [such employees'] credibility." Finally, the executor argued that the employee information might also contain information revealing possible employee concerns regarding the operation of the facility, and was therefore relevant to the issue of the facility's notice of such concerns.

At the hearing on the executor's motion to compel, Sterling House objected to the motion on the basis that the documentation the executor was seeking contained information protected from disclosure under the privacy provision of the Florida Constitution. *See* art. I, § 23, Fla. Const. Sterling House also argued that the executor had the burden of demonstrating a need for the documentation which it unilaterally classified as confidential, which outweighed the employees' privacy rights. The trial court granted the motion to compel and disagreed with Sterling House that the executor was seeking documentation that would be classified as confidential under the circumstances.

Sterling House then filed a petition for writ of certiorari to the First District Court of Appeal, seeking an order quashing that portion of the trial court's order which compelled the production of the materials requested. The First District

denied the petition for writ of certiorari on the basis that it was bound by its decision in *North Florida Regional Hospital, Inc. v. Douglas,* 454 So.2d 759 (Fla. 1st DCA 1984), to hold that Sterling House did not have standing to raise the privacy rights of its employees. *Alterra Health Care Corp.,* 779 So.2d at 636. However, the First District acknowledged and certified conflict with *Beverly Enterprises-Florida, Inc. v. Deutsch,* 765 So.2d 778 (Fla. 5th DCA 2000), in which the Fifth District had held that an employer had standing there to assert the privacy rights of its employees, and had certified conflict with *Douglas.*[2] ***940** This timely petition for review followed.[3]

PRIVACY RIGHT IN NONPUBLIC EMPLOYMENT RECORDS

[1] **[2]** The issue addressed here is whether an employer that is not subject to the Public Records Act[4] has standing under Florida law to challenge the disclosure of nonparty personnel records pursuant to court-ordered discovery[5] by asserting that information contained therein is private.[6] ***941** This Court has acknowledged that the Florida Constitution contains, in article I, section 23, a strong right of privacy provision. *See Shaktman v. State* 553 So.2d 148 (Fla.1989). In *Shaktman,* the Court reasoned that the enactment of this provision "ensures that individuals are able 'to determine for themselves when, how and to what extent information about them is communicated to others.' " *Id.* at 150 (quoting from Alan F. Westin, *Privacy and Freedom* 7 (1967)). There, we spoke of a "zone of privacy into which not even government may intrude without invitation or consent," elaborating:

> Because this power is exercised in varying degrees by differing individuals, the parameters of an individual's privacy can be dictated only by that individual. The central concern is the inviolability of one's own thought, person, and personal action. The inviolability of that right assures its preeminence over 'majoritarian sentiment' and thus cannot be universally defined by consensus.
>
> *Shaktman,* 553 So.2d at 150-51. Such privacy right may, under certain circumstances, extend to personal information contained in nonpublic employee personnel files.

EMPLOYERS' *JUS TERTII* STANDING TO ASSERT EMPLOYEE RIGHTS

[3] **[4]** Nonetheless, even where a constitutional right to privacy is implicated, that right is a personal one, inuring solely to individuals. *Cf. Parnell v. St. Johns County,* 603 So.2d 56, 57 (Fla. 5th DCA 1992) (holding that the petitioner had the right not to have her state court cause of action asserting an individual right to privacy claim stayed pending a federal action brought by her employer challenging the same nudity ordinance, observing that the petitioner had "raised an important state constitutional issue which pertains to her and not to her employer, because the right to privacy extends only to natural persons"). Under traditional *jus tertii* jurisprudence, "In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). However, the United States Supreme Court has recognized certain limited exceptions to this general rule:

> We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute, [*Singleton v. Wulff,* 428 U.S. 106, 112, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976)]; the litigant must have a close relation to the third party, *id.,* at 113-114, 96 S.Ct. 2868; and there must exist some hindrance to the third party's ability to protect his or her own interests. ***942** *Id.,* at 115-116, 96 S.Ct. 2868. See also *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). These criteria have been satisfied in cases where we have permitted criminal defendants to challenge their convictions by raising the rights of third parties. See, *e.g., Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); see

> also *McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L:Ed.2d 393 (1961). By similar reasoning, we have permitted litigants to raise third-party rights in order to prevent possible future prosecution. See, *e.g., Doe v. Bolton,* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973).

Powers, 499 U.S. at 410-11, 111 S.Ct. 1364.

[5] The "injury in fact" asserted by the employer here is potential tort liability for disclosure of private information contained in the employees' personnel files. Even in the context of public employment records, this Court-while holding that the documents were subject to disclosure-has expressed the opinion that "the right of access to public records is not the right to rummage freely through public employees' personal lives."[7] *Michel,* 464 So.2d at 546. Sterling House has not brought to our attention, nor have we encountered, any case in which the alleged threat of liability or responsibility in a civil action against the party seeking to assert a third-party right has been addressed in determining *jus tertii* standing. The available decisions address only threats of criminal prosecution and economic sanctions. *Cf. Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (holding that a licensed beer vendor, who would be subject to sanctions and the loss of her license for violation of the subject statute, had standing to raise the equal protection claim of a male customer challenging a statutory scheme prohibiting the sale of beer to males under the age of 21); *cf. also Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (holding that Baird, who was convicted of giving a young woman a package of Emko vaginal foam at the close of his address to a group of students at Boston University, had standing to raise the equal protection claim of unmarried persons denied access to contraceptives under the challenged statute); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (holding that the Executive Director of the Planned Parenthood ***943** League of Connecticut and a licensed physician who had prescribed contraceptives for married persons and been convicted as accessories to the crime of using contraceptives had standing to raise the constitutional rights of their patients). In *Craig,* the United States Supreme Court explained:

> [O]ur decisions have settled that limitations on a litigant's assertion of *jus tertii* are not constitutionally mandated, but rather stem from a salutary "rule of self-restraint" designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative. See, *e.g., Barrows v. Jackson,* 346 U.S. 249, 255, 257, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953); see also *Singleton v. Wulff,* 428 U.S. 106, 123-124, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (Powell, J., dissenting). These prudential objectives, thought to be enhanced by restrictions on third-party standing, cannot be furthered here, where the lower court already has entertained the relevant constitutional challenge and the parties have sought-or at least have never resisted-an authoritative constitutional determination. In such circumstances, a decision by us to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence. Moreover, insofar as the applicable constitutional questions have been and continue to be presented vigorously and "cogently," *Holden v. Hardy,* 169 U.S. 366, 397, 18 S.Ct. 383, 42 L.Ed. 780 (1898), the denial of *jus tertii* standing in deference to a direct class suit can serve no functional purpose. Our Brother Blackmun's comment is pertinent: "[I]t may be that a class could be assembled, whose fluid membership always included some [males] with live claims. But if the assertion of the right is to be 'representative' to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by" the present *jus tertii* champion. *Singleton v. Wulff, supra,* at 117-118, 96 S.Ct. 2868.
>
> 429 U.S. at 193-94, 97 S.Ct. 451. Applying this reasoning, it is at least questionable whether Sterling House's expressed concern satisfies the "injury in fact" prong of the three-part standing test.

If, however, it does, then we must next determine whether the litigant seeking to assert the right in this case has a "close relation" to the third party.[8] The First District in *Douglas* held that "a mere employee/employer relationship is not the kind of special relationship necessary for third-party standing." 454 So.2d at 760. The Fifth District in *Deutsch* expressly disagreed. 765 So.2d at 784. In so doing, however, it focused on the character of the contents of the personnel file and its relevance to the litigation in which disclosure was sought, rather than on the employer-employee relationship:

> In ***944** *Rosado v. Bridgeport Roman Catholic Diocesan Corp.,* 1994 WL 700344 (Conn.Super.Ct.1994), a plaintiff alleged that he was sexually assaulted by the defendant

Pcolka while Pcolka was a priest employed by the defendant Bridgeport Roman Catholic Diocese. The court noted that while the rules of civil discovery are liberally construed, that policy is qualified where the object of discovery is a personnel file:

> The disclosure of such information must be carefully tailored to a legitimate and demonstrated need for such information in any given case. Where disclosure of the personnel file would place in the hands of a [party] irrelevant or personal and sensitive information concerning ... [another], the entire file should not be disclosed. No ... [party] has the right to conduct a general "fishing expedition" into the personnel records of a[nother]. Any request for information that does not directly relate to legitimate issues that may arise in the course of the ... [trial] ought to be denied. In recognizing the danger of permitting the disclosure of personnel records of any witness or litigant, one court has said:
>
> > "It has been widely noted that such records often contain raw data, uncorroborated complaints, and other information which may or may not be true but may be embarrassing, although entirely irrelevant to any issue in the case, even as to credibility."
>
> *People v. Sumpter,* 75 Misc.2d 55, 60, 347 N.Y.S.2d 670 (1973).

Deutsch, 765 So.2d at 783-84; *cf. also Alterra Health Care Corp.,* 779 So.2d at 636 n. 1 (Wolf, J., specially concurring) ("In addition, Alterra and its employees have a substantial relationship and consistent interests which favor the granting of third party standing.").

The last prong to consider is whether there is "some hindrance to the third party's ability to protect his or her own interests." While Judge Wolf, in his specially concurring opinion in *Alterra Health Care Corp.,* opined that there was,[9] the court in *Douglas* observed that the nurse employees had, in fact, moved to intervene in the litigation, lending credence to the conclusion that, at least in that case, there was no hindrance. *See Douglas,* 454 So.2d at 761 ("Also, the nurses have moved to intervene. If they are allowed to intervene, they can assert their own rights."); *cf. also Rosado v. Bridgeport Roman Catholic Diocesan Corp.,* 60 Conn.App. 134, 758 A.2d 916 (2000) (allowing non-party priests to intervene in the litigation to protest production of their personnel records on the alleged grounds that the records are protected from disclosure by the United States Constitution, the state constitution, state statutes, and the common law).

[6] On balance, we conclude that application of the three-part *jus tertii* analysis militates against recognizing third-party standing for nonpublic employers involved in requests for production of personnel records to assert their employees' privacy rights in those records. This does not necessarily mean, however, that such important nonparty rights should not be considered, or that the right to privacy and the right to know should not be weighed, during the discovery process.

THE TRIAL COURT'S RELEVANCY ANALYSIS MAY IMPLICATE A WEIGHING OF COMPETING RIGHTS

[7] **[8]** **[9]** As this Court stated in *Allstate Insurance Co. v. Langston,* 655 So.2d 91 (Fla.1995), it is axiomatic that discovery in civil cases must be relevant:

> Discovery in civil cases must be relevant to the subject matter of the case, ***945** and must be admissible or reasonably calculated to lead to admissible evidence. *Brooks [v. Owens],* 97 So.2d [693, 699 (Fla.1957)]; *see also Amente v. Newman,* 653 So.2d 1030 (Fla.1995) (concept of relevancy is broader in discovery context than in trial context, and party may be permitted to discover relevant evidence that would be inadmissible at trial if it may lead to discovery of relevant evidence); *Krypton [Broadcasting of Jacksonville, Inc. v. MGM-Pathe Communications Co.],* 629 So.2d [852, 854 (Fla. 1st DCA 1993)] ("It is axiomatic that information sought in discovery must relate to the issues involved in the litigation, as framed in all pleadings."); Fla. R. Civ. P. 1.280(b)(1) (discovery must be relevant to the subject matter of the pending action).

Id. at 94. Further, in *Martin-Johnson, Inc. v. Savage,* 509 So.2d 1097, 1100 (Fla.1987), this Court observed that irreparable harm such as might be occasioned by an order that would let the "cat out of the bag" and provide the opponent "material that could be used by an unscrupulous litigant to injure another person" was the governing standard for determining whether a petition for writ of certiorari would, in a particular case, be an appropriate vehicle for challenging

nonfinal orders granting discovery. As this Court observed in *Rasmussen v. South Florida Blood Service, Inc.,* 500 So.2d 533 (Fla.1987):

> In deciding whether a protective order is appropriate in a particular case, the court must balance the competing interests that would be served by granting discovery or by denying it. *North Miami General Hospital v. Royal Palm Beach Colony, Inc.,* 397 So.2d 1033, 1035 (Fla. 3d DCA 1981); *Dade County Medical Association v. Hlis,* 372 So.2d 117, 121 (Fla. 3d DCA 1979). Thus, 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. This framework allows for broad discovery in order to advance the state's important interest in the fair and efficient resolution of disputes while at the same time providing protective measures to minimize the impact of discovery on competing privacy interests.
>
> Accordingly, we must assess all of the interests that would be served by the granting or denying of discovery-the importance of each and the extent to which the action serves each interest.

Id. at 535. While the Fifth District in *Deutsch* incorrectly concluded that an employer has standing to raise the privacy interest of its employees as a shield against discovery, it correctly observed that employers have standing to oppose production of personal information contained in employee files on the ground that such information is not relevant to the pending litigation. [10] Important to our analysis here, in the context of considering a relevancy objection, the trial court can consider the constitutional rights of third parties who would be substantially affected by the outcome of the litigation. [11]

[10] As appropriate, the trial court may conduct an in-camera inspection of the subject records. In that context, the ***946** trial court may balance (on an ad hoc basis) "the right to privacy and the right to know." *City of Billings,* 649 P.2d at 1290 (holding that the Montana Human Rights Commission, as part of its investigation of a discrimination complaint, could require an employer to submit certain evidence from its personnel files relating to persons other than the complainants, but that the HRC had to handle this information in a manner which would minimize the invasion of those employees' privacy rights).

[11] **[12]** As a predicate to such review, the record custodian should direct the trial court's attention to the allegedly private information. *Cf. First Healthcare Corp. v. Hamilton,* 740 So.2d 1189, 1193 (Fla. 4th DCA 1999) (requiring the defendant to produce the reports for which a privilege was claimed for an in-camera inspection, with a privilege log and an affidavit of the basis of the claimed privilege). Even though the scope of discovery is broad, it must be relevant to issues properly framed by the pleadings in the litigation. Legitimate employee privacy concerns may also be addressed by a carefully crafted discovery order. However, given the broad scope of discovery pursuant to Florida Rule of Civil Procedure 1.280, [12] if private and confidential information that is not relevant is redacted or withheld from the ***947** documents produced, it would be appropriate to require the records custodian to provide to the requesting party details concerning the information withheld, to enable the parties to fully address the issue at the trial level and to challenge the trial court's ruling, if necessary. [13]

Based upon the foregoing, we approve the decision in *Alterra Health Care Corp.* to the extent it is consistent with this opinion, and disapprove the reasoning in *Deutsch,* with respect to the issue of whether a private employer has standing to challenge a discovery request based exclusively upon the privacy interest of its employees in their personnel files. In so doing, however, we recognize that nonpublic employees may have a privacy interest in certain information contained in their personnel files, which they may assert as intervenors in the litigation. Moreover, in the appropriate case, the trial court should fully consider the employees' alleged privacy interest-in the context of determining the relevancy of any discovery request which implicates it-regardless of whether the subject employees have intervened or not.

It is so ordered.

ANSTEAD, C.J., SHAW, WELLS, and QUINCE, JJ., and HARDING, Senior Justice, concur.

PARIENTE, J., concurs with an opinion.

PARIENTE, J., concurring.

I agree with the majority that Sterling House lacked standing to assert the constitutional right of privacy of its employees. Further, I also agree that trial courts can and should make appropriate provisions in orders compelling discovery to protect against the unnecessary disclosure of confidential or private information. *See Amente v. Newman,* 653 So.2d 1030,

1032 (Fla.1995); *Berkeley v. Eisen,* 699 So.2d 789, 790 (Fla. 4th DCA 1997).

I write to emphasize, however, that the courts also must be alert to the possibility of a litigant raising a claim of the privacy rights of others as a subterfuge to prevent the disclosure of relevant information. In this case, the nursing home had complete access to all of its employees' files and thus had the ability to use that information to impeach those former employees who were witnesses in this case with information gained from those files. Yet, the nursing home then attempted to prevent the plaintiff from having that same access. The question becomes whom was the nursing home protecting when it raised a privacy objection to information in its personnel files. In this case, as the majority points out, the plaintiff had already agreed to a redaction of purely private information such as home telephone numbers and social security numbers.

***948** We reiterated the importance of our "broad and liberal" discovery rules in our adversary system in *Allstate Insurance Co. v. Boecher,* 733 So.2d 993, 995 (Fla.1999). Thus, while being sensitive that unrestricted disclosure may in a given case implicate an individual's reasonable expectation of privacy, courts must remain vigilant in preserving our discovery rules' basic framework, which envisions "broad discovery in order to advance the state's important interest in the fair and efficient resolution of disputes." *Rasmussen v. South Florida Blood Serv., Inc.,* 500 So.2d 533, 535 (Fla.1987).

Parallel Citations

27 Fla. L. Weekly S735

Footnotes

1 Specifically, in paragraph 21(a-g) of the discovery request, the executor asked Sterling House to produce the following:

> Copies of any and all documentation maintained by Defendants for each employee of Sterling House of Tallahassee who provided any care or service to Frances Shelley at the facility, including but not limited to the following information:
>
> (a) Any and all applications for employment;
>
> (b) Copies of any and all documentation obtained by the facility about said employees from any third source, such as employment verification information from other employers, reports from any law enforcement or state administrative agency, or any abuse reporting agency where such document is not privileged by state or federal law creating the abuse reporting agency;
>
> (c) Copies of any and all licensing certification for said employees;
>
> (d) Any and all documents which would contain disciplinary information on said employees by the nursing home, including letters of reprimand, or complaints by outside persons;
>
> (e) Any and all documents submitted by said employees or recorded by the facility concerning complaints registered by the employees;
>
> (f) Any and all performance evaluations completed for said employees; and
>
> (g) Any and all forms, letters or notes relating to termination of said employees' service at the nursing home, including writings completed by the employees or any other member of the nursing home's staff or administration.

2 In a concurring opinion below, Judge Wolf noted that, if the Court were able to "work with a clean slate," he would follow *Deutsch.* Judge Wolf reasoned:

> Innocent employees who are not parties to an action against their employer should not be required to hire a lawyer to protect their interests. It would be better to allow the employer, who is a party to the action and who collected the information, to assert its employees' privacy rights guaranteed by the Florida Constitution.

Alterra Health Care Corp., 779 So.2d at 636 (Wolf, J., specially concurring). Judge Wolf also observed that the "criteria for granting third party standing to assert a constitutional right are not a barrier in this case." *Id.* at 636 n. 1 (citing *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 623 n. 3, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989) and *Craig v. Boren,* 429 U.S. 190, 193, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976)). He concluded that intervention by the employees "would be costly and inefficient," and that Sterling House and its employees had a "substantial relationship and consistent interests which favor[ed] the granting of third-party standing." *Id.*

3 After the initial brief was filed in this case on May 10, 2001, this Court was notified that the underlying action between the parties was amicably resolved by settlement. Accordingly, on May 31, 2001, the executor filed a motion to dismiss the petition for discretionary review, asserting that Sterling House was unwilling to execute a joint stipulation for dismissal.

Sterling House filed a response, urging this Court to address both the conflict certified by the First District Court of Appeal and the substantive order of the trial court which compelled production of the employee information. We decline to address in detail all substantive aspects of the discovery order rendered by the trial court. *Cf. Antell v. Attorney General,* 52 Mass.App.Ct. 244, 752 N.E.2d 823, 825 n. 1 (2001) (observing that the plaintiff's need for discovery was moot where the underlying litigation had been settled). We do, however, address the general nature of the discovery sought here with regard to the privacy claim.

4 Florida's constitutional right to privacy provision states that the right to privacy "shall not be construed to limit the public's right of access to public records." Art. I, § 23, Fla. Const. Absent an applicable statutory exception, pursuant to Florida's Public Records Act (embodied in chapter 119, Florida Statutes), public employees (as a general rule) do not have privacy rights in such records. *See Michel v. Douglas,* 464 So.2d 545 (Fla.1985) (holding that with the exception of personal information for certain types of occupations that are exempted from public disclosure by section 119.07(3)(i), Florida Statutes (1999), there is no state or federal right of disclosural privacy in hospital personnel records that shields them from disclosure pursuant to a Public Records Act request). Further, this Court has made it clear that only the custodian of such records can assert any applicable exemption; not the employee. *See Tribune Co. v. Cannella,* 458 So.2d 1075, 1079 (Fla.1984). However, at least one court has suggested that an employer may be subject to potential civil liability for the unwarranted disclosure of public records. *See Williams v. City of Minneola,* 575 So.2d 683, 687 (Fla. 5th DCA 1991).

5 In *Berkeley v. Eisen,* 699 So.2d 789 (Fla. 4th DCA 1997), Justice Pariente (then writing the Fourth District's majority opinion) expressed the view that discovery orders may implicate constitutional rights:

> Court orders compelling discovery constitute state action that may impinge on constitutional rights, including the constitutional right of privacy. *See Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17, (1984); *South Florida Blood Serv., Inc. v. Rasmussen,* 467 So.2d 798, 803 (Fla. 3d DCA 1985), *aff'd,* 500 So.2d 533 (Fla.1987). As recognized by our supreme court's decision in *Rasmussen,* "[t]he potential for invasion of privacy is inherent in the litigation process." 500 So.2d at 535.

Id. at 790.

6 In other jurisdictions, some courts have determined (albeit in the context of public employment) that employees have a privacy right in otherwise personal information when it is contained in their employment records. *See Montana Human Rights Division v. City of Billings,* 199 Mont. 434, 649 P.2d 1283, 1288 (1982) ("It may well be unreasonable for an employee to expect that this information will never be divulged to prospective employers. It does not necessarily follow that, therefore, this information is unprotected by the [state constitutional] right of privacy under all other circumstances, even where an employee can reasonably expect it will not be divulged, such as in an investigation or during a public hearing in which the employee is only remotely involved."); *Trenton Times Corp. v. Board of Education* 138 N.J.Super. 357, 351 A.2d 30, 33 (1976) ("The policy to keep performance ratings [contained in personnel records] confidential has been adopted: first, to protect the right of privacy of the government employee; second, because the evaluations are subjective opinions of the performance of the employee that vary with the person giving the rating; third, public disclosure would impede receiving candid evaluations; and fourth, a supervisor could use the public nature of these ratings as a vindictive mechanism against employees he disliked.").

7 This observation prompted the Court to make the non-binding suggestion that agencies not maintain sensitive information in the personnel files unrelated to the employee's qualifications or performance of job duties:

> We suggest, therefore, that public agencies monitor their personnel records and exclude information not related to their employees' qualifications for their jobs or to the performance of their jobs. *Compare News-Press v. Wisher,* 345 So.2d [646, 648 (Fla.1977)] ("No policy of the state protects a public employee from the embarrassment which results from his or her public employer's discussion or action on the employee's failure to perform his or her duties properly.") This suggestion, however, is only that. We do not impose a duty on an agency to so act, and do not create or recognize a cause of action by an employee for the employer's failure to do so. What is kept in personnel files is largely a matter of judgment of the employer, but whatever is so kept is public record and subject to being published.

Michel, 464 So.2d at 546-47; *cf. also* § 400.4174, Fla. Stat. (2000) (requiring level 1 background screening, as set forth in chapter 435, to be conducted on all assisted living facility employees hired on or after October 1, 1998, who perform personal services as defined in § 400.402(17)); § 435.11(b), Fla. Stat. (2000) (providing that it is a misdemeanor of the first degree for any person to use employee screening records information "for purposes other than screening for employment or release records information to other persons for purposes other than screening for employment").

8 Aside from the area of workers' compensation law, in at least one other context (which is not analogous), the employer-employee relationship has been recognized as "special." *Cf. Gross v. Family Services Agency, Inc.,* 716 So.2d 337, 338 (Fla. 4th DCA 1998) (discussing, *inter alia,* the employer-employee relationship as qualifying for the "special relationship"

exception to the general rule that "a person or other entity generally has no duty to take precautions to protect another against criminal acts of third parties"), *approved,* 758 So.2d 86 (Fla.2000). However, the role of the employer as a custodian of employee personnel records was not the focus in *Gross.* It is not entirely clear whether the employer-employee relationship would satisfy the United States Supreme Court's "close relation" test.

9 *See Alterra Health Care Corp.,* 779 So.2d at 636 n. 1 (Wolf, J., specially concurring).

10 Thus, the court in *Deutsch* recognized, as required by our decisions, that information which is both material and relevant to the litigation should be disclosed and the judicial authority should exercise discretion to determine disclosure of contested information. *See Deutsch,* 765 So.2d at 783-84.

11 This was suggested by the United States Supreme Court's discussion of the *jus tertii* issue in *Craig:*

> Indeed, the *jus tertii* question raised here is answered by our disposition of a like argument in *Eisenstadt v. Baird, supra.* There, as here, a state statute imposed legal duties and disabilities upon the claimant, who was convicted of distributing a package of contraceptive foam to a third party. [Note 5] Since the statute was directed at Baird and penalized his conduct, the Court did not hesitate-again as here-to conclude that the "case or controversy" requirement of Art. III was satisfied. 405 U.S., at 443, 92 S.Ct. 1029. In considering Baird's constitutional objections, the Court fully recognized his standing to defend the privacy interests of third parties. Deemed crucial to the decision to permit *jus tertii* standing was the recognition of "the impact of the litigation on the third-party interests." *Id.,* at 445, 92 S.Ct. 1029. Just as the defeat of Baird's suit and the "[e]nforcement of the Massachusetts statute will materially impair the ability of single persons to obtain contraceptives," *id.,* at 446, 92 S.Ct. 1029, so too the failure of Whitener to prevail in this suit and the continued enforcement of §§ 241 and 245 will "materially impair the ability of" males 18-20 years of age to purchase 3.2% beer despite their classification by an overt gender-based criterion. Similarly, just as the Massachusetts law in *Eisenstadt* "prohibit[ed], not use, but distribution," 405 U.S., at 446, 92 S.Ct. 1029 and consequently the least awkward challenger was one in Baird's position who was subject to that proscription, the law challenged here explicitly regulates the sale rather than use of 3.2% beer, thus leaving a vendor as the obvious claimant.
>
> [Note 5] The fact that Baird chose to disobey the legal duty imposed upon him by the Massachusetts anticontraception statute, resulting in his criminal conviction, 405 U.S., at 440, 92 S.Ct. 1029, does not distinguish the standing inquiry from that pertaining to the anticipatory attack in this case. In both *Eisenstadt* and here, the challenged statutes compel *jus tertii* claimants either to cease their proscribed activities or to suffer appropriate sanctions. The existence of Art. III "injury in fact" and the structure of the claimant's relationship to the third parties are not altered by the litigative posture of the suit. And, certainly, no suggestion will be heard that Whitener's anticipatory challenge offends the normal requirements governing such actions. See generally *Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Samuels v. Mackell,* 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Craig, 429 U.S. at 196-97 & n. 5, 97 S.Ct. 451; *cf. also* Note, *Standing to Assert Constitutional Jus Tertii,* 88 Harv. L.Rev. 423, 424 (1974) (asserting that *jus tertii* cases involve "a litigant's claim that a single application of a law both injures him and impinges upon the constitutional rights of third persons").

12 Rule 1.280(b)(1) provides: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action.... It is not ground 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."

13 A similar procedure applies in the administrative forum. Pursuant to section 552, 5 U.S.C. (2000), public agencies are required to make available to the public for inspection and copying certain agency records. However, § 552(a)(2)(E) provides a mechanism for safeguarding private information in this process:

> To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made.

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612 So.2d 549
Supreme Court of Florida.

POST-NEWSWEEK STATIONS, FLORIDA INC., The Miami Herald Publishing Company, News and Sun-Sentinel Company, and NBC Subsidiary (WTVJ-TV), Inc., Petitioners/Cross-Respondents,
v.
John DOE, et al., Respondents/Cross-Petitioners.

No. 78915. | Nov. 25, 1992.
| Rehearing Denied Feb. 16, 1993.

John Does, who were named on "client list" of an alleged prostitute, brought motions to restrict or limit public access to pretrial discovery materials in a criminal prostitution case. The Circuit Court, Broward County, John A. Fruseiante, J., refused to restrict or limit public access to pretrial discovery, and the John Does sought a writ of certiorari. The District Court of Appeal, 587 So.2d 526, affirmed, and certified the controlling questions as questions of great public importance. The Supreme Court, McDonald, J., held that: (1) John Does named on "client list" of alleged prostitute had standing in prostitution prosecution to seek an order which would deny the public and the press access to evidence revealing their names, and (2) John Does lacked a privacy interest in their names and addresses and therefore they failed to show good cause for prohibiting the disclosure to public of their names and addresses on witness list in prostitution prosecution.

Decision approved.

Barkett, C.J., filed a concurring opinion.

Kogan, J., filed a dissenting opinion.

West Headnotes (2)

[1] Records
Court Records
326 Records
326II Public Access
326II(A) In General
326k32 Court Records
John Does named on "client list" of alleged prostitute had standing in prostitution prosecution to seek an order which would deny the public and the press access to evidence revealing their names after its disclosure to defendant during discovery. West's F.S.A. RCrP Rule 3.220(*l*, m).

14 Cases that cite this headnote

[2] Records
Court Records
326 Records
326II Public Access
326II(A) In General
326k32 Court Records
John Does named on "client list" of alleged prostitute lacked a privacy interest in their names and addresses and therefore they failed to show good cause for prohibiting the disclosure to public of their names and addresses furnished on witness list in prostitution prosecution. West's F.S.A. § 119.011(3)(c) 5; West's F.S.A. RCrP Rule 3.220; West's F.S.A. Const. Art. 1, § 23.

12 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

McDONALD, Justice.

We review *Doe v. State,* 587 So.2d 526, 528-29 (Fla. 4th DCA1991), in which the district court certified the following questions:

> 1. IN A CRIMINAL PROCEEDING CHARGING A DEFENDANT WITH PROSTITUTION, DOES A NON-PARTY WHO CLAIMS A RIGHT OF PRIVACY IN DOCUMENTS HELD BY THE STATE ATTORNEY AS CRIMINAL INVESTIGATIVE INFORMATION HAVE STANDING TO SEEK AN ORDER OF THE TRIAL COURT WHICH WOULD DENY THE PUBLIC AND THE PRESS ACCESS TO EVIDENCE REVEALING NAMES OF THE DEFENDANT'S CLIENTS WHEN PURSUANT TO THE DEFENDANT'S DISCOVERY MOTION THE STATE IS PREPARED TO DELIVER SAID EVIDENCE ***550** TO THE DEFENDANTS AS REQUIRED BY FLORIDA RULE OF CRIMINAL PROCEDURE 3.220 AND WHICH UPON DELIVERY WOULD OTHERWISE RENDER THEM 'PUBLIC RECORDS' PURSUANT TO *BLUDWORTH V. PALM BEACH NEWSPAPERS, INC.*, 476 SO.2D 775 (FLA. 4TH DCA1985), *REV. DENIED*, 488 SO.2D 67 (FLA. 1986)?
>
> 2. IN A CRIMINAL PROCEEDING CHARGING A DEFENDANT WITH PROSTITUTION, DOES THE TRIAL COURT ABUSE ITS DISCRETION UNDER SECTION 119.011(3)(c) 5 OF THE PUBLIC RECORDS ACT IN DENYING CLOSURE OF DISCOVERY DOCUMENTS WHERE AN UNNAMED THIRD PARTY CLAIMS THAT RELEASE OF SUCH INFORMATION WOULD BE DEFAMATORY TO HIM AND WOULD INVADE HIS RIGHT OF PRIVACY BOTH UNDER THE ACT, ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION AND THE FEDERAL CONSTITUTION, AND THE TRIAL COURT FINDS THAT RELEASE OF THE INFORMATION WILL HARM THE THIRD PARTY?

We have jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution. We answer the first question in the affirmative and under the facts of this case answer the second question in the negative and approve the decision of the district court.

In July 1991, the Broward County Sheriff's Office investigated allegations that Kathy Willets and her husband, Deputy Sheriff Jeffrey Willets, were involved in a criminal prostitution scheme. On July 23, 1991, the police obtained a search warrant and searched the Willets' home. Various pieces of evidence were seized, including cassette tapes containing recorded telephone conversations, business cards of alleged customers of Kathy Willets, a Rolodex containing names and addresses, and other lists stating the names, amounts paid, and sexual notations regarding her customers.

The state charged Kathy Willets with one count of prostitution, Jeffrey Willets with one count of living off the proceeds of prostitution, and charged both with illegal wiretapping. On August 31, 1991, the Willets filed a discovery request under rule 3.220 of the Florida Rules of Criminal Procedure asking the state to turn over all of the material seized from their home, including the documents identifying the John Does. Numerous John Does, styled as interested parties/witnesses, filed a motion in the trial court to deny public access to pretrial discovery materials. [1] The trial court denied the Does' motion and declared that, once the state attorney provided the discovery documents to the Willets, the documents became records available for public inspection. When the state announced that it was prepared to disclose the material in its possession as required by rule 3.220, the Does moved for a stay of release of the discovery materials. The trial judge concluded that people named on the "client list" of a prostitute have no reasonable expectation of privacy as to their identity and ordered the release of the names and addresses contained in the documents. He reserved ruling, subject to an in-camera review, on whether other material or information should be released. The district court subsequently

stayed the order, affirmed the trial court's decision, and certified the questions.

[1] Pursuant to rule 3.220(m), the Does have standing to challenge the release of the discovery materials.[2] Rule 3.220(m) provides that "[u]pon request of *any person,* the court may permit any showing of ***551** cause for denial or regulation of disclosures, or any portion of such showing to be made in camera." (Emphasis added). In addition, rule 3.220(*l*) allows the court to restrict disclosure to protect a witness from "harassment, unnecessary inconvenience or invasion of privacy." Even though the Does are not parties named in the state's criminal action against the Willets, the broad language of rule 3.220 permits them to show cause for denying the disclosure of the discovery information at issue in the criminal proceeding. Therefore, we answer the first certified question in the affirmative.

[2] Our answer to the second certified question requires us to analyze the discovery information under the rubric of the rules of criminal procedure, the public records law, and the right to privacy. Rule 3.220 requires the state to disclose to the defendant, upon request, any tangible papers or objects which were obtained from or belonged to the accused. The state, which takes no position on the issue in this case, was prepared to comply with the Willets' discovery request when the Does sought a stay in the trial court. The media contends that the Public Records Act establishes a statutory right of access to the pretrial discovery information. The Does, on the other hand, argue that disclosure of the discovery information will violate their right of privacy and that the information should be exempted from the disclosure requirements of the public records law, chapter 119, Florida Statutes (1989).

Florida law clearly expresses that it is the policy of this state that all government records, with particular exemptions, shall be open for public inspection. § 119.01. Subsection 119.011(3)(c) provides an exemption for criminal investigative information developed for the prosecution of a criminal defendant. Pursuant to the statute, such information will not be accessible to the public until the information is given or required by law or agency rule to be given to the accused. § 119.011(3)(c)(5). Rule 3.220 requires the state to turn over the discovery information to the defendant. In *Florida Freedom Newspapers, Inc. v. McCrary,* 520 So.2d 32 (Fla.1988), we stated that, once the state gives the requested information to the defendant, pretrial discovery information attains the status of a public record. However, *McCrary* qualified the statutory right of access to public records by balancing it against the constitutional rights of a fair trial and due process. *Id.* at 36. Here, we also qualify the public's statutory right of access to pretrial discovery information by balancing it against the Does' constitutional right to privacy.

The Does bear the burden of proving that closure is necessary to prevent an imminent threat to their privacy rights. *Barron v. Florida Freedom Newspapers, Inc.,* 531 So.2d 113 (Fla.1988); *Miami Herald Publishing Co. v. Lewis,* 426 So.2d 1 (Fla.1982). The media argue that the Does have failed to satisfy the three-pronged test articulated in *Lewis,* and, therefore, they have failed to carry their burden to justify closure. Under *Lewis,* the party seeking closure must prove the following:

> 1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;
>
> 2. No alternatives are available, other than a change of venue, which would protect the defendant's right to a fair trial; and,
>
> 3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Id. at 6. The *Lewis* test balances a criminal defendant's rights to a fair trial against the public's right to disclosure in pretrial proceedings. We conclude, however, that the *Lewis* test is not applicable to the balancing of interests in the instant case. First, the *Lewis* test does not address the impact of public disclosure on a third party's right of privacy. Unlike the defendant in *Lewis,* the John Does have not been charged with any crime. Second, *Lewis* dealt with the closure of a pretrial hearing, not with the closure of pretrial discovery documents that are at issue in this case.

*552 The more appropriate standard that we choose to apply in the instant case was set forth by this Court in *Barron:*

> [C]losure of court proceedings or records should occur only when necessary (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest [e.g., national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) *to avoid substantial injury to innocent third parties* [e.g. to protect young witnesses from offensive testimony; to protect children in a divorce]; or (f) *to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.*

531 So.2d at 118 (emphasis supplied). The media oppose application of the *Barron* test because that case involved a common law right of access to judicial records rather than a statutory right of access. However, whether public access is afforded via a common law right or a statutory right, both the goals of opening government to public scrutiny and simultaneously protecting individuals from unwarranted government intrusion are served by application of the *Barron* standard.

Barron recognized that "it is generally the content of the subject matter" that determines whether a privacy interest exists that might override the public's right to inspect the records. *Id.* The Does assert that the materials at issue include intimate information relating to genital size and sexual performance. Although documents containing such information were seized from the Willets' home, the trial court limited its order to the release of only the names and addresses on the state's witness list. Therefore, the matter we address here is limited strictly to the names and addresses contained on the same list. [3]

According to the Does' reasoning, Florida's constitutional right to privacy protects them from having their names and addresses released to the public:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Art. I, § 23, Fla. Const. Since its adoption by the voters of Florida in 1980, the privacy amendment has provided the basis for protecting several types of information and activities from public disclosure. *In re T.W.*, 551 So.2d 1186 (Fla.1989) (woman's decision of whether to continue her pregnancy); *Rasmussen v. South Florida Blood Service, Inc.*, 500 So.2d 533 (Fla.1987) (confidential donor information concerning AIDS-tainted blood supply); *Florida Board of Bar Examiners re: Applicant*, 443 So.2d 71 (Fla.1983) (bar application questions concerning disclosure of psychiatric counseling). The privacy amendment has not been interpreted to protect names and addresses contained in public records, and we reject the Does' suggestion that the privacy right should be extended that far based on the facts of this case. The Does in the instant case had their names and addresses associated with a criminal prostitution scheme. Any right of privacy that the Does might have is limited by the circumstances under which they assert that right. *See Florida Board of Bar Examiners*, 443 So.2d at 74. The circumstances here do not afford them such a right. Because the Does' privacy rights are not implicated when they participate in a crime, we find that closure is not justified *553 under *Barron.* [4]

Even though the names and addresses of people on the witness list of a criminal prosecution may be disclosed to the public, we emphasize that the public does not have a universal right to all discovery

materials. Depending on the circumstances and the subject matter, discovery may "seriously implicate privacy interests of litigants and third parties." *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 35, 104 S.Ct. 2199, 2208, 81 L.Ed.2d 17 (1984). The purposes of criminal discovery are to narrow the issues of the case, to ascertain facts that will be relevant at trial, and to avail the parties of information that will avoid surprise tactics in the courtroom. *State v. Tascarella,* 580 So.2d 154 (Fla.1991). Discovery is not intended to be a vehicle for the media to use in its search for newsworthy information. This Court is wary of an outcome that will cause victims and witnesses to withhold valuable discovery information because they fear that personal information will be divulged without discretion. However, we also recognize that this state's open government policy requires that information be available for public inspection unless the information fits under a legislatively created exemption.[5] *Wait v. Florida Power & Light Co.,* 372 So.2d 420 (Fla.1979).

We are confident that the in-camera proceeding conducted by the trial judge protects any privacy interests of third parties like the John Does. The purpose of the in-camera inspection is to balance the privacy interests of the parties with the public's need to know the information. *State v. Burns,* 830 P.2d 1318 (Mont.1992). In addition to lending credence to the trial court's decision whether to release the information, the in-camera inspection also "helps dispel any cloud of public suspicion that might otherwise be suspended over governmental efforts to sustain secrecy *sua sponte.*" *Tribune Co. v. Public Records,* 493 So.2d 480, 484 (Fla. 2d DCA1986), *review denied,* 503 So.2d 327 (Fla.1987).

We hold that the trial judge did not abuse his discretion in concluding that the Does lacked a privacy interest in their names and addresses. Although the trial judge did not make a finding as to whether release of the information would be defamatory to the good name of a victim or witness,[6] our conclusion that the Does do not have a privacy interest in their names and addresses negates the need for such a factual determination.

For the reasons stated, we find that the Does have failed to show good cause for prohibiting the disclosure of the names and addresses on the witness list. We therefore approve the district court's decision affirming the trial court's order.

It is so ordered.

*554 OVERTON, SHAW, GRIMES and HARDING, JJ., concur.

BARKETT, C.J., concurs with an opinion.

KOGAN, J., dissents with an opinion.

BARKETT, Chief Justice, concurring.
I concur with the Court's holding that a full and proper in camera review should be sufficient to protect third parties against violations of their constitutional right to privacy and, to the extent that they fall within the scope of section 119.011(3)(c)(5)(a), Florida Statutes (1989), to enforce their statutory right against defamatory disclosures.

KOGAN, Justice, dissenting.
In many years as a trial judge I personally had the opportunity to see a large number of cases in which unfounded innuendo, malicious gossip, and irrelevant speculation about private lives found their way into the State's discovery materials. There may be a case for allowing public access to such materials when they only affect the parties to the proceeding itself, public figures, or persons *actually charged* with a related crime. But the same conclusion is far less supportable when the material affects private persons who are not parties to the proceeding and are not charged with criminal wrongdoing.

The various John Does in this case are not presently charged with any crime. For all we know, any information about them now in the State's possession may be unfounded, distorted, or even contrived. There has been no information or indictment issued against them. That being the case, I cannot conclude that the public records laws ever were meant to subject at least some of these John Does to public scrutiny of their private lives. People have a constitutionally protected interest in their good names. Art. I, §§ 2, 9, Fla. Const.; *see, e.g., Ritter v. Board of Comm'rs,* 96 Wash.2d 503, 637 P.2d 940 (1981).

The Florida Constitution recognizes that people cannot be stripped of such an interest without good and just reason. Art. I, § 9, Fla. Const. We have recognized, as the majority notes, that the public records laws themselves allow courts to order that discovery documents be withheld if this is the only way to preserve other constitutional rights. *Florida Freedom Newspapers, Inc. v. McCrary,* 520 So.2d 32 (Fla.1988).

For these reasons, I dissent from the majority's analysis and conclusion. I would remand to the trial court for a determination of whether there is any legitimate public concern in the names, addresses, and other information contained in the State's discovery materials as to each John Doe. I strongly doubt that any legitimate public concern would exist with regard to private individuals not charged with a crime, although there could be a legitimate public interest if any of the material reflects on public figures or persons actually charged with a crime arising from this or a related case.

I am especially troubled by the majority's tacit assumption that people's interest in their good names evaporates merely because of unfounded, unproven, and possibly erroneous information that they have participated in criminal activity. Majority op. at 552-53. At the very least, I believe that private individuals have a right to require the State at least to commence a criminal prosecution against them before it can release scandalous material the State itself has collected alleging criminal wrongdoing. In effect, the majority authorizes the State to brand such persons as criminals without even offering them the procedural protections guaranteed by our Constitution or a forum for vindication. This is a process more reminiscent of Nathaniel Hawthorne's scarlet letter than modern constitutional law.

I also emphasize that the right to one's good name does not provide any basis for a person to refuse a lawful summons to appear at a deposition or testify at a trial. Rather, the right prohibits the news media and others from using a state-created method of gathering information as a means of prying into the personal lives of private individuals or of transforming unsubstantiated rumor into tabloid headlines. The State's own use of that information in ***555** a lawful proceeding is another matter altogether, because the State's interest in enforcing its laws and investigating crime is compelling.

Parallel Citations

61 USLW 2392, 17 Fla. L. Weekly S715, 20 Media L. Rep. 2089

Footnotes

1 Five John Does initially submitted sworn affidavits in support of their motions for closure. The affidavits asserted that the affiants were "private" individuals and that release of the information would be defamatory to the Does' personal and professional reputations. All of the affidavits were identical in form and content, except for one which adds a paragraph stating that he sent a letter and his business card to Kathy Willets and spoke to her on the telephone, but claiming that he did not "meet Kathy Willets, travel to her house, or engage or attempt to engage in any illegal activity with her." Affidavit of John Doe, August 19, 1991.

2 The media conceded the Does' standing during oral arguments.

3 Because the trial court has not conducted an in-camera review of any information other than the names and addresses and because the trial court has not ruled on the disclosure of any other information, we do not address whether that information should be released. However, we note that the details of an individual's life dealing with noncriminal intimate associations fall within a protected zone of privacy. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

4 In *Rasmussen v. South Florida Blood Service, Inc.,* 500 So.2d 533 (Fla.1987), an AIDS victim served a subpoena on a blood donor organization requesting the names and addresses of blood donors who may have been the source of his disease. We held that the privacy interests of the blood donors and society's interest in maintaining a strong volunteer blood donation system outweighed the victim's interest in obtaining the information. Therefore, the victim was not entitled to the donors' names and addresses. Although the instant case involves the release of names and addresses, *Rasmussen* differs in two significant aspects.

First, *Rasmussen* did not involve records subject to chapter 119, Florida Statutes (1989). Second, the instant case does not involve a policy consideration like that of protecting the blood donor system in *Rasmussen.*

5 For example, the legislature has chosen to exclude the following types of information from public inspection: communications between state employees and personnel in state agencies' employee assistance programs for substance abuse and other disorders, § 119.07(3)(b); examination answers of applicants for admission to The Florida Bar, § 119.07(3)(c); active criminal intelligence information and active criminal investigative information, § 119.07(3)(d); the identity of a victim of a sexual offense, § 119.07(3)(h); a criminal defendant's confession, § 119.07(3)(m); the work-product of an attorney representing a government agency or officer during the pendency of adversarial proceedings, § 119.07(3)(n); and "all public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law," § 119.07(3)(a).

6 Section 119.011(3)(c)(5), Florida Statutes (1989), provides an exemption from disclosure for documents that would "be defamatory to the good name of a victim or witness or would jeopardize the safety of such victim or witness."

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35 So.3d 953
District Court of Appeal of Florida,
Fifth District.

Lorell HOLLAND, Petitioner,
v.
Kimberly BARFIELD, as Personal Representative for the Estate of Brandon Scott Ledford, Respondent.

No. 5D09-3828. | May 7, 2010.

Synopsis

Background: Wrongful death action was brought. The Circuit Court, Seminole County, Michael Rudisill, J., entered order compelling defendant to produce her computer hard drive and cell phone. Defendant filed petition for writ of certiorari.

[Holding:] The District Court of Appeal, Cohen, J., held that trial court departed from the essential requirements of law causing irreparable harm to defendant by ordering defendant to produce her hard drive and phone.

Writ granted and order quashed.

West Headnotes (3)

[1] **Certiorari**
Inadequacy of remedy by appeal or writ of error

Certiorari
Particular proceedings in civil actions

73 Certiorari
73I Nature and Grounds
73k5 Existence of Remedy by Appeal or Writ of Error
73k5(2) Inadequacy of remedy by appeal or writ of error
73 Certiorari
73I Nature and Grounds
73k11 Decisions and Proceedings of Courts, Judges, and Judicial Officers
73k17 Particular proceedings in civil actions

District Court of Appeal has certiorari jurisdiction to review a discovery order that departs from the essential requirements of law by requiring disclosure of allegedly confidential information or discovery requests that are overbroad and thereby cause material injury to the petitioner throughout the remainder of the proceedings below, effectively leaving no adequate remedy on appeal.

3 Cases that cite this headnote

[2] **Certiorari**
Particular proceedings in civil actions

73 Certiorari
73I Nature and Grounds
73k11 Decisions and Proceedings of Courts, Judges, and Judicial Officers
73k17 Particular proceedings in civil actions

The irrelevancy of the discovery alone is not a basis for granting the extraordinary remedy of certiorari to review a discovery order, unless the disclosure may reasonably cause material injury of an irreparable nature.

2 Cases that cite this headnote

[3] **Pretrial Procedure**
Failure to Comply; Sanctions

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land
307AII(E)6 Failure to Comply; Sanctions
307Ak434 In general

Trial court departed from the essential requirements of law causing irreparable harm to defendant in a wrongful death action by ordering defendant to produce to plaintiff her computer hard drive and cell phone; there was no

evidence of destruction of evidence or thwarting of discovery, the electronic media was sought only as a back-up for information sought in other discovery requests as to which a compromise was reached between the parties, and discovery order allowed complete access to the information on the hard drive and phone without regard to defendant's constitutional right of privacy, her right against self-incrimination, or any applicable privileges. U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

COHEN, J.

Lorell Holland, Petitioner, seeks a writ of certiorari quashing the trial court's order ***954** that compelled Petitioner to produce all computer hard drives and all cell phone SIM cards in her possession to Respondent, Kimberly Barfield, as Personal Representative of the Estate of Brandon Scott Ledford. We grant certiorari and quash the trial court's order.

Respondent filed suit against Petitioner and five others alleging damages for the wrongful death of Brandon Ledford on February 28, 2009, when he fell from the tenth floor balcony of Petitioner's residence in North Miami Beach. Respondent alleged that Ledford died because the defendants breached their duties of care to him.

Respondent served a request to produce[1] upon Petitioner, seeking, *inter alia:*

4. Any and all computer hard drives in possession of the [Petitioner] from 24 hours preceding February 27, 2009 to present; and

5. Any and all cell phones in possession of the [Petitioner] from 24 hours preceding February 27, 2009 to the present.

Petitioner objected to these requests, asserting that they sought irrelevant information unlikely to lead to the discovery of admissible evidence, were overbroad in scope with respect to time and subject matter, were harassing in nature and constituted a "fishing expedition," and invaded her right to privacy under Article I, section 23 of the Florida Constitution.

Respondent moved to compel production of the hard drives and cell phones, seeking evidence of communications among the defendants through mobile phone text messages, Facebook.com, and MySpace.com. After a hearing, the trial court granted the motion. The trial court's order also directed that Respondent agree to a protective order and confidentiality agreement wherein all information would be for the attorney's eyes only unless a court order was first obtained; prohibited the use or sharing of financial or social security information with any third party; and required any third party provided discovery to sign a copy of the order and agree to be bound by its terms.

Petitioner argues that the trial court's order violates Florida Rule of Civil Procedure 1.350 because it gives Respondent unlimited access to her hard drive and SIM card without satisfying the requirements of *Menke v. Broward County School Board,* 916 So.2d 8, 11-12 (Fla. 4th DCA 2005). In particular, she asserts that Respondent could examine every byte of information on the devices in contravention of her right of privacy and without regard to attorney-client or work-product privileges.

Petitioner also contends that the order violates rule 1.280(b)(5) because it ordered her to first relinquish possession of the hard drive and SIM card, rather than permitting her to review the information beforehand and produce the response herself. Further, the order allowed Respondent's computer expert to review the hard drive and SIM card outside the presence of

Petitioner's counsel, thereby depriving Petitioner of an opportunity to object and preserve her claims of privilege and right of privacy, resulting in irreparable harm. Lastly, she asserts that the trial court's order is unduly burdensome because it deprives her of her only telephone and computer for an undetermined period of time, which affects her ability to prepare for classes, take notes, research, and communicate ***955** with other students and faculty at Florida Atlantic University where she attends college.

Respondent contends that Petitioner thwarted discovery by failing to produce any documents responsive to her request, which therefore allows the requesting party to access the computer without first affording a review by the producing party. *See Menke,* 916 So.2d at 12, citing *Strasser v. Yalamanchi,* 669 So.2d 1142, 1145 (Fla. 4th DCA 1996). Further, Respondent suggests that the degree of irreparable harm Petitioner would allegedly suffer was minimal compared to the parties in *Menke, Strasser,* and *Rasmussen v. South Florida Blood Service,* 500 So.2d 533, 534 (Fla.1987).

[1] **[2]** This court has certiorari jurisdiction to review a discovery order that departs from the essential requirements of law by requiring disclosure of allegedly confidential information or discovery requests that are overbroad and thereby cause material injury to the petitioner throughout the remainder of the proceedings below, effectively leaving no adequate remedy on appeal. *Life Care Ctrs. of Am. v. Reese,* 948 So.2d 830 (Fla. 5th DCA 2007); *Wooten, Honeywell & Kest, P.A. v. Posner,* 556 So.2d 1245 (Fla. 5th DCA 1990). The irrelevancy of the discovery alone is not a basis for granting the extraordinary remedy of certiorari, "unless the disclosure 'may reasonably cause material injury of an irreparable nature.' " *State Farm Gen. Ins. Co. v. Grant,* 641 So.2d 949, 952 (Fla. 1st DCA 1994) (quoting *Allstate Ins. Co. v. Langston,* 627 So.2d 1178 (Fla. 4th DCA 1993)).

This case is very similar to *Menke,* 916 So.2d 8, where the court issued a writ of certiorari and quashed the trial court's order to produce a party's computers. There, the trial court ordered a high school teacher, accused of exchanging sexually explicit emails with students and making derogatory comments regarding high school personnel, to produce all computers in his household for inspection by the school board's computer expert. The Fourth District described rule 1.350(a)(3) as "broad enough to encompass requests to examine a computer hard drive but only in limited and strictly controlled circumstances, acknowledging that unlimited access to anything on the computer would constitute irreparable harm, because it would expose confidential, privileged information to the opposing party." *Id.* at 11 (citing *Strasser,* 669 So.2d 1142). The court indicated that a search might be approved after the requesting party proved (1) evidence of any destruction of evidence or thwarting of discovery; (2) a likelihood the information exists on the devices; and (3) no less intrusive means exists of obtaining the information. *Id.* at 12. One alternative the court suggested would allow defendant's representative to physically access the computer system in the presence of plaintiff's representative under an agreed-upon set of procedures to test plaintiff's theory that it is possible to retrieve the information. *Id.* The court also said that "[w]here a need for electronically stored information is demanded, such searching should first be done by defendant so as to protect confidential information, unless, of course, there is evidence of data destruction designed to prevent the discovery of relevant evidence in the particular case." *Id.* at 12.

[3] In this case, there is no evidence of any destruction of evidence or thwarting of discovery.[2] Further, the request to produce ***956** sought the electronic media themselves, not specific information contained therein. Since Respondent asserts that the electronic media was sought as a "back-up" to the information sought in items 1. through 3. of the request to produce, the record demonstrates that a less intrusive means was already achieved as part of the compromise the parties reached. Items 1. through 3. requested the same information, *i.e.,* statements among the defendants and photographs taken regarding the incident for the same time period.

As such, that discovery request, subject to the parties' compromise, represents the less intrusive means to obtain the same discovery without violating Petitioner's rights and privileges. Further, the record does not show that Respondent made any request for Petitioner to first search the media so she could protect her confidential information.

The unlimited breadth of the trial court's order allows Respondent to review, without limit or time frame, all of the information on Petitioner's computer and mobile phone SIM card without regard to her constitutional right of privacy and the right against self-incrimination or privileges, including attorney-client, work product. Although the discovery Respondent seeks does not necessarily include medical records[3], such as those protected by the constitutional right of privacy in the *Rasmussen* and *Strasser* cases, Petitioner's asserted right against self-incrimination and right of privacy nonetheless enjoy protection. The court in *Menke* protected the petitioner's assertion of his rights to privacy and against self-incrimination in the face of an order allowing wholesale access to his personal computer that would expose confidential communications and matters extraneous to the litigation such as banking records.

The order permitting Respondent's expert to examine Petitioner's hard drive and SIM card did not protect against disclosure of confidential and privileged information and, therefore, caused irreparable harm. Because the order departed from the essential requirements of law and would cause material injury to Petitioner throughout the remainder of the proceedings below, effectively leaving no adequate remedy on appeal, we grant the petition for certiorari and quash the trial court's discovery order.

WRIT OF CERTIORARI GRANTED and ORDER QUASHED.

PALMER and EVANDER, JJ., concur.

Parallel Citations

35 Fla. L. Weekly D1018

Footnotes

1 Respondent's counsel informed the trial court that he had reached a compromise with Petitioner's counsel regarding items 1., 2., and 3. of the request to produce, which sought statements by Petitioner and other defendants regarding the incident and all photographs in her possession taken during the time period.

2 Respondent specifically declined a tampering order because Petitioner was not a threat to destroy evidence.

3 The broad production sought in this case might, in fact, produce medical records, banking records, and other confidential information in Petitioner's computer hard-drive.

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612 So.2d 549
Supreme Court of Florida.

POST-NEWSWEEK STATIONS, FLORIDA INC., The Miami Herald Publishing Company, News and Sun-Sentinel Company, and NBC Subsidiary (WTVJ-TV), Inc., Petitioners/Cross-Respondents,
v.
John DOE, et al., Respondents/Cross-Petitioners.

No. 78915. | Nov. 25, 1992.
| Rehearing Denied Feb. 16, 1993.

John Does, who were named on "client list" of an alleged prostitute, brought motions to restrict or limit public access to pretrial discovery materials in a criminal prostitution case. The Circuit Court, Broward County, John A. Fruseiante, J., refused to restrict or limit public access to pretrial discovery, and the John Does sought a writ of certiorari. The District Court of Appeal, 587 So.2d 526, affirmed, and certified the controlling questions as questions of great public importance. The Supreme Court, McDonald, J., held that: (1) John Does named on "client list" of alleged prostitute had standing in prostitution prosecution to seek an order which would deny the public and the press access to evidence revealing their names, and (2) John Does lacked a privacy interest in their names and addresses and therefore they failed to show good cause for prohibiting the disclosure to public of their names and addresses on witness list in prostitution prosecution.

Decision approved.

Barkett, C.J., filed a concurring opinion.

Kogan, J., filed a dissenting opinion.

West Headnotes (2)

[1] **Records**
Court Records

John Does named on "client list" of alleged prostitute had standing in prostitution prosecution to seek an order which would deny the public and the press access to evidence revealing their names after its disclosure to defendant during discovery. West's F.S.A. RCrP Rule 3.220(*l*, m).

14 Cases that cite this headnote

[2] **Records**
Court Records

John Does named on "client list" of alleged prostitute lacked a privacy interest in their names and addresses and therefore they failed to show good cause for prohibiting the disclosure to public of their names and addresses furnished on witness list in prostitution prosecution. West's F.S.A. § 119.011(3)(c) 5; West's F.S.A. RCrP Rule 3.220; West's F.S.A. Const. Art. 1, § 23.

12 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

McDONALD, Justice.

We review *Doe v. State,* 587 So.2d 526, 528-29 (Fla. 4th DCA1991), in which the district court certified the following questions:

> 1. IN A CRIMINAL PROCEEDING CHARGING A DEFENDANT WITH PROSTITUTION, DOES A NON-PARTY WHO CLAIMS A RIGHT OF PRIVACY IN DOCUMENTS HELD BY THE STATE ATTORNEY AS CRIMINAL INVESTIGATIVE INFORMATION HAVE STANDING TO SEEK AN ORDER OF THE TRIAL COURT WHICH WOULD DENY THE PUBLIC AND THE PRESS ACCESS TO EVIDENCE REVEALING

NAMES OF THE DEFENDANT'S CLIENTS WHEN PURSUANT TO THE DEFENDANT'S DISCOVERY MOTION THE STATE IS PREPARED TO DELIVER SAID EVIDENCE *550 TO THE DEFENDANTS AS REQUIRED BY FLORIDA RULE OF CRIMINAL PROCEDURE 3.220 AND WHICH UPON DELIVERY WOULD OTHERWISE RENDER THEM 'PUBLIC RECORDS' PURSUANT TO *BLUDWORTH V. PALM BEACH NEWSPAPERS, INC.*, 476 SO.2D 775 (FLA. 4TH DCA1985), *REV. DENIED*, 488 SO.2D 67 (FLA. 1986)?

2. IN A CRIMINAL PROCEEDING CHARGING A DEFENDANT WITH PROSTITUTION, DOES THE TRIAL COURT ABUSE ITS DISCRETION UNDER SECTION 119.011(3)(c) 5 OF THE PUBLIC RECORDS ACT IN DENYING CLOSURE OF DISCOVERY DOCUMENTS WHERE AN UNNAMED THIRD PARTY CLAIMS THAT RELEASE OF SUCH INFORMATION WOULD BE DEFAMATORY TO HIM AND WOULD INVADE HIS RIGHT OF PRIVACY BOTH UNDER THE ACT, ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION AND THE FEDERAL CONSTITUTION, AND THE TRIAL COURT FINDS THAT RELEASE OF THE INFORMATION WILL HARM THE THIRD PARTY?

We have jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution. We answer the first question in the affirmative and under the facts of this case answer the second question in the negative and approve the decision of the district court.

In July 1991, the Broward County Sheriff's Office investigated allegations that Kathy Willets and her husband, Deputy Sheriff Jeffrey Willets, were involved in a criminal prostitution scheme. On July 23, 1991, the police obtained a search warrant and searched the Willets' home. Various pieces of evidence were seized, including cassette tapes containing recorded telephone conversations, business cards of alleged customers of Kathy Willets, a Rolodex containing names and addresses, and other lists stating the names, amounts paid, and sexual notations regarding her customers.

The state charged Kathy Willets with one count of prostitution, Jeffrey Willets with one count of living off the proceeds of prostitution, and charged both with illegal wiretapping. On August 31, 1991, the Willets filed a discovery request under rule 3.220 of the Florida Rules of Criminal Procedure asking the state to turn over all of the material seized from their home, including the documents identifying the John Does. Numerous John Does, styled as interested parties/witnesses, filed a motion in the trial court to deny public access to pretrial discovery materials. [1] The trial court denied the Does' motion and declared that, once the state attorney provided the discovery documents to the Willets, the documents became records available for public inspection. When the state announced that it was prepared to disclose the material in its possession as required by rule 3.220, the Does moved for a stay of release of the discovery materials. The trial judge concluded that people named on the "client list" of a prostitute have no reasonable expectation of privacy as to their identity and ordered the release of the names and addresses contained in the documents. He reserved ruling, subject to an in-camera review, on whether other material or information should be released. The district court subsequently stayed the order, affirmed the trial court's decision, and certified the questions.

[1] Pursuant to rule 3.220(m), the Does have standing to challenge the release of the discovery materials. [2] Rule 3.220(m) provides that "[u]pon request of *any person,* the court may permit any showing of *551 cause for denial or regulation of disclosures, or any portion of such showing to be made in camera." (Emphasis added). In addition, rule 3.220(*l*) allows the court to restrict disclosure to protect a witness from "harassment, unnecessary inconvenience or invasion of privacy." Even though the Does are not parties named in the state's criminal action against the Willets, the broad language of rule 3.220 permits them to show cause for denying the disclosure of the discovery information at issue in the criminal proceeding. Therefore, we answer the first certified question in the affirmative.

[2] Our answer to the second certified question requires us to analyze the discovery information under the rubric of the rules of criminal procedure, the public records law, and the right to privacy. Rule 3.220 requires the state to disclose to the defendant, upon request, any tangible papers or objects which were obtained from or belonged to the accused. The state, which takes no position on the issue in this case, was prepared to comply with the Willets' discovery request when the Does sought a stay in the trial court. The media contends that the Public Records Act establishes a statutory right of access to the pretrial discovery information. The Does, on the other hand, argue that disclosure of the discovery information will violate their right of privacy and that the information should be exempted from the disclosure requirements of the public records law, chapter 119, Florida Statutes (1989).

Florida law clearly expresses that it is the policy of this state that all government records, with particular exemptions, shall be open for public inspection. § 119.01. Subsection 119.011(3)(c) provides an exemption for criminal investigative information developed for the prosecution of a criminal defendant. Pursuant to the statute, such information will not be accessible to the public until the information is given or required by law or agency rule to be given to the accused. § 119.011(3)(c)(5). Rule 3.220 requires the state to turn over the discovery information to the defendant. In *Florida Freedom Newspapers, Inc. v. McCrary,* 520 So.2d 32 (Fla.1988), we stated that, once the state gives the requested information to the defendant, pretrial discovery information attains the status of a public record. However, *McCrary* qualified the statutory right of access to public records by balancing it against the constitutional rights of a fair trial and due process. *Id.* at 36. Here, we also qualify the public's statutory right of access to pretrial discovery information by balancing it against the Does' constitutional right to privacy.

The Does bear the burden of proving that closure is necessary to prevent an imminent threat to their privacy rights. *Barron v. Florida Freedom Newspapers, Inc.,* 531 So.2d 113 (Fla.1988); *Miami Herald Publishing Co. v. Lewis,* 426 So.2d 1 (Fla.1982). The media argue that the Does have failed to satisfy the three-pronged test articulated in *Lewis,* and, therefore, they have failed to carry their burden to justify closure. Under *Lewis,* the party seeking closure must prove the following:

> 1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;
>
> 2. No alternatives are available, other than a change of venue, which would protect the defendant's right to a fair trial; and,
>
> 3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Id. at 6. The *Lewis* test balances a criminal defendant's rights to a fair trial against the public's right to disclosure in pretrial proceedings. We conclude, however, that the *Lewis* test is not applicable to the balancing of interests in the instant case. First, the *Lewis* test does not address the impact of public disclosure on a third party's right of privacy. Unlike the defendant in *Lewis,* the John Does have not been charged with any crime. Second, *Lewis* dealt with the closure of a pretrial hearing, not with the closure of pretrial discovery documents that are at issue in this case.

***552** The more appropriate standard that we choose to apply in the instant case was set forth by this Court in *Barron:*

> [C]losure of court proceedings or records should occur only when necessary (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest [e.g., national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) *to avoid substantial injury to innocent third parties* [e.g. to protect young witnesses from offensive testimony; to protect children in a divorce]; or (f) *to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.*

531 So.2d at 118 (emphasis supplied). The media oppose application of the *Barron* test because that case involved a common law right of access to judicial records rather than a statutory right of access. However, whether public access is afforded via a common law right or a statutory right, both the goals of opening government to public scrutiny and simultaneously protecting individuals from unwarranted government intrusion are served by application of the *Barron* standard.

Barron recognized that "it is generally the content of the subject matter" that determines whether a privacy interest exists that might override the public's right to inspect the records. *Id.* The Does assert that the materials at issue include intimate information relating to genital size and sexual performance. Although documents containing such information were seized from the Willets' home, the trial court limited its order to the release of only the names and addresses on the state's witness list. Therefore, the matter we address here is limited strictly to the names and addresses contained on the same list. [3]

According to the Does' reasoning, Florida's constitutional right to privacy protects them from having their names and addresses released to the public:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Art. I, § 23, Fla. Const. Since its adoption by the voters of Florida in 1980, the privacy amendment has provided the basis for protecting several types of information and activities from public disclosure. *In re T.W.,* 551 So.2d 1186 (Fla.1989) (woman's decision of whether to continue her pregnancy); *Rasmussen v. South Florida Blood Service, Inc.,* 500 So.2d 533 (Fla.1987) (confidential donor information concerning AIDS-tainted blood supply); *Florida Board of Bar Examiners re: Applicant,* 443 So.2d 71 (Fla.1983) (bar application questions concerning disclosure of psychiatric counseling). The privacy amendment has not been interpreted to protect names and addresses contained in public records, and we reject the Does' suggestion that the privacy right should be extended that far based on the facts of this case. The Does in the instant case had their names and addresses associated with a criminal prostitution scheme. Any right of privacy that the Does might have is limited by the circumstances under which they assert that right. *See Florida Board of Bar Examiners,* 443 So.2d at 74. The circumstances here do not afford them such a right. Because the Does' privacy rights are not implicated when they participate in a crime, we find that closure is not justified ***553** under *Barron.* [4]

Even though the names and addresses of people on the witness list of a criminal prosecution may be disclosed to the public, we emphasize that the public does not have a universal right to all discovery materials. Depending on the circumstances and the subject matter, discovery may "seriously implicate privacy interests of litigants and third parties." *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 35, 104 S.Ct. 2199, 2208, 81 L.Ed.2d 17 (1984). The purposes of criminal discovery are to narrow the issues of the case, to ascertain facts that will be relevant at trial, and to avail the parties of information that will avoid surprise tactics in the courtroom. *State v. Tascarella,* 580 So.2d 154 (Fla.1991). Discovery is not intended to be a vehicle for the media to use in its search for newsworthy information. This Court is wary of an outcome that will cause victims and witnesses to withhold valuable discovery information because they fear that personal information will be divulged without discretion. However, we also recognize that this state's open government policy requires that information be available for public inspection unless the information fits under a legislatively created exemption. [5] *Wait v. Florida Power & Light Co.,* 372 So.2d 420 (Fla.1979).

We are confident that the in-camera proceeding conducted by the trial judge protects any privacy interests of third parties like the John Does. The purpose of the in-camera inspection is to balance the privacy interests of the parties with the public's need to know the information. *State v. Burns,* 830 P.2d 1318 (Mont.1992). In addition to lending credence to the trial court's decision whether to release the information, the in-camera inspection also "helps dispel any cloud of public suspicion that might otherwise be suspended over governmental efforts to sustain secrecy *sua sponte.*" *Tribune Co. v. Public Records,* 493 So.2d 480, 484 (Fla. 2d DCA1986), *review denied,* 503 So.2d 327 (Fla.1987).

We hold that the trial judge did not abuse his discretion in concluding that the Does lacked a privacy interest in their names and addresses. Although the trial judge did not make a finding as to whether release of the information would be defamatory to the good name of a victim or witness, [6] our conclusion that the Does do not have a privacy interest in their names and addresses negates the need for such a factual determination.

For the reasons stated, we find that the Does have failed to show good cause for prohibiting the disclosure of the names and addresses on the witness list. We therefore approve the district court's decision affirming the trial court's order.

It is so ordered.

***554** OVERTON, SHAW, GRIMES and HARDING, JJ., concur.

BARKETT, C.J., concurs with an opinion.

KOGAN, J., dissents with an opinion.

BARKETT, Chief Justice, concurring.
I concur with the Court's holding that a full and proper in camera review should be sufficient to protect third parties

against violations of their constitutional right to privacy and, to the extent that they fall within the scope of section 119.011(3)(c)(5)(a), Florida Statutes (1989), to enforce their statutory right against defamatory disclosures.

KOGAN, Justice, dissenting.

In many years as a trial judge I personally had the opportunity to see a large number of cases in which unfounded innuendo, malicious gossip, and irrelevant speculation about private lives found their way into the State's discovery materials. There may be a case for allowing public access to such materials when they only affect the parties to the proceeding itself, public figures, or persons *actually charged* with a related crime. But the same conclusion is far less supportable when the material affects private persons who are not parties to the proceeding and are not charged with criminal wrongdoing.

The various John Does in this case are not presently charged with any crime. For all we know, any information about them now in the State's possession may be unfounded, distorted, or even contrived. There has been no information or indictment issued against them. That being the case, I cannot conclude that the public records laws ever were meant to subject at least some of these John Does to public scrutiny of their private lives. People have a constitutionally protected interest in their good names. Art. I, §§ 2, 9, Fla. Const.; *see, e.g., Ritter v. Board of Comm'rs,* 96 Wash.2d 503, 637 P.2d 940 (1981).

The Florida Constitution recognizes that people cannot be stripped of such an interest without good and just reason. Art. I, § 9, Fla. Const. We have recognized, as the majority notes, that the public records laws themselves allow courts to order that discovery documents be withheld if this is the only way to preserve other constitutional rights. *Florida Freedom Newspapers, Inc. v. McCrary,* 520 So.2d 32 (Fla.1988).

For these reasons, I dissent from the majority's analysis and conclusion. I would remand to the trial court for a determination of whether there is any legitimate public concern in the names, addresses, and other information contained in the State's discovery materials as to each John Doe. I strongly doubt that any legitimate public concern would exist with regard to private individuals not charged with a crime, although there could be a legitimate public interest if any of the material reflects on public figures or persons actually charged with a crime arising from this or a related case.

I am especially troubled by the majority's tacit assumption that people's interest in their good names evaporates merely because of unfounded, unproven, and possibly erroneous information that they have participated in criminal activity. Majority op. at 552-53. At the very least, I believe that private individuals have a right to require the State at least to commence a criminal prosecution against them before it can release scandalous material the State itself has collected alleging criminal wrongdoing. In effect, the majority authorizes the State to brand such persons as criminals without even offering them the procedural protections guaranteed by our Constitution or a forum for vindication. This is a process more reminiscent of Nathaniel Hawthorne's scarlet letter than modern constitutional law.

I also emphasize that the right to one's good name does not provide any basis for a person to refuse a lawful summons to appear at a deposition or testify at a trial. Rather, the right prohibits the news media and others from using a state-created method of gathering information as a means of prying into the personal lives of private individuals or of transforming unsubstantiated rumor into tabloid headlines. The State's own use of that information in *555 a lawful proceeding is another matter altogether, because the State's interest in enforcing its laws and investigating crime is compelling.

Parallel Citations

61 USLW 2392, 17 Fla. L. Weekly S715, 20 Media L. Rep. 2089

Footnotes

1 Five John Does initially submitted sworn affidavits in support of their motions for closure. The affidavits asserted that the affiants were "private" individuals and that release of the information would be defamatory to the Does' personal and professional reputations. All of the affidavits were identical in form and content, except for one which adds a paragraph stating that he sent a letter and his business card to Kathy Willets and spoke to her on the telephone, but claiming that he did not "meet Kathy Willets, travel to her house, or engage or attempt to engage in any illegal activity with her." Affidavit of John Doe, August 19, 1991.

2 The media conceded the Does' standing during oral arguments.

3 Because the trial court has not conducted an in-camera review of any information other than the names and addresses and because the trial court has not ruled on the disclosure of any other information, we do not address whether that information should be released. However, we note that the details of an individual's life dealing with noncriminal intimate associations fall within a protected zone of privacy. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

4 In *Rasmussen v. South Florida Blood Service, Inc.*, 500 So.2d 533 (Fla.1987), an AIDS victim served a subpoena on a blood donor organization requesting the names and addresses of blood donors who may have been the source of his disease. We held that the privacy interests of the blood donors and society's interest in maintaining a strong volunteer blood donation system outweighed the victim's interest in obtaining the information. Therefore, the victim was not entitled to the donors' names and addresses. Although the instant case involves the release of names and addresses, *Rasmussen* differs in two significant aspects. First, *Rasmussen* did not involve records subject to chapter 119, Florida Statutes (1989). Second, the instant case does not involve a policy consideration like that of protecting the blood donor system in *Rasmussen.*

5 For example, the legislature has chosen to exclude the following types of information from public inspection: communications between state employees and personnel in state agencies' employee assistance programs for substance abuse and other disorders, § 119.07(3)(b); examination answers of applicants for admission to The Florida Bar, § 119.07(3)(c); active criminal intelligence information and active criminal investigative information, § 119.07(3)(d); the identity of a victim of a sexual offense, § 119.07(3)(h); a criminal defendant's confession, § 119.07(3)(m); the work-product of an attorney representing a government agency or officer during the pendency of adversarial proceedings, § 119.07(3)(n); and "all public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law," § 119.07(3)(a).

6 Section 119.011(3)(c)(5), Florida Statutes (1989), provides an exemption from disclosure for documents that would "be defamatory to the good name of a victim or witness or would jeopardize the safety of such victim or witness."

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Declined to Follow by State ex rel. Brant v. Bank of America, Kan., September 28, 2001

477 So.2d 544
Supreme Court of Florida.

Clifton WINFIELD, Nigel Winfield, Nikki Winfield, a minor, By and Through her father and next friend Malcolm Winfield and Frank Marano, Petitioners,
v.
DIVISION OF PARI-MUTUEL WAGERING, DEPARTMENT OF BUSINESS REGULATION, Robert M. Smith, Jr., and Gary Rutledge, Respondents.

No. 64793. | Oct. 10, 1985.

Department of Business Regulation and the Division of Pari-Mutuel Wagering subpoenaed without notice bank records of citizens who were subjects of investigation, and citizens filed for declaratory and injunctive relief in the Circuit Court, which granted the relief. Department appealed. The District Court of Appeal, 443 So.2d 455, ruled in favor of Department and certified questions as being of great public importance. The Supreme Court, Adkins, J., held that: (1) compelling state interest standard is appropriate standard of review in assessing a claim of unconstitutional governmental intrusion under right to privacy provision of Constitution; (2) state law recognizes an individual's legitimate expectation of privacy in financial institution records; (3) state's interest in conducting effective investigation in pari-mutuel industry is a compelling state interest; (4) Department's issuance of subpoenas to various banks to obtain banking records of citizens without giving notice was least intrusive means to achieve compelling state interest; (5) predisclosure notification by a bank to its customers of release of banking records is not mandated by right to privacy provision of Constitution; and (6) Department's subpoenaing of all bank records of citizens under investigation did not constitute an impermissible and unbridled exercise of legislative power.

So ordered.

McDonald, J., concurred in result only.

West Headnotes (9)

[1] **Constitutional Law**
Compelling Interest
92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1217 Compelling Interest
(Formerly 92k82(7))
Compelling state interest standard is appropriate standard of review in assessing a claim of unconstitutional governmental intrusion into one's privacy rights under West's F.S.A. Const. Art. 1, § 23, and shifts burden of proof to state to justify an intrusion on privacy; burden can be met by demonstrating that challenged regulation serves a compelling state interest and accomplishes its goal through use of least intrusive means.

69 Cases that cite this headnote

[2] **Constitutional Law**
Absolute, Inviolable, or Unlimited Nature
Constitutional Law
Compelling Interest
92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1214 Absolute, Inviolable, or Unlimited Nature
(Formerly 92k82(7))
92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1217 Compelling Interest
(Formerly 92k82(7))
Right of privacy does not confer a complete immunity from governmental regulation and will yield to compelling governmental interests.

17 Cases that cite this headnote

[3] **Constitutional Law**
Reasonable, Justifiable, or Legitimate Expectation

92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1215 Reasonable, Justifiable, or Legitimate Expectation
(Formerly 92k82(7))

Before right of privacy is attached and delineated standard applied, a reasonable expectation of privacy must exist.

18 Cases that cite this headnote

[4] **Constitutional Law**
Relation Between State and Federal Rights

92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1211 Relation Between State and Federal Rights
(Formerly 92k82(7))

Right of privacy contained in West's F.S.A. Const. Art. 1, § 23 is much broader in scope than that of Federal Constitution.

6 Cases that cite this headnote

[5] **Banks and Banking**
Depositors' Passbooks and Accounts

Privileged Communications and Confidentiality
Bank and Customer; Bank Records

52 Banks and Banking
52III Functions and Dealings
52III(C) Deposits
52k151 Depositors' Passbooks and Accounts
311H Privileged Communications and Confidentiality
311HVII Other Privileges
311Hk407 Bank and Customer; Bank Records

State law recognizes an individual's legitimate expectation of privacy in financial institution records. West's F.S.A. Const. Art. 1, § 23.

21 Cases that cite this headnote

[6] **Banks and Banking**
Depositors' Passbooks and Accounts

52 Banks and Banking
52III Functions and Dealings
52III(C) Deposits
52k151 Depositors' Passbooks and Accounts

State's interest in conducting effective investigations in the pari-mutuel industry is a compelling state interest when regarded in connection with individual's right of privacy in their banking records.

5 Cases that cite this headnote

[7] **Banks and Banking**
Depositors' Passbooks and Accounts

52 Banks and Banking
52III Functions and Dealings
52III(C) Deposits
52k151 Depositors' Passbooks and Accounts

Department of Business Regulation and the Division of Pari-Mutuel Wagering's issuance of subpoenas duces tecum to various banks to obtain banking records of citizens pursuant to an investigation without giving notice to citizens and asking banks not to inform citizens of the investigation was least intrusive means to achieve compelling state interest in conducting effective investigations in pari-mutuel industry when regarded in connection with an individual's right of privacy in their banking records. West's F.S.A. Const. Art. 1, § 23.

27 Cases that cite this headnote

[8] **Banks and Banking**
Depositors' Passbooks and Accounts

52 Banks and Banking

52III Functions and Dealings
52III(C) Deposits
52k151 Depositors' Passbooks and Accounts
Predisclosure notification by a bank to its customers of release of customer's bank records is not mandated by right to privacy provision of State Constitution. West's F.S.A. Const. Art. 1, § 23.

3 Cases that cite this headnote

[9] **Administrative Law and Procedure**
Subpoenas Duces Tecum
15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(B) Investigations
15Ak356 Witnesses
15Ak358 Subpoenas Duces Tecum
Department of Business Regulation and the Division of Pari-Mutuel Wagering's subpoenaing of all bank records of citizens who were subject of investigation did not constitute an impermissible and unbridled exercise of legislative power under facts of case, where subpoenas in question were reasonably calculated to obtain information relevant to state investigation.

4 Cases that cite this headnote

Attorneys and Law Firms

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Elliot H. Henslovitz, Miami, for respondents.

Jim Smith, Atty. Gen., David K. Miller, Chief Counsel and John Miller, Asst. Atty. Gen., Dept. of Legal Affairs, Economic Crime Litigation Unit, Tallahassee, for Atty. Gen., amicus curiae.

Opinion

ADKINS, Justice.

This cause is before us for review of two questions certified by the Fourth District Court of Appeal to be of great public importance. *Division of Pari-Mutuel Wagering,* *546 *Department of Business Regulation v. Winfield,* 443 So.2d 455 (Fla. 4th DCA 1984). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

The Department of Business Regulation and the Division of Pari-Mutuel Wagering, respondents, issued subpoenas duces tecum to various banking institutions to obtain banking records of the accounts of Nigel Winfield and Malcolm Winfield, petitioners. Respondents gave no notice of the subpoenas to petitioners and asked the banks not to inform petitioners of the investigation.

Petitioners filed for declaratory and injunctive relief against the subpoenas duces tecum alleging that the subpoenas were facially invalid, that they violated petitioners' constitutional right to privacy and due process, and that maintenance of the records as public records in the respondent's files constituted an additional violation of their constitutional right to privacy. The circuit court found that respondents had probable cause to institute the investigation, and that it had acted within its authority. The court nevertheless granted petitioners relief on the grounds that their constitutional privacy rights would be violated if the subpoenaed records became public records in the hands of respondents pursuant to chapter 119, Florida Statutes. The court thereupon confirmed a previous interlocutory order in effect restraining respondents from inspecting, copying or using the records or the information contained in them, and directing that the records be maintained under court seal. Appeal was taken to the district court which ruled in favor of respondents and certified the following questions to this Court as being of great public importance:

I. Does article I, section 23 of the Florida Constitution prevent the Division of Pari-Mutuel Wagering from subpoenaing a Florida citizen's bank records without notice?

II. Does the subpoenaing of *all* of a citizen's bank records under the facts of this case constitute an

impermissible and unbridled exercise of legislative power?

443 So.2d at 457. We answer both questions in the negative and approve the decision of the district court.

The concept of privacy or right to be let alone is deeply rooted in our heritage and is founded upon historical notions and federal constitutional expressions of ordered liberty. Justice Brandeis, sometimes called the father of the idea of privacy, recognized this fundamental right of privacy when he wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect.... They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

The United States Supreme Court has fashioned a right of privacy which protects the decision-making or autonomy zone of privacy interests of the individual. The Court's decisions include matters concerning marriage, procreation, contraception, family relationships and child rearing, and education. *Roe v. Wade,* 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147 (1973). Other privacy interests enunciated by the Court in *Nixon v. Administrator of General Services,* 433 U.S. 425, 97 S.Ct. 277, 53 L.Ed.2d 867 (1977), and *Whalen v. Roe,* 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1976), involve one's interest in avoiding the public disclosure of personal matters. However, *Nixon, Whalen,* and those cases involving the autonomy zone of privacy are not directly applicable to the case at bar.

Likewise, the decision of the Third District Court of Appeal in *Milohnich v. First National Bank,* 224 So.2d 759 (Fla. 3d DCA 1969), does not apply to the case before us. In that case, the court held that ***547** the complaint was sufficient to state a cause of action for breach by a bank of an implied contractual duty to its depositor by negligently, intentionally, willfully or maliciously disclosing information concerning a depositor's accounts to a private third party. *Id.* at 762. In *Milohnich,* the court clearly stated that it was dealing with the bank's liability only and not with disclosures required by the government or under compulsion of law. *Id.*

In formulating privacy interests, the Supreme Court has given much of the responsibility to the individual states. *Katz v. United States,* 389 U.S. 347, 350-51, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). Thus, on November 4, 1980, the voters of Florida approved article I, section 23, thereby adding a new privacy provision to the Florida Constitution. Article I, section 23 provides:

> Right of privacy.-Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

[1] Heretofore, we have not enunciated the appropriate standard of review in assessing a claim of unconstitutional governmental intrusion into one's privacy rights under article I, section 23. Since the privacy section as adopted contains no textual standard of review, it is important for us to identify an explicit standard to be applied in order to give proper force and effect to the amendment. The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. *See Roe v. Wade,* 410 U.S.

113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *In re Estate of Greenberg,* 390 So.2d 40 (Fla.1980).

[2] Although we choose a strong standard to review a claim under article I, section 23, "this constitutional provision was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual." *Florida Board of Bar Examiners Re: Applicant,* 443 So.2d 71, 74 (Fla.1983). The right of privacy does not confer a complete immunity from governmental regulation and will yield to compelling governmental interests.

[3] However, before the right of privacy is attached and the delineated standard applied, a reasonable expectation of privacy must exist. Thus, implicit within the question of whether article I, section 23 of the Florida Constitution prevents the Division of Pari-Mutuel Wagering from subpoenaing a Florida citizen's bank records without notice, is the threshold question of whether the law recognizes an individual's legitimate expectation of privacy in financial institution records.

The United States Supreme Court addressed the threshold question in *United States v. Miller,* 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976), where it held that bank records, subpoenaed by the government without notice to a depositor under investigation, did not fall within a protected zone of privacy and were not "private papers" protected by the Fourth Amendment. *Id.* at 440, 96 S.Ct. at 1622-23. In reaching its conclusion, the Court further noted that there is no legitimate "expectation of privacy" in the contents of original checks and deposit slips in the possession of a bank. *Id.* at 442, 96 S.Ct. at 1623-24. However, as previously noted, the United States Supreme Court has also made it absolutely clear that the states, not the federal government, are responsible for the protection of personal privacy: "the protection of a person's general right to privacy-his right to be let alone by other people-is, like the protection of his property and of his very life, left largely to the law of the individual States." *Katz v. United States,* 389 U.S. 347, 350-51, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). This ***548** Court accepted that responsibility of protecting the privacy interests of Florida citizens when we stated that "the citizens of Florida, through their state constitution, may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution." *State v. Sarmiento,* 397 So.2d 643, 645 (1981).

[4] The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

[5] [6] [7] [8] This is a case of first impression in the state of Florida; therefore, it is within the discretion of this Court to decide the limitations and latitude afforded article I, section 23. We believe that the amendment should be interpreted in accordance with the intent of its drafters. Thus, we find that the law in the state of Florida recognizes an individual's legitimate expectation of privacy in financial institution records. However, we further find that the state's interest in conducting effective investigations in the pari-mutuel industry is a compelling state interest and that the least intrusive means was employed to achieve that interest. We also note that predisclosure notification by a bank to its customers should not be and is not mandated by article I, section 23. Thus, we hold that article I, section 23, of the Florida Constitution does not prevent the Division of Pari-Mutuel wagering from subpoenaing a Florida citizen's bank records without notice.

[9] Concerning the second certified question, we believe that the information sought by the government was essential to its inquiry. To ensure that it has all of the information necessary for a complete investigation, the agency rather than the bank or depositor must calculate what is and what is not relevant. The subpoenas in question were reasonably calculated to

obtain information relevant to a state investigation. There is nothing in the record to support a contrary finding. Thus, we hold that the subpoenaing of all of a citizen's bank records under the facts of this case does not constitute an impermissible and unbridled exercise of legislative power.

It is so ordered.

BOYD, C.J., and OVERTON, EHRLICH and SHAW, JJ., concur.

McDONALD, J., concurs in result only.

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2015 WL 71726
District Court of Appeal of Florida,
Fourth District.

Maria F. Leon **NUCCI** and Henry Leon, her husband, Petitioners,
v.
TARGET CORPORATION, American Cleaning Contracting, Inc., and First Choice Building Maintenance, Inc., Respondents.

No. 4D14–138. | Jan. 7, 2015.

Synopsis

Background: Customer brought personal injury action against retail store alleging that she slipped and fell on foreign substance on floor. The Seventeenth Judicial Circuit Court, Broward County, John J. Murphy, III, J., compelled discovery of photographs from customer's social media accounts. Customer petitioned for writ of certiorari.

Holdings: The District Court of Appeal, Gross, J., held that:

[1] order compelling discovery of photographs depicting customer from two years prior to date of her alleged slip and fall to the present was reasonably calculated to lead to the discovery of admissible evidence;

[2] relevance of photographs outweighed any privacy interests despite fact that general public could not access them; and

[3] federal Stored Communications Act (SCA) did not apply to prevent discovery of photographs.

Petition denied.

West Headnotes (17)

[1] **Certiorari**
Existence of Remedy by Appeal or Writ of Error

Certiorari
Particular proceedings in civil actions

73 Certiorari
73I Nature and Grounds
73k5 Existence of Remedy by Appeal or Writ of Error
73k5(1) In general
73 Certiorari
73I Nature and Grounds
73k11 Decisions and Proceedings of Courts, Judges, and Judicial Officers
73k17 Particular proceedings in civil actions

To be entitled to certiorari review of a discovery order, the petitioner must establish three elements: (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.

Cases that cite this headnote

[2] **Certiorari**
Particular proceedings in civil actions

Certiorari
Quashing or dismissal

73 Certiorari
73I Nature and Grounds
73k11 Decisions and Proceedings of Courts, Judges, and Judicial Officers
73k17 Particular proceedings in civil actions
73 Certiorari
73II Proceedings and Determination
73k60 Quashing or dismissal

If a petitioner fails to make a threshold showing of irreparable harm in a petition for certiorari review of a discovery order, the District Court of Appeal lacks jurisdiction and will dismiss the petition.

Cases that cite this headnote

[3] **Certiorari**

Particular proceedings in civil actions

73 Certiorari
73I Nature and Grounds
73k11 Decisions and Proceedings of Courts, Judges, and Judicial Officers
73k17 Particular proceedings in civil actions

Overbreadth of discovery alone is not a basis for certiorari jurisdiction to review a discovery order.

Cases that cite this headnote

[4] **Certiorari**

Particular proceedings in civil actions

73 Certiorari
73I Nature and Grounds
73k11 Decisions and Proceedings of Courts, Judges, and Judicial Officers
73k17 Particular proceedings in civil actions

Mere irrelevance of discovery is not enough to justify certiorari relief from a discovery order.

Cases that cite this headnote

[5] **Certiorari**

Particular proceedings in civil actions

73 Certiorari
73I Nature and Grounds
73k11 Decisions and Proceedings of Courts, Judges, and Judicial Officers
73k17 Particular proceedings in civil actions

Certiorari may be granted from a discovery order where a party affirmatively establishes that the private information at issue is not relevant to any issue in the litigation and is not reasonably calculated to lead to admissible evidence.

Cases that cite this headnote

[6] **Pretrial Procedure**

Relevancy and materiality

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak31 Relevancy and materiality

The concept of relevancy has a much wider application in the discovery context than in the context of admissible evidence at trial. West's F.S.A. RCP Rule 1.280(b)(1).

Cases that cite this headnote

[7] **Certiorari**

Discretion as to grant of writ

Certiorari

Errors and irregularities

73 Certiorari
73I Nature and Grounds
73k9 Discretion as to grant of writ
73 Certiorari
73I Nature and Grounds
73k29 Errors and irregularities

District Court of Appeal should exercise discretion to grant certiorari relief only where the petitioner has shown that there has been a violation of clearly established principle of law resulting in a miscarriage of justice.

Cases that cite this headnote

[8] **Certiorari**

Discretion as to grant of writ

Certiorari

Errors and irregularities

73 Certiorari
73I Nature and Grounds
73k9 Discretion as to grant of writ
73 Certiorari
73I Nature and Grounds
73k29 Errors and irregularities

An error must be serious to merit certiorari relief; even where a departure from the essential requirements of law is shown, the District Court of Appeal may still deny the petition, as certiorari relief is discretionary.

Cases that cite this headnote

[9] **Appeal and Error**
Depositions, affidavits, or discovery
Pretrial Procedure
Discretion of court

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k961 Depositions, affidavits, or discovery
307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak19 Discretion of court

A trial court is given wide discretion in dealing with discovery matters, and unless there is a clear abuse of that discretion, the appellate court will not disturb the trial court's order.

Cases that cite this headnote

[10] **Pretrial Procedure**
Documents, papers, and books in general
Pretrial Procedure
Photographs; X rays; sound recordings

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land
307AII(E)3 Particular Documents or Things
307Ak371 Documents, papers, and books in general
307A Pretrial Procedure
307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land
307AII(E)3 Particular Documents or Things
307Ak383 Photographs; X rays; sound recordings

Order compelling discovery of photographs from customer's social media accounts depicting her from two years prior to date of her alleged slip and fall inside retail store to the present was reasonably calculated to lead to the discovery of admissible evidence in customer's personal injury action against store; photographs she chose to share on social media were equivalent of a "day in the life" slide show produced by customer prior to existence of any motive to manipulate reality and were powerfully relevant to issue of damages, relevance was enhanced due to post-accident surveillance videos suggesting that customer's injury claims were suspect and that she may not have given an accurate report of her pre-accident life or quality of life since then, order was not overly broad, and photographs were easily accessed and existed in electronic form. West's F.S.A. RCP Rules 1.280(b)(1), 1.350(a).

Cases that cite this headnote

[11] **Pretrial Procedure**
Documents, papers, and books in general
Pretrial Procedure
Photographs; X rays; sound recordings

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land
307AII(E)3 Particular Documents or Things
307Ak371 Documents, papers, and books in general
307A Pretrial Procedure
307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land
307AII(E)3 Particular Documents or Things
307Ak383 Photographs; X rays; sound recordings

Relevance of photographs from customer's account on social networking site depicting her from two years prior to date of her alleged slip and fall inside retail store to the present outweighed any privacy interests in photographs in her personal injury action against

store, despite fact that privacy setting on account prevented general public from accessing it since its creation; customer had no justifiable expectation that persons she allowed to access account would keep its contents private, customer acknowledged that her personal information would be shared with others when she created account, and order compelling production of photographs was narrow in scope and calculated to lead to the discovery of admissible evidence. West's F.S.A. Const. Art. 1, § 23; West's F.S.A. RCP Rules 1.280(b)(1), 1.350(a).

Cases that cite this headnote

[12] **Constitutional Law**
Relation between state and federal rights

92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1211 Relation between state and federal rights
Right of privacy under State Constitution is broader than the right to privacy implied in the Federal Constitution. West's F.S.A. Const. Art. 1, § 23.

Cases that cite this headnote

[13] **Constitutional Law**
Reasonable, justifiable, or legitimate expectation

92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1215 Reasonable, justifiable, or legitimate expectation
Before the right to privacy attaches under the State Constitution, there must exist a legitimate expectation of privacy. West's F.S.A. Const. Art. 1, § 23.

Cases that cite this headnote

[14] **Constitutional Law**
Particular Issues and Applications

Constitutional Law
Compelling interest

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1032 Particular Issues and Applications
92k1033 In general
92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1217 Compelling interest
Once a legitimate expectation of privacy is shown, as required for the right to privacy to attach under the State Constitution, the burden is on the party seeking disclosure to show the invasion is warranted by a compelling interest and that the least intrusive means are used. West's F.S.A. Const. Art. 1, § 23.

Cases that cite this headnote

[15] **Constitutional Law**
Discovery

92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1227 Records or Information
92k1229 Discovery
When a litigant asserts a right to privacy under the State Constitution in the civil discovery context, courts must engage in a balancing test, weighing the need for the discovery against the privacy interests; if the litigant 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. West's F.S.A. Const. Art. 1, § 23.

Cases that cite this headnote

[16] **Constitutional Law**
Telecommunications

92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1227 Records or Information
92k1236 Telecommunications
Generally, photographs posted on a social networking site are neither privileged from discovery in a civil action nor protected by any right of privacy, regardless of any privacy settings that the user may have established. West's F.S.A. Const. Art. 1, § 23.

Cases that cite this headnote

[17] **Telecommunications**
Computer communications
372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1439 Computer communications
Stored Communications Act (SCA) did not apply to prevent discovery of photographs from customer's account on social media networking site depicting her from two years prior to date of her alleged slip and fall inside retail store to the present, in customer's personal injury action against store; SCA did not apply to individuals who used communication services. 18 U.S.C.A. § 2701 et seq.

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

GROSS, J.

***1** In a personal injury case, Maria **Nucci** petitions for certiorari relief to quash a December 12, 2013 order compelling discovery of photographs from her Facebook account. The photographs sought were reasonably calculated to lead to the discovery of admissible evidence and **Nucci's** privacy interest in them was minimal, if any. Because the discovery order did not amount to a departure from the essential requirements of law, we deny the petition.

In her personal injury lawsuit, **Nucci** claimed that on February 4, 2010, she slipped and fell on a foreign substance on the floor of a **Target** store. In the complaint, she alleged the following:

- Suffered bodily injury
- Experienced pain from the injury
- Incurred medical, hospital, and nursing expenses, suffered physical handicap
- Suffered emotional pain and suffering
- Lost earnings
- Lost the ability to earn money
- Lost or suffered a diminution of ability to enjoy her life
- Suffered aggravation of preexisting injuries
- Suffered permanent or continuing injuries
- Will continue to suffer the losses and impairment in the future

Target took **Nucci's** deposition on September 4, 2013. Before the deposition, **Target's** lawyer viewed **Nucci's** Facebook profile and saw that it contained 1,285 photographs. At the deposition, **Nucci** objected to disclosing her Facebook photographs. **Target's** lawyer examined **Nucci's** Facebook profile two days after the deposition and saw that it listed only 1,249 photographs. On September 9, 2013, **Target** moved to compel inspection of **Nucci's** Facebook profile. **Target** wrote to **Nucci** and asked that she not

destroy further information posted on her social media websites. Target argued that it was entitled to view the profile because Nucci's lawsuit put her physical and mental condition at issue.

Nucci's response to the motion explained that, since its creation, her Facebook page had been on a privacy setting that prevented the general public from having access to her account. She claimed that she had a reasonable expectation of privacy regarding her Facebook information and that Target's access would invade that privacy right. In addition, Nucci argued that Target's motion was an overbroad fishing expedition.

On October 17, 2013, the trial court conducted a hearing on Target's motion to compel. At the hearing, Target showed the court photographs from a surveillance video in which Nucci could be seen walking with two purses on her shoulders or carrying two jugs of water. Again, Target argued that because Nucci had put her physical condition at question, the relevancy of the Facebook photographs outweighed Nucci's right to privacy. It also argued that there was no constitutional right to privacy in photographs posted on Facebook. The circuit court denied Target's motion to compel, in part because the request was "vague, overly broad and unduly burdensome."

Target responded to the court's ruling by filing narrower, more focused discovery requests. Target served Nucci with a set of Electronic Media Interrogatories, with four questions. It also served a Request for Production of Electronic Media, requesting nine items. In response to the interrogatories, Nucci objected on the grounds of (1) privacy; (2) items not readily accessible; and (3) relevance.

*2 As to the Request for Production, Nucci raised the same three objections and additionally argued that the request was (4) overbroad; (5) brought solely to harass; (6) "over[ly] burdensome;" (7) "unduly burdensome"; and (9) unduly vague. Nucci raised only these general claims and no objections specifically directed at any particular photograph.

Target moved that the trial court disallow Nucci's objections. At a hearing on the motion, Target conceded that its request for production should be limited to photographs depicting Nucci. After a hearing on the motion, the trial court granted Target's motion in part and denied it in part. On December 12, 2013, the trial court compelled answers to the following interrogatories:

1. Identify all social/professional networking websites that Plaintiff is registered with currently (such as Facebook, MySpace, LinkedIn, Meetup.com, MyLife, etc.)

2. Please list the number and service carrier associated with each cellular telephone used by the Plaintiff and/or registered in the Plaintiff's name (this includes all numbers registered to and/or used by the Plaintiff under a "family plan" or similar service) at the time of loss and currently.

The order also compelled production of the following items:

1. For each social networking account listed in response to the interrogatories, please ***provide copies or screenshots of all photographs associated with that account during the two (2) years prior to the date of loss.***

2. For each social networking account listed in the interrogatories, provide ***copies or screenshots of all photographs associated with that account from the date of loss to present.***

3. For each cell phone listed in the interrogatories, please provide ***copies or screenshots of all photographs associated with that account during the two years prior to the date of loss.***

4. For each cellular phone listed in response to the interrogatories, please provide ***copies or screenshots of all photographs associated with that account from the date of loss to present.***

5. For each cellular phone listed in the interrogatories, please provide ***copies of any documentation outlining what calls were made or received on the date of loss.***

Nucci argues that the December 12 order departs from the essential requirements of the law because it constitutes an invasion of privacy. [1] Citing to *Salvato*

v. Miley, No. 5:12–CV–635–Oc–10PRL, 2013 WL 2712206 (M.D.Fla. June 11, 2013), which involved a request for e-mails and text messages, she contends that "the mere hope" that the discovery yields relevant evidence is not enough to warrant production. She also argues that the traditional rules of relevancy still apply to a request for social media materials. **Nucci** additionally asserts that her activation of privacy settings demonstrates an invocation of federal law. *See Ehling v. Monmouth–Ocean Hosp. Serv. Corp.*, 961 F.Supp.2d 659, 665 (D.N.J.2013). Relying upon *Ehling*, **Nucci** argues that her private Facebook posts were covered by the Federal Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701–2712, and were not therefore discoverable. We note that **Nucci** objected below to *all* disclosure; she did not attempt to limit disclosure of the photographs by establishing discrete guidelines. *See Reid v. Ingerman Smith LLP*, No. CV 2012–0307(ILG)(MDG), 2012 WL 6720752, at *2 (E.D.N.Y. Dec. 27, 2012); *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 436 (S.D.Ind.2010).

***3** In its response, **Target** points out, as it did below, that surveillance videos show **Nucci** carrying heavy bags, jugs of water, and doing other physical acts, suggesting that her claim of serious personal injury is suspect.

Target suggests that the material ordered is relevant to **Nucci's** claim of injury in that it allows a comparison of her current physical condition and limitations to her physical condition and quality of life before the date of the slip and fall. In its response to this Court, **Target** concedes that the order is limited to photographs depicting **Nucci** from the two years before the date of the incident to the present. It argues that the trial court did not grant unfettered access because it did not compel the production of passwords to her social networking accounts.

As to material injury or harm, **Target** points out that **Nucci** has not claimed that production of any particular photograph or other identifiable material will cause her damage or embarrassment. Citing to *Davenport v. State Farm Mutual Automobile Insurance Co.*, No. 3:11–cv–632–J–JBT, 2012 WL 555759 (M.D.Fla. Feb. 21, 2012), **Target** contends that the content of social networking sites is not privileged or protected by the right to privacy. It notes that Facebook's terms and conditions explain that, regardless of a user's intentions, the material contained in a post could be disseminated by Facebook at its discretion or under court order.

Finally, **Target** argues that in the context of a civil lawsuit, Florida courts can compel a party to release relevant records from social networking sites without implicating or violating the SCA.

Discussion

This case stands at the intersection of a litigant's privacy interests in social media postings and the broad discovery allowed in Florida in a civil case. Consideration of four factors leads to the conclusion that **Nucci's** petition for certiorari should be denied. First, certiorari relief is available in only a narrow class of cases and this case does not meet the stringent requirements for certiorari relief. Second, the scope of discovery in civil cases is broad and discovery rulings by trial courts are reviewed under an abuse of discretion standard. Third, the information sought—photographs of **Nucci** posted on **Nucci's** social media sites—is highly relevant. Fourth, **Nucci** has but a limited privacy interest, if any, in pictures posted on her social networking sites.

Nucci's petition challenges only the discovery of photographs from social networking sites, such as Facebook. Thus, the order compelling the answers to interrogatories and production pertaining to a cellular phone are not at issue. Similarly, our ruling in this case covers neither communications other than photographs exchanged through electronic means nor access to other types of information contained on social networking sites.

Legal Standard for Certiorari

[1] **[2]** Certiorari is not available to review every erroneous discovery ruling. To be entitled to certiorari, the petitioner must establish three elements: " '(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.' " *Williams v. Oken*, 62 So.3d 1129, 1132

(Fla.2011) (quoting *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So.2d 812, 822 (Fla.2004)). The last two elements, often referred to as "irreparable harm," are jurisdictional. If a petition fails to make a threshold showing of irreparable harm, this Court will dismiss the petition. *Bared & Co., Inc. v. McGuire*, 670 So.2d 153, 157 (Fla. 4th DCA 1996).

*4 [3] [4] [5] [6] Overbreadth of discovery alone is not a basis for certiorari jurisdiction. *Bd. of Trs. of Internal Improvement Trust Fund v. Am. Educ. Enters., LLC*, 99 So.3d 450, 456 (Fla.2012). Similarly, mere irrelevance is not enough to justify certiorari relief. Certiorari may be granted from a discovery order where a party "affirmatively establishes" that the private information at issue is not relevant to any issue in the litigation and is not reasonably calculated to lead to admissible evidence. *Id.* at 457 (quoting *Allstate Ins. Co. v. Langston*, 655 So.2d 91, 95 (Fla.1995)); *see also Berkeley v. Eisen*, 699 So.2d 789 (Fla. 4th DCA 1997) (granting certiorari relief to protect privacy rights of non-parties to litigation). "The concept of relevancy has a much wider application in the discovery context than in the context of admissible evidence at trial." *Bd. of Trs.*, 99 So.3d at 458.

[7] [8] Certiorari relief is discretionary, but this Court should exercise this discretion only where the party has shown that " 'there has been a violation of clearly established principle of law resulting in a miscarriage of justice.' " *Williams*, 62 So.3d at 1133 (quoting *Haines City Cmty. Dev. v. Heggs*, 658 So.2d 523, 527 (Fla.1995)). The error must be serious to merit certiorari relief. Even where a departure from the essential requirements of law is shown, this Court may still deny the petition as certiorari relief is discretionary. *Id.*

The Broad Scope of Discovery

[9] 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). "It is not ground 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.* (emphasis added). Florida Rule of Civil Procedure 1.350(a) includes electronically stored information within the scope of discovery.[2] An outer limit of discovery is that " 'litigants are not entitled to *carte blanche* discovery of irrelevant material.' " *Life Care Ctrs. of Am. v. Reese*, 948 So.2d 830, 832 (Fla. 5th DCA 2007) (quoting *Tanchel v. Shoemaker*, 928 So.2d 440, 442 (Fla. 5th DCA 2006)). Because the permissible scope of discovery is so broad, a "trial court is given wide discretion in dealing with discovery matters, and unless there is a clear abuse of that discretion, the appellate court will not disturb the trial court's order." *Alvarez v. Cooper Tire & Rubber Co.*, 75 So.3d 789, 793 (Fla. 4th DCA 2011) (direct appeal of discovery issue). It is because of this wide discretion accorded to trial judges that it is difficult to establish certiorari jurisdiction of discovery orders.

[10] In a personal injury case where the plaintiff is seeking intangible damages, the fact-finder is required to examine the quality of the plaintiff's life before and after the accident to determine the extent of the loss. From testimony alone, it is often difficult for the fact-finder to grasp what a plaintiff's life was like prior to an accident. It would take a great novelist, a Tolstoy, a Dickens, or a Hemingway, to use words to summarize the totality of a prior life. If a photograph is worth a thousand words, there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media before the occurrence of an accident causing injury. Such photographs are the equivalent of a "day in the life" slide show produced by the plaintiff before the existence of any motive to manipulate reality. The photographs sought here are thus powerfully relevant to the damage issues in the lawsuit. The relevance of the photographs is enhanced, because the post-accident surveillance videos of **Nucci** suggest that her injury claims are suspect and that she may not be an accurate reporter of her pre-accident life or of the quality of her life since then. The production order is not overly broad under the circumstances, as it is limited to the two years prior to the incident up to the present; the photographs sought are easily accessed and exist in electronic form, so compliance with the order is not onerous.

The Right of Privacy

*5 [11] To curtail the broad scope of discovery allowed in civil litigation, Nucci asserts a right of privacy. However, the relevance of the photographs overwhelms Nucci's minimal privacy interest in them.

[12] The Florida Constitution expressly protects an individual's right to privacy. *See* Art. I, § 23, Fla. Const. ("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."). This right is broader than the right to privacy implied in the Federal Constitution. *Berkeley*, 699 So.2d at 790. The right to privacy in the Florida Constitution "ensures that individuals are able 'to determine for themselves when, how and to what extent information about them is communicated to others.' " *Shaktman v. State*, 553 So.2d 148, 150 (Fla.1989) (quoting A. Westin, *Privacy and Freedom* 7 (1967)).

[13] [14] [15] Before the right to privacy attaches, there must exist a legitimate expectation of privacy. *Winfield v. Div. of Pari–Mutuel Wagering, Dep't of Bus. Regulation*, 477 So.2d 544, 547 (Fla.1985). Once a legitimate expectation of privacy is shown, the burden is on the party seeking disclosure to show the invasion is warranted by a compelling interest and that the least intrusive means are used. *Id.* In the civil discovery context, courts must engage in a balancing test, weighing the need for the discovery against the privacy interests. *Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So.2d 533, 535 (Fla.1987). If the 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. *Berkeley*, 699 So.2d at 791–92.

In a thoughtful opinion, a Palm Beach County circuit judge has summarized the nature of social networking sites as follows:

> Social networking sites, such as Facebook, are free websites where an individual creates a "profile" which functions as a personal web page and may include, at the user's discretion, numerous photos and a vast array of personal information including age, employment, education, religious and political views and various recreational interests. *Trail v. Lesko*, [No. GD–10–017249,] 2012 WL 2864004 (Pa.Com.Pl. July 5, 2012). Once a user joins a social networking site, he or she can use the site to search for "friends" and create linkages to others based on similar interests. Kelly Ann Bub, Comment, *Privacy's Role in the Discovery of Social Networking Site Information*, 64 SMU L.Rev. 1433, 1435 (2011).
>
> Through the use of these sites, "users can share a variety of materials with friends or acquaintances of their choosing, including tasteless jokes, updates on their love lives, poignant reminiscences, business successes, petty complaints, party photographs, news about their children, or anything else they choose to disclose." Bruce E. Boyden, Comment, *Oversharing: Facebook Discovery and the Unbearable Sameness of Internet Law*, 65 Ark. L.Rev. 39, 42 (2012). As a result, social networking sites can provide a "treasure trove" of information in litigation. Christopher B. Hopkins, *Discovery of Facebook Contents in Florida Cases*, 31 No. 2 Trial Advoc. Q. 14 (2012).

*6 *Levine v. Culligan of Fla., Inc.*, Case No. 50–2011–CA–010339–XXXXMB, 2013 WL 1100404, at *2–*3 (Fla. 15th Cir.Ct. Jan. 29, 2013).

[16] We agree with those cases concluding that, generally, the photographs posted on a social networking site are neither privileged nor protected by any right of privacy, regardless of any privacy settings that the user may have established. *See Davenport v. State Farm Mut. Auto. Ins. Co.*, No. 3:11–cv–632–J–JBT, 2012 WL 555759, at *1 (M.D.Fla. Feb. 21, 2012); *see also Patterson v. Turner Constr. Co.*, 88 A.D.3d 617, 931 N.Y.S.2d 311, 312 (N.Y.App.2011) (holding that the "postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access"). Such posted photographs are unlike medical records or communications with one's attorney, where disclosure is confined to narrow, confidential relationships. Facebook itself does not guarantee privacy. *Romano v. Steelcase, Inc.*, 30 Misc.3d 426, 907 N.Y.S.2d 650, 656 (N.Y.Sup.Ct.2010). By creating a Facebook account,

a user acknowledges that her personal information would be shared with others. *Id.* at 657. "Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist." *Id.*

Because "information that an individual shares through social networking web-sites like Facebook may be copied and disseminated by another," the expectation that such information is private, in the traditional sense of the word, is not a reasonable one. *Beswick v. N.W. Med. Ctr., Inc.*, No. 07–020592 CACE(03), 2011 WL 7005038 (Fla. 17th Cir.Ct. Nov. 3, 2011). As one federal judge has observed,

> Even had plaintiff used privacy settings that allowed only her "friends" on Facebook to see postings, she "had no justifiable expectation that h[er] 'friends' would keep h[er] profile private...." *U.S. v. Meregildo*, 2012 WL 3264501, at *2 (S.D.N.Y.2012). In fact, "the wider h[er] circle of 'friends,' the more likely [her] posts would be viewed by someone [s]he never expected to see them." *Id.* Thus, as the Second Circuit has recognized, legitimate expectations of privacy may be lower in e-mails or other Internet transmissions. *U.S. v. Lifshitz*, 369 F.3d 173, 190 (2d Cir.2004) (contrasting privacy expectation of e-mail with greater expectation of privacy of materials located on a person's computer).

Reid v. Ingerman Smith LLP, No. CV2012–0307(ILG) (MDG), 2012 WL 6720752, at *2 (E.D.N.Y. Dec. 27, 2012); *see also Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387, 388 (E.D.Mich.2012) (holding that "material posted on a 'private' Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy"); *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D.Cal.2012) (indicating that social networking site content is neither privileged nor protected, but recognizing that party requesting discovery must make a threshold showing that such discovery is reasonably calculated to lead to admissible evidence).

*7 We distinguish this case from *Root v. Balfour Beatty Construction, LLC*, 132 So.3d 867 (Fla. 2d DCA 2014). That case involved a claim filed by a mother on behalf of her three-year-old son who was struck by a vehicle. Unlike this case, where the trial court ordered the production of photographs from the plaintiff's Facebook account, the court in *Balfour* ordered the production of a much broader swath of Facebook material without any temporal limitation —postings, statuses, photos, "likes," or videos— that relate to the mother's relationships with all of her children, not just the three year old, and with "other family members, boyfriends, husbands, and/or significant others, both prior to, and following the accident." *Id.* at 869. The second district determined that "social media evidence is discoverable," but held that the ordered discovery was "overbroad" and compelled "the production of personal information ... not relevant to" the mother's claims. *Id.* at 868, 870. The court found that this was the type of "carte blanche" irrelevant discovery the Florida Supreme Court has sought to guard against. *Id.* at 870; *Langston*, 655 So.2d at 95 ("[W]e do not believe that a litigant is entitled *carte blanche* to irrelevant discovery.") The discovery ordered in this case is narrower in scope and, as set forth above, is calculated to lead to evidence that is admissible in court.

[17] Finally, we reject the claim that the Stored Communications Act, 18 U.S.C. §§ 2701–2712, has any application to this case. Generally, the "SCA prevents 'providers' of communication services from divulging private communications to certain entities and/or individuals." *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 900 (9th Cir.2008), *rev'd on other grounds by City of Ontario, Cal. v. Quon*, 560 U.S. 746, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010) (citation omitted). The act does not apply to individuals who use the communications services provided. *See, e.g., Flagg v. City of Detroit*, 252 F.R.D. 346, 349 (E.D.Mich.2008) (ruling that the SCA does not preclude civil discovery of a party's electronically stored communications which remain within the party's control even if they are maintained by a non-party service provider).

Finding no departure from the essential requirements of law, we deny the petition for certiorari.

STEVENSON and GERBER, JJ., concur.

Parallel Citations

40 Fla. L. Weekly D166

Footnotes

1 The petition challenges the order to produce content from social networking sites. The petition does not challenge that portion of the orders below pertaining to a cellular telephone.

2 Rule 1.350(a) states:

> Any party may request any other party (1) to produce and permit the party making the request, or someone acting in the requesting party's behalf, to inspect and copy any designated documents, *including electronically stored information,* writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the party to whom the request is directed through detection devices into reasonably usable form, that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed....

(Emphasis added).

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916 So.2d 8
District Court of Appeal of Florida,
Fourth District.

David **MENKE**, Petitioner,
v.
BROWARD COUNTY
SCHOOL BOARD, Respondent.

No. 4D05–978. | Sept. 28, 2005.

Synopsis
Background: Disciplinary proceedings were brought against high school teacher accused of exchanging sexually-explicit e-mails with students and making derogatory comments regarding school personnel. The Circuit Court, Seventeenth Judicial Circuit, **Broward** County, Claude B. Arrington, Administrative Law Judge, entered order compelling production of all computers in teacher's household. Teacher filed petition for writ of certiorari.

[Holding:] The District Court of Appeal, Warner, J., held that ALJ could not order production of all computers in teacher's household.

Writ granted; order quashed.

West Headnotes (6)

[1] Administrative Law and Procedure
Scope of Review in General
15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak741 In general
In petitions for review from administrative orders, the standard of review is essentially the same as that from an order from a civil proceeding.

Cases that cite this headnote

[2] Administrative Law and Procedure
Scope of Review in General
15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak741 In general
District Court of Appeal's scope of review on a petition for review from an administrative order is analogous to and no broader than the right of review by common law writ of certiorari.

1 Cases that cite this headnote

[3] Certiorari
Inadequacy of remedy by appeal or writ of error
Certiorari
Finality of determination
73 Certiorari
73I Nature and Grounds
73k5 Existence of Remedy by Appeal or Writ of Error
73k5(2) Inadequacy of remedy by appeal or writ of error
73 Certiorari
73I Nature and Grounds
73k11 Decisions and Proceedings of Courts, Judges, and Judicial Officers
73k16 Finality of determination
To be entitled to relief from a non-final order pursuant to a petition seeking a common law writ of certiorari, the petitioner must demonstrate that the trial court departed from the essential requirements of the law, thereby causing irreparable injury which cannot be adequately remedied on appeal following final judgment.

1 Cases that cite this headnote

[4] Administrative Law and Procedure

Finality; ripeness

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(B) Decisions and Acts Reviewable
15Ak704 Finality; ripeness

An order compelling discovery over a claim that the evidence is privileged is generally reviewable under statute governing immediate review of non-final administrative orders, because the harm cannot be remedied on review of the final order. West's F.S.A. § 120.68(1).

Cases that cite this headnote

[5] **Pretrial Procedure**

Objects and tangible things; entry on land

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land
307AII(E)3 Particular Documents or Things
307Ak390 Objects and tangible things; entry on land

Intrusive searching of an entire computer by an opposing party should not be the first means of obtaining relevant information stored on the computer.

3 Cases that cite this headnote

[6] **Education**

Discovery

141E Education
141EII Public Primary and Secondary Schools
141EII(D) Teachers and Education Professionals
141EII(D)5 Adverse Personnel Actions
141Ek589 Proceedings
141Ek594 Discovery
(Formerly 345k147.31 Schools)

ALJ in disciplinary proceeding against high school teacher accused of exchanging sexually explicit e-mails with students and making derogatory comments regarding school personnel could not order production of all computers in teacher's household for purpose of discovery; computers might contain privileged or private information, there was no evidence of destruction of evidence or thwarting of discovery, school board did not request alternate method of discovery or prove there was no less intrusive way to obtain information, and order did not allow teacher to assert privilege, Fifth Amendment right against self-incrimination, or privacy rights of himself or others in household prior to disclosure. U.S.C.A. Const.Amend. 5; West's F.S.A. § 120.569(2)(f); West's F.S.A. RCP Rule 1.280(b)(1, 5).

3 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

WARNER, J.

We review a petition for certiorari from the order of an administrative law judge ordering production of all computers in petitioner's household for examination by respondent's expert for the purpose of discovery. Petitioner contends that the production of the computers, including all of their contents, would violate his Fifth Amendment right against self-incrimination and his right of privacy, and would disclose privileged communications in the manner in which this examination was to be made. We agree and grant the writ.

Petitioner **Menke** is a high school teacher in **Broward** County. He was suspended from his position for "misconduct in office" in September 2004 pending the determination of an administrative complaint filed by the **Broward** County School Board seeking

his termination. The misconduct included allegations that he had exchanged sexually-explicit e-mails with minor students and also made derogatory comments regarding school personnel and operations with students. The respondent School Board was advised of some of the e-mails, which Menke states are not actually e-mails but instant messages.

Menke requested a formal hearing, and the complaint was forwarded to the Division of Administrative Hearings. In the proceedings, the Board served a request on Menke for inspection of all of the computers in his household, which consists of Menke, his wife, and his children. The Board wanted its retained computer expert to inspect all such computers in his laboratory for messages between Menke and any students. It requested various categories of information which it sought to review.

Menke objected to the inspection on the grounds that such a wholesale inspection of the hard drives of his computers would violate his Fifth Amendment right and his right of privacy, and may reveal privileged communications with his wife, attorneys, accountants, clergy, or doctors.

After a hearing on the issue, the administrative law judge granted the motion to compel production of the computers for inspection. The order allowed the expert to inspect the hard drives of all the home computers to discover whether they contained various categories of information requested. The judge sought to protect Menke's rights by ordering the expert not to retain, provide, or discuss with counsel for the Board the existence of any communications which might be deemed privileged. It also allowed for Menke to have his own expert present when the inspection took place. If Menke's expert believed a privileged communication was discovered, then the document could be marked and the ALJ could conduct an *in camera* inspection of the document before it was delivered to the Board. Menke brings this petition to review this order.

[1] [2] [3] [4] In petitions for review from administrative orders, the standard of review is essentially the same as that from an order from a civil proceeding. As the first district recently pronounced in *Eight Hundred, Inc. v. Florida Dep't of Revenue*, 837 So.2d 574, 575 (Fla. 1st DCA 2003):

> ***10** [O]ur scope of review in such a matter "is analogous to and no broader than the right of review by common law writ of certiorari." *Charlotte County v. Gen. Dev. Utils., Inc.*, 653 So.2d 1081, 1084 (Fla. 1st DCA 1995). To be entitled to relief from a non-final order pursuant to a petition seeking a common law writ of certiorari, "the petitioner must demonstrate that the trial court departed from the essential requirements of the law, thereby causing irreparable injury which cannot be adequately remedied on appeal following final judgment." *Belair v. Drew*, 770 So.2d 1164, 1166 (Fla.2000). "An order compelling discovery over a claim that the evidence is privileged is generally reviewable under section 120.68(1), because the harm cannot be remedied on review of the final order." *State Dep't of Transp. v. OHM Remediation Servs. Corp.*, 772 So.2d 572, 573 (Fla. 1st DCA 2000).

Because the order of inspection involves an order compelling discovery of privileged information as well as constitutionally protected information, we have jurisdiction to review by way of certiorari. *See Martin–Johnson, Inc. v. Savage*, 509 So.2d 1097 (Fla.1987); *Ginsburg v. Pachter*, 893 So.2d 586 (Fla. 4th DCA 2004); *Boyle v. Buck*, 858 So.2d 391 (Fla. 4th DCA 2003); *Straub v. Matte*, 805 So.2d 99 (Fla. 4th DCA 2002); *Hill v. State*, 846 So.2d 1208 (Fla. 5th DCA 2003).

As Menke states in his petition, this order "gives an agent of the Board carte blanche authorization to examine the hard drives it will duplicate from the computers Menke has been ordered to produce, combing through every byte, every word, every sentence, every data fragment, and every document, including those that are privileged or that may be part of privileged communications, looking for 'any data' that may evidence communication between Menke and his accusers." The only admonition to the Board's expert is that if he finds such communication, he cannot discuss it with counsel. However, those communications are still revealed to a paid representative of the opposing party, as will be everything else on the computer, substantially

invading the privacy of **Menke** and his family members.

Today, instead of filing cabinets filled with paper documents, computers store bytes of information in an "electronic filing cabinet." Information from that cabinet can be extracted, just as one would look in the filing cabinet for the correct file containing the information being sought. In fact, even more information can be extracted, such as what internet sites an individual might access as well as the time spent in internet chat rooms. In civil litigation, we have never heard of a discovery request which would simply ask a party litigant to produce its business or personal filing cabinets for inspection by its adversary to see if they contain any information useful to the litigation. Requests for production ask *the party* to produce copies of the relevant information in those filing cabinets for the adversary.

Menke contends that the respondent's representative's wholesale access to his personal computer will expose confidential communications and matters entirely extraneous to the present litigation, such as banking records. Additionally, privileged communications, such as those between **Menke** and his attorney concerning the very issues in the underlying proceeding, may be exposed. Furthermore, **Menke** contends that his privacy is invaded by such an inspection, and his Fifth Amendment right may also be implicated by such an intrusive review by the opposing expert.

Preliminarily, the authority of the administrative law judge in discovery matters ***11** is prescribed by section 120.569(2)(f), Florida Statutes, providing in part:

> (f) The presiding officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas, and to effect discovery on the written request of any party by any means available to the courts and *in the manner provided in the Florida Rules of Civil Procedure,* including the imposition of sanctions, except contempt.

(emphasis supplied).

[5] In accordance with the Florida Rules of Civil Procedure, "[p]arties may obtain discovery regarding any matter, *not privileged, that is relevant to the subject matter of the pending action* ...." Fla. R. Civ. P. 1.280(b)(1) (emphasis supplied). Although the Florida Rules of Civil Procedure have not been amended specifically to accommodate discovery of electronic data, rule 1.350(a) provides that:

> Any party may request any other party (1) to produce and permit the party making the request, or someone acting in the requesting party's behalf, to inspect and copy any designated documents, including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the party to whom the request is directed through detection devices into reasonably usable form, that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed; (2) to inspect and copy, test, or sample any tangible things that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed; or (3) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying,

> photographing, testing, or sampling the property or any designated object or operation on it within the scope of rule 1.280(b).

In the only Florida appellate court opinion discussing electronic discovery, we held that rule 1.350(a)(3) was broad enough to encompass requests to examine a computer hard drive but only in limited and strictly controlled circumstances, acknowledging that unlimited access to anything on the computer would constitute irreparable harm, because it would expose confidential, privileged information to the opposing party. *See Strasser v. Yalamanchi*, 669 So.2d 1142 (Fla. 4th DCA 1996). In that case, involving a dispute between doctors, the defendant asserted that he had purged data that plaintiff was attempting to discover. According to the plaintiff, the defendant had a history of thwarting discovery. We said,

> If plaintiff can present evidence to demonstrate the likelihood of retrieving purged information, and if the trial court finds that there is no other less intrusive manner to obtain the information, then the computer search might be appropriate. In such an event, the order must define parameters of time and scope, and must place sufficient access restrictions to prevent compromising patient confidentiality and to prevent harm to defendant's computer and data bases. One alternative might be for *defendant's* representative to physically access the computer system in the presence of plaintiff's representative under an agreed-upon set of procedures to test plaintiff's theory that it is possible to retrieve this purged data.

Id. at 1145 (emphasis supplied). Thus, intrusive searching of the entire computer by an opposing party should not be the ***12** first means of obtaining the relevant information.

Where a need for electronically stored information is demanded, such searching should first be done by defendant so as to protect confidential information, unless, of course, there is evidence of data destruction designed to prevent the discovery of relevant evidence in the particular case. *Id.* In fact, in the few cases we have found across the country permitting access to another party's computer, all have been in situations where evidence of intentional deletion of data was present. *See, e.g., Etzion v. Etzion*, 7 Misc.3d 940, 796 N.Y.S.2d 844 (2005); *Renda Marine, Inc. v. U.S.*, 58 Fed.Cl. 57 (Fed.Cl.2003).

[6] Here, there is no evidence of any destruction of evidence or thwarting of discovery. It does not appear from the record provided that any other method of discovery of relevant information has been requested, even a request to provide hard copies of all relevant documents. There is also no proof that there is no less intrusive method of obtaining the information.

The order permitting the respondent's expert to examine the computers of petitioner does not allow the petitioner to assert privilege as to information on the computer in advance of its disclosure to the respondent's expert. Thus, it prevents petitioner from exercising his right to assert privilege as permitted under Florida Rule of Civil Procedure 1.280(b)(5), a rule revision adopted after our opinion in *Strasser*. *See In re Amendments to Florida Rules of Civil Procedure*, 682 So.2d 105, 115 (Fla.1996). It also prevents petitioner from making a specific assertion of his Fifth Amendment right against self-incrimination or of his right to privacy or that of others within the household.

Because the order of the administrative law judge allowed the respondent's expert access to literally everything on the petitioner's computers, it did not protect against disclosure of confidential and privileged information. It therefore caused irreparable harm, and we grant the writ and quash the discovery order under review. We do not deny the Board the right to request that the petitioner produce relevant, non-privileged, information; we simply deny it unfettered access to the petitioner's computers in the first instance.

Requests should conform to discovery methods and manners provided within the Rules of Civil Procedure.

STEVENSON, C.J., and POLEN, J., concur.

Parallel Citations

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903 So.2d 322
District Court of Appeal of Florida,
Second District.

TIMES PUBLISHING CO., Petitioner,
v.
STATE of Florida and Joseph P. Smith, Respondents.

No. 2D04-4293. | June 10, **2005**.

Synopsis

Background: Newspaper **publisher** filed petition for writ of certiorari seeking review of an order of the Circuit Court, Sarasota County, Andrew D. Owens, Jr., J., that restricted disclosure of certain discovery materials provided to a defendant in a criminal prosecution.

Holdings: The District Court of Appeal, Canady, J., held that:

[1] order restricting public disclosure of certain discovery materials provided to defendant in criminal prosecution could not be based on privacy concerns related to witnesses and other nonparties in absence of motion by nonparty asserting privacy claim, and showing by nonparty of good cause for closure, and

[2] trial court's order could not be based on provisions of public records law that permitted denial of public access to discovery materials where release of material would defame or threaten safety of victim or witness.

Petition granted, order quashed in part.

Davis, J., concurred with an opinion.

West Headnotes (9)

[1] **Records**
Personal Privacy Considerations in General; Personnel Matters
326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k58 Personal Privacy Considerations in General; Personnel Matters
Trial court order, restricting public disclosure of certain discovery materials provided to defendant in criminal prosecution, could not be based on provision of public records law on privacy concerns related to witnesses and other nonparties, in absence of motion by nonparty asserting privacy claim, and showing by nonparty of good cause for closure; on its own initiative, trial court addressed privacy issues related to nonparties in ruling on criminal defendant's claim regarding his right to fair trial. West's F.S.A. § 119.07(1); West's F.S.A. RCrP Rule 3.220; West's F.S.A. R.App.P.Rule 9.100(d)(1).

Cases that cite this headnote

[2] **Records**
Investigatory or Law Enforcement Records
326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k60 Investigatory or Law Enforcement Records
Once criminal investigative or intelligence information is disclosed by state to criminal defendant, that information becomes nonexempt public record subject to disclosure pursuant to statute on inspection of public records. West's F.S.A. §§ 119.07(1, 6), 119.011(3)(c) 5.

Cases that cite this headnote

[3] **Records**

Personal Privacy Considerations in General; Personnel Matters

Records

Investigatory or Law Enforcement Records

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k58 Personal Privacy Considerations in General; Personnel Matters
326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k60 Investigatory or Law Enforcement Records

Under public records law, public may be denied access to discovery materials related to criminal prosecution in limited circumstances, including those where it is established that release of materials would: (1) interfere with defendant's right to fair trial, or (2) infringe on privacy rights of nonparty. West's F.S.A. § 119.07(1).

Cases that cite this headnote

[4] **Records**

Personal Privacy Considerations in General; Personnel Matters

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k58 Personal Privacy Considerations in General; Personnel Matters

Under public records law, privacy concerns related to certain witnesses and other persons may, in some circumstances, be proper basis for withholding discovery materials involved in judicial proceeding from public disclosure. West's F.S.A. § 119.07(1).

Cases that cite this headnote

[5] **Records**

Court Records

326 Records
326II Public Access
326II(A) In General
326k32 Court Records

Individuals seeking to prevent public disclosure of discovery materials involved in judicial proceeding, based on claim that disclosure would violate their right to privacy, bear burden of proving that closure is necessary to prevent imminent threat to their privacy rights. West's F.S.A. § 119.07(1).

Cases that cite this headnote

[6] **Records**

Court Records

326 Records
326II Public Access
326II(A) In General
326k32 Court Records

Under criminal procedure rule providing that any person may move for order denying or regulating disclosure of sensitive matters, nonparty to judicial proceeding has standing to challenge release of discovery materials related to proceeding. West's F.S.A. RCrP Rule 3.220(m)(1).

1 Cases that cite this headnote

[7] **Records**

Court Records

326 Records
326II Public Access
326II(A) In General
326k32 Court Records

Broad language of criminal procedure rule permits nonparty to show cause for denying public disclosure of discovery

information in criminal proceeding. West's F.S.A. RCrP Rule 3.220(l, m).

Cases that cite this headnote

[8] **Records**

Court Records

326 Records
326II Public Access
326II(A) In General
326k32 Court Records

Criminal procedure rule on discovery, providing that court, on its own initiative, shall deny or partially restrict disclosures authorized by rule if there is substantial risk to any person of unnecessary annoyance or embarrassment resulting from disclosure, does not grant trial court authority to prevent public access to discovery materials, but instead authorizes limitation on availability of discovery between parties to proceeding, and rule has nothing to do with whether public should be denied access to material provided by state to criminal defendant in discovery. West's F.S.A. RCrP Rule 3.220(e).

Cases that cite this headnote

[9] **Records**

Court Records

326 Records
326II Public Access
326II(A) In General
326k32 Court Records

Trial court order, restricting public disclosure of certain discovery materials provided to defendant in criminal prosecution, could not be based on provision of public records law that permitted denial of public access to discovery materials if release of material would defame or threaten safety of victim or witness, as trial court did not make reference to statute or make any findings that public disclosure would be defamatory to good name of witnesses or jeopardize their safety. West's F.S.A. § 119.011(3)(c) 5.

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

CANADY, Judge.

Times Publishing Company ("Times Publishing") petitions for review of the trial court order restricting disclosure of certain discovery materials related to the criminal prosecution of Joseph P. Smith. Review is by way of a petition for writ of certiorari under Florida Rule of Appellate Procedure 9.100(d)(1), which governs petitions "to review an order excluding the press or public from access to ... judicial records, if the ... records are not required by law to be confidential." Times Publishing challenges only that portion of the trial court's order that was based on provisions of Florida Rule of Criminal Procedure 3.220, which governs discovery. Because we conclude that under the circumstances presented here the trial court erred in entering the challenged portion of the order under that rule, we grant Times Publishing's petition.

Background

On February 20, 2004, a grand jury issued an indictment charging Smith with the premeditated murder, kidnapping, and sexual assault of Carlie Brucia. Prior to receiving discovery materials from the State, Smith filed a motion asking the trial court to

conduct an in camera inspection of these materials and to enter an order directing the State to seal them. Smith argued that all of the materials should be sealed for three reasons: (1) the materials are exempt from the public records law; (2) sealing the materials would avoid prejudicial pretrial publicity; and (3) sealing the materials would protect Smith's right to a fair trial. The trial court entered an order temporarily sealing the discovery materials upon delivery to Smith and establishing *325 a procedure for an in camera review of specific materials upon further motion of Smith. At the same time, the trial court granted Times Publishing's motion to intervene for the purpose of opposing Smith's motion.

Subsequently, Smith filed a further motion requesting an in camera review and the blanket sealing of the discovery materials. On August 27, 2004, after an evidentiary hearing, the trial court issued a written order denying Smith's request for a blanket sealing of the discovery materials but providing that portions of the materials should be temporarily sealed to protect Smith's right to a fair trial. The order further provided for the redaction of certain information in portions of the released materials to protect Smith's right to a fair trial or pursuant to particular provisions of section 119.07, Florida Statutes (2003).

The trial court's order also provided for the nondisclosure, pursuant to Florida Rule of Criminal Procedure 3.220(e), (*l*), and (m), of portions of the discovery materials consisting of certain FBI reports, witness statements, and investigative reports. In entering this portion of the order, the trial court relied on "a finding that if the sealed portions of the documents were disclosed, there would be a substantial risk to witnesses and other persons, such as unnecessary annoyance or embarrassment, which outweighs any usefulness of the disclosure." The order stated that "the court determined that privacy concerns of the non-parties in areas such as prior drug use or addiction or current medical conditions should not be released."

In its petition, Times Publishing only challenges that portion of the order that was based on rule 3.220, which governs discovery in criminal proceedings. Times Publishing argues that the provisions of rule 3.220(e), (*l*), and (m) were not a proper basis for withholding the materials in question from the public. Times Publishing asserts that the trial court departed from the essential requirements of the law and requests that this court quash that portion of the order and direct the affected records to be released. Smith and the State contend that the trial court's order was a proper exercise of its authority under rule 3.220.

Analysis

[1] [2] [3] In evaluating the challenged portion of the trial court's order, we begin with the important general principle that once criminal investigative or intelligence information is disclosed by the State to a criminal defendant that information becomes a nonexempt public record subject to disclosure pursuant to section 119.07(1). *See* §§ 119.07(6)(b), .011(3)(c)(5). The public may, however, be denied access to such discovery materials in limited circumstances, including those where it is established that the release of the materials would (a) interfere with a defendant's right to a fair trial, *see Fla. Freedom Newspapers, Inc. v. McCrary,* 520 So.2d 32 (Fla.1988); or (b) infringe on the privacy rights of a nonparty, *see Post-Newsweek Stations, Fla. Inc. v. Doe,* 612 So.2d 549 (Fla.1992).

In entering the order under review, the trial court was acting on a request submitted by Smith to protect his right to a fair trial by preventing prejudicial pretrial publicity. *See Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *McCrary,* 520 So.2d 32; *Miami Herald Publ'g Co. v. Lewis,* 426 So.2d 1 (Fla.1982). The challenged portions of the trial court's order were based, however, not on Smith's right to a fair trial but on the "privacy concerns" related to certain "witnesses and other persons."

[4] [5] Such privacy concerns may in some circumstances be a proper basis for *326 withholding discovery materials involved in a judicial proceeding from public disclosure. *See Doe,* 612 So.2d at 551; *see also Barron v. Fla. Freedom Newspapers, Inc.,* 531 So.2d 113 (Fla.1988). Individuals seeking to prevent the disclosure of such information based on a claim that the disclosure would violate their right to privacy "bear the burden of proving that closure is necessary

to prevent an imminent threat to their privacy rights." *Doe*, 612 So.2d at 551.

[6] Such a privacy claim by a nonparty may be asserted pursuant to the provision of rule 3.220(m)(1) that "[*a*]*ny person* may move for an order denying or regulating disclosure of sensitive matters." (Emphasis added.) Under this provision, a nonparty has "standing to challenge the release of the discovery materials." *Doe*, 612 So.2d at 550.

[7] Rule 3.220(*l*)(1) is also a potential basis for protecting the privacy rights of nonparties. It provides:

> On a *showing of good cause,* the court shall at any time order that specified disclosures be restricted, deferred, or exempted from discovery ... or make such other order as is appropriate to protect a witness from harassment, unnecessary inconvenience, or invasion of privacy, including prohibiting the taking of a deposition.

(Emphasis added.) Under both subsection (*l*) and (m), nonparties may seek to protect their privacy interests: "[T]he broad language of rule 3.220 permits [a nonparty] to show cause for denying the [public] disclosure of ... discovery information ... in [a] criminal proceeding." *Doe*, 612 So.2d at 551.

In the instant case, however, no motion asserting a privacy claim and no "showing of good cause" was made by any nonparty-or by any party. Instead, the trial court on its own initiative addressed the privacy issues related to nonparties in ruling on Smith's claim regarding his right to a fair trial. This was inconsistent with the clear language of subsections (*l*) and (m), which contemplates that there be a specific assertion of privacy rights-or some other pertinent basis-as a predicate for the consideration of an order preventing the disclosure of particular information. In the absence of a proper motion pursuant to rule 3.220(*l*) or (m), the trial court erred in relying on those rule provisions to order that discovery materials provided to Smith be withheld from the public. And even if a proper motion had been filed and considered by the trial court, the challenged portions of the order would nonetheless be erroneous because the trial court failed to make the required determination showing "that closure is necessary to prevent an imminent threat to [the nonparties'] privacy rights." *Doe*, 612 So.2d at 551.

[8] Finally, we address the trial court's reliance on rule 3.220(e), which provides in pertinent part:

> The court *on its own initiative* or on motion of counsel shall *deny or partially restrict disclosures authorized by this rule* if it finds there is a substantial risk to any person of ... unnecessary annoyance or embarrassment resulting from the disclosure, that *outweighs any usefulness of the disclosure* to either party.

(Emphasis added.) The text of this provision makes plain that, unlike subsections (*l*) and (m), it does not grant the court the authority to prevent public access to discovery materials, but instead authorizes limitation on the availability of discovery between the parties to a proceeding. The focus of this subsection is on weighing the "usefulness of the disclosure to either party." Such a weighing process is relevant only to whether it would be appropriate to deny a party access to otherwise discoverable ***327** material. It has nothing to do with whether the public should be denied access to materials provided by the State to a criminal defendant in discovery. Although subsection (e)-unlike subsections (*l*) and (m)-authorizes the court to act "on its own initiative," that authority may only be exercised to deny a party access in discovery of particular information. Accordingly, rule 3.220(e) was not a proper basis for the challenged portions of the trial court's order under review here.

In sum, on the record before us in this case, there was no basis for the challenged portions of the trial court's order under rule 3.220. Subsection (e) has no application to the issue of public disclosure of documents provided in discovery. And subsections (*l*) and (m) may not be utilized to deny public access to discovery materials to protect the privacy rights of a nonparty in the absence of a proper motion specifically asserting a privacy claim.

[9] We note that chapter 119 contains a provision-not mentioned by the parties to this proceeding-permitting the denial of public access to discovery materials where the release of those materials would defame or threaten the safety of a victim or witness. Section 119.011(3)(c)(5) provides, in pertinent part, that

> the court in a criminal case may order that certain information [provided to a criminal defendant by the State] be maintained in a confidential manner and exempt from the provisions of s. 119.07(1) until released at trial if it is found that the release of such information would:
>
> a. Be defamatory to the good name of a victim or witness or would jeopardize the safety of such victim or witness....

The trial court did not make reference to this provision or any findings that the public disclosure of the information in question would "[b]e defamatory to the good name" of the witnesses or "would jeopardize [their] safety." The entry of an order under section 119.011(3)(c)(5)(a) on the court's own initiative may well be authorized where the requirements of that provision are met. Here, however, there is no basis for concluding that those requirements were satisfied. The trial court's references to "privacy concerns" and "unnecessary annoyance or embarrassment" clearly do not bring the challenged portions of the order on review within the scope of the exemption from disclosure under this provision of chapter 119. The release of materials may raise "privacy concerns" without either being defamatory or posing a threat to witness safety.

Conclusion

Based on the foregoing analysis of the pertinent law, we conclude that the challenged portion of the trial court's order denying public access to the public records in question was a departure from the essential requirements of law. And **Times Publishing's** injury from this error is "that it does not have access to otherwise public documents during trial," which is an injury that "cannot be remedied on postjudgment appeal." ***Times*** *Publ'g Co. v. State,* 827 So.2d 1040, 1041-42 (Fla. 2d DCA 2002). The requirements for granting certiorari relief thus are satisfied. The challenged portions of the trial court's order are therefore quashed.

Our disposition of this case is without prejudice to further proceedings in the trial court with respect to the discovery materials in question based on a proper motion under rule 3.220(*l*) or (m) seeking the nondisclosure of those materials.[1] Our ***328** disposition is also without prejudice to the issuance of a properly justified order pursuant to section 119.011(3)(c)(5)(a).

Petition granted; order quashed in part.

STRINGER, J., Concurs.

DAVIS, J., Concurs with opinion.

DAVIS, Judge, Concurring.

I agree with the majority decision. However, I write to point out the difficult situation that results from our ruling. Although the trial court erred in ruling on issues that were not properly before it, the court entered the ruling in an attempt to resolve the gap in the statutes that this case so aptly illustrates.

First, we start with the principle that all criminal investigative information is exempt from section 119.07 until the information is disclosed to the defendant pursuant to the discovery rules contained in the Florida Rules of Criminal Procedure. *See McCrary,* 520 So.2d 32. Second, the Florida Rules of Criminal Procedure provide that "any person" may ask the trial court to restrict the disclosure of that portion of the discovery information that might violate that person's privacy rights even though the person is not a party to the criminal prosecution. *Doe,* 612 So.2d 549; *see also* Fla. R.Crim. P. 3.220(m). Finally, once the criminal investigative information is provided to the defendant, it becomes a public record and must be disclosed upon request unless the custodian of that information (the State) finds that the specific information is exempt from the application of section 119.07. *See Tribune Co. v. Pub. Records, P.C.S.O. # 79-35504, Miller/Jent,* 493 So.2d 480 (Fla. 2d DCA 1986).

As demonstrated by the majority opinion, however, the protection provided by the Florida Rules of Criminal Procedure is limited to those individuals who know that information about them is about to be disclosed and that their privacy rights might be violated. Thus, in the absence of knowledge that the disclosure is imminent, the individual cannot avail himself of the protection that the rules attempt to provide. Although a witness might know that he or she will be named and will have to appear publicly at a trial, it is unreasonable to assume that the witness would also anticipate that personal background information gathered by the State in its case preparation would become public upon release to the defendant. Likewise, it is unreasonable to assume that a caller to a tip line would anticipate his identity becoming public. The person most aggrieved by this system is the person who does not even know that his name has been reported as a potential suspect and thus does not anticipate his name becoming a matter of public information.

The seriousness of this issue involves more than just the fact that an individual's name and identifying information will be made public; it is the additional potentially inculpatory information that is associated with that name that implicates the individual's privacy right. In this case, some of the callers to the hotline gave descriptive information about the subject being reported. While the statement, "He looks like my ex-husband" may not be too embarrassing, some of the callers went on to suggest that the person named had committed other unseemly acts that were not only embarrassing but also unverified-and in many cases purely speculative. To have one's name publicized with such potentially intimate and personal information, which may or may not be true, with no prior knowledge or notice of such a release, is grossly unjust.

***329** Florida Rule of Criminal Procedure 3.200(e) allows the trial court to impose certain restrictions "on its own initiative"; however, that rule is limited to disclosures between the State and the defendant. It may be that similar language should be added to subsections (*l*) and (m) to allow the trial court to exercise its judgment in protecting affected nonparties in their absence. That is what the trial court attempted to do here. After hearing from representatives of the press and weighing the issues of the public's need to know against the privacy rights of individual citizens, the trial court redacted the names and identifying information contained in the release. Although it was without authority to do this, as demonstrated by the majority's opinion, it is clear that what the trial court did was a reasonable attempt to protect the privacy of individuals left unprotected by the statute.

The rules, as correctly interpreted by the majority opinion, leave the person who needs to be present before the court to assert his or her privacy rights ignorant of this need to appear until after the disclosure has occurred. This is an injustice that needs to be addressed.

Parallel Citations

30 Fla. L. Weekly D1462

Footnotes

1 Because resolution of the question has not been necessary to determining the disposition of **Times Publishing's** petition, we have not decided whether the State has standing to assert a privacy interest of a nonparty.

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743 So.2d 46
District Court of Appeal of Florida,
Fifth District.

Charles Owen DWYER, Appellant,
v.
STATE of Florida, Appellee.

No. 97–3233. | Aug. 20, 1999.

After defendant's conviction for two counts of attempted first-degree murder, robbery, and criminal mischief was affirmed on appeal, defendant filed motion to vacate sentence, which the Circuit Court, Orange County, Cynthia Z. Mackinnon, J., denied. Defendant appealed. The District Court of Appeal, Peterson, J., held that: (1) previous appeal involving claim that testimony adduced at trial was fraudulently obtained did not bar post-conviction relief claim for new trial based on newly discovered evidence, and (2) evidence of victim's reputation for violence was not prohibited by defendant's lack of prior knowledge of that character trait of victim.

Vacated and remanded.

Harris, J., filed a dissenting opinion.

West Headnotes (7)

[1] **Criminal Law**
Affirmance of conviction
110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1433 Matters Already Adjudicated
110k1433(2) Affirmance of conviction
(Formerly 110k998(13))
Previous appeal involving whether the trial court improperly struck defendant's second motion for new trial claiming that new evidence established that testimony adduced at trial was fraudulently obtained and resulted in a tainted verdict did not bar post-conviction relief claim for new trial based on newly discovered evidence, as previous appeal involved solely procedural issue of whether extraordinary second and belated motion for new trial should be allowed, and did not address entitlement issue based upon newly discovered evidence.

Cases that cite this headnote

[2] **Criminal Law**
Perjured testimony
110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1537 Perjured testimony
(Formerly 110k998(10))
Issue of fraudulently obtained testimony may be raised by extraordinary means.

Cases that cite this headnote

[3] **Criminal Law**
Right to counsel
Criminal Law
Newly discovered evidence
110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1574 Petition or Motion
110k1580 Particular Issues
110k1580(10) Right to counsel
(Formerly 110k998(15))
110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1574 Petition or Motion
110k1580 Particular Issues
110k1580(11) Newly discovered evidence
(Formerly 110k998(15))
Newly discovered evidence claim was not contradictory and inconsistent with ineffectiveness of counsel claim, as defendant was only advancing alternative theories of relief in his motion for post conviction relief based upon the same underlying facts.

Cases that cite this headnote

[4] **Assault and Battery**
Provocation, justification, or self-defense

37 Assault and Battery
37II Criminal Responsibility
37II(B) Prosecution
37k81 Evidence in General
37k83 Admissibility
37k83(4) Provocation, justification, or self-defense
(Formerly 37k85)

Defendant who alleges self-defense can show, through the testimony of another witness, that the alleged victim had a propensity for violence, thereby inferring that the alleged victim was the aggressor.

2 Cases that cite this headnote

[5] **Assault and Battery**
Provocation, justification, or self-defense

37 Assault and Battery
37II Criminal Responsibility
37II(B) Prosecution
37k81 Evidence in General
37k83 Admissibility
37k83(4) Provocation, justification, or self-defense
(Formerly 37k85)

Defendant's prior knowledge of the victim's reputation for violence is irrelevant to admission of such reputation evidence on claim of self-defense, as the evidence is offered to show the conduct of the victim, rather than the defendant's state of mind.

3 Cases that cite this headnote

[6] **Assault and Battery**
Self-defense

37 Assault and Battery
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses
37k67 Self-defense

Fact that defendant alleged he shot victim by accident while exercising the right of self-defense did not eliminate the "self-defense against an aggressor" principle.

Cases that cite this headnote

[7] **Assault and Battery**
Self-defense

37 Assault and Battery
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses
37k67 Self-defense

"Self-defense against an aggressor" principle continues until some intervening act occurs, such as a departure and return or an unreasonable expiration of time between disarmament and departure, or some other factual scenario which makes it no longer reasonable for a jury to conclude that an accident resulted from a justifiable use of force.

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

PETERSON, J.

Charles Owen Dwyer appeals the denial of his Florida Rule of Criminal Procedure 3.850 motion in which he made claims of ineffective assistance of his trial counsel, newly discovered evidence [1] of the victim's violent nature, and a *Brady* violation. We vacate the order based on the first two claims and remand for an evidentiary hearing. [2]

Dwyer's conviction rested entirely on the jury's consideration of the credibility of Dwyer and

a co-defendant versus the testimony of the two victims. Dwyer alleged in his 3.850 motion that one of the victim's reputation for violence constituted newly discovered evidence because it was not discoverable at the time of trial through the exercise of due diligence. Alternatively, Dwyer alleged that he received ineffective assistance because his counsel ignored his pleas to obtain the services of an investigator to seek evidence of the victim's background, character, and reputation, and that, because his counsel hired an investigator only immediately before the trial, he was unable to discover any useful background information about the victim.

The trial court granted an evidentiary hearing "for the limited purpose of determining whether the affidavits of approximately 21 witnesses constitute newly discovered evidence which would have been admissible at trial and would probably have resulted in a different verdict." Five witnesses ultimately appeared on behalf of the appellant and confirmed that they would have testified at trial that they knew one of the victims to have a reputation for being aggressive and violent. Four out of five of the witnesses had been involved in previous skirmishes with this victim in which charges of armed trespass or similar charges were brought, and later dismissed, against the witnesses or members of their families.

[1] **[2]** Following the hearing, the trial court held, inter alia, that the newly discovered evidence could not be revisited because this court had previously affirmed Dwyer's conviction. *Dwyer v. State,* 661 So.2d 840 (Fla. 5th DCA 1995); see *Turner v. Dugger,* 614 So.2d 1075, 1078 (Fla.1992) (claims procedurally barred if they, or variations thereof, were raised on direct appeal). Although this court did affirm the conviction, the only issue considered that involved the "newly discovered evidence" was a procedural issue, to wit: whether the trial court improperly struck Dwyer's second motion for new trial. The second motion for a new trial is not a motion provided for in the Florida Rules of Criminal Procedure. The issue on appeal did not raise Dwyer's entitlement to a new trial based on the discovery of new evidence. The issue was whether the trial court abused its discretion in determining that this new evidence did not establish that the testimony adduced at trial was fraudulently obtained and resulted in a verdict so tainted that the unusual remedy of granting an unauthorized, second and belated motion for new trial was warranted. Fraudulently obtained testimony may be raised by extraordinary means. *State v. Glover,* 564 So.2d 191 (Fla. 5th DCA 1990). Dwyer's newly discovered evidence claim was procedurally barred from being considered in Dwyer's prior appeal that raised the fraud issue. We believe that the trial court has not yet considered the impact the newly discovered evidence may have had on the verdict of guilt without being influenced by an erroneous belief that the issue had already been reviewed on the prior appeal.

***48** **[3]** The trial court also found merit in the state's argument that Dwyer's newly discovered evidence claim was contradictory and inconsistent with his ineffectiveness of counsel claim. Dwyer's contention that the newly discovered evidence could not have been discovered with due diligence seemed contradictory to his claim that counsel was ineffective for failing to timely discover that evidence. However, Dwyer was only advancing alternative theories of relief in his motion for post conviction relief based upon the same underlying facts. As noted by the second district in *Jancar v. State,* 711 So.2d 143, 144 (Fla. 2d DCA 1998), the contradiction is not between the underlying evidentiary facts alleged in the motion, but between the alternative ultimate conclusions that could be derived from the single set of underlying facts.

[4] **[5]** The lower court further rejected Dwyer's ineffective assistance of counsel claim based on the erroneous belief that even if defense counsel had discovered the omitted reputation witnesses, such evidence was not likely admissible because Dwyer did not know of the alleged victim's reputation for violence. Generally, evidence of a victim's character is inadmissible, but a defendant who alleges self-defense can show, through the testimony of another witness, that the alleged victim had a propensity for violence, thereby inferring that the alleged victim was the aggressor. *Smith v. State,* 606 So.2d 641 (Fla. 1st DCA 1992); *see also* Ehrhardt, Florida Evidence § 404.6 (1999 ed.); Graham, Handbook of Florida Evidence § 404.1 (1987). A defendant's prior knowledge of the victim's reputation for violence is irrelevant, because the evidence is offered to show the conduct of the victim, rather than the defendant's state of mind. Ehrhardt. Accordingly, evidence of one of the victim's

reputation for violence was not prohibited by Dwyer's lack of prior knowledge of that victim's character traits.

[6] [7] We reverse and remand for a new evidentiary hearing on Dwyer's claims of newly discovered evidence and ineffective assistance of counsel.[3] Upon remand, the trial court shall determine whether, through the exercise of due diligence, the reputation witnesses could have been timely discovered and if their testimony could have been presented at trial. If the reputation witnesses could not have been discovered through the exercise of due diligence, this newly discovered evidence must be evaluated to determine whether it would "probably produce an acquittal on retrial." *Jancar,* at 145, citing *Jones v. State,* 591 So.2d 911, 915–16 (Fla.1991), ***49** *cert. denied,* 523 U.S. 1041, 118 S.Ct. 1351, 140 L.Ed.2d 499 (1998). Alternatively, if the lower court concludes that the evidence could have been found with the exercise of due diligence, it must then determine whether the failure of Dwyer's trial counsel to discover the evidence was an omission that fell below a standard of reasonableness under prevailing professional norms. *Id.* If so, the lower court must also determine whether this oversight probably affected the outcome of the proceedings. *Id.,* citing *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh. denied,* 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984).

ORDER VACATED AND REMANDED.

GOSHORN, J., concurs.

HARRIS, J., dissents, with opinion.

HARRIS, J., dissenting.
I respectfully dissent.

I accept appellant's contention that he discovered after the trial, and could not have discovered earlier, the violent nature of Lawson, one of the victims. I agree also that such evidence might be relevant under certain circumstances in his claim of self-defense. And I agree with the majority herein that the mere fact that we affirmed without opinion appellant's previous appeal, which included some reference to this late discovered evidence, does not obstruct Dwyer's current effort to obtain a new trial.

I dissent not because some law prevents appellant from raising the issue; I dissent because the facts testified to *by him and his co-defendant* at trial preclude relief because they demonstrate that he cannot meet the *Jones*[1] standard that in order to obtain relief based on newly discovered evidence "the evidence must be of such nature that it would probably produce an acquittal on retrial." The trial court denied relief, at least partially, because there was no showing "how counsel's performance affected the outcome of the case." I agree with the trial judge.

Self-defense involves an admission and avoidance: "I shot the victim but I did so in order to protect myself or another." It does not apply, at least generally, when the defendant claims the shooting was an accident.[2] *Pimentel v. State,* 442 So.2d 228 (Fla. 3d DCA 1983), *rev. denied,* 450 So.2d 488 (Fla.1984).

In this case, Dwyer was convicted of the attempted first degree murder of Lawson and the attempted first degree murder of Norris.[3] Even though Dwyer admittedly was unaware of the victim's reputation for violence at the time of the incident, nevertheless, as indicated by the majority, such testimony might be relevant to show that the victim was the aggressor. But that depends, I submit, on the defendant's claiming that the victim was in fact acting aggressively at the time the injury was inflicted.

According to the defendants' testimony, the two victims approached the defendants at night on a dark road. The victims pretended to be policemen and one of them pulled a gun on the defendants. *Then the defendants disarmed the victims!*[4] Had ***50** the shooting and attempted shooting taken place during the period that Dwyer contends he and his companion were resisting the aggression of the victims, this newly discovered evidence would be relevant.[5] But consider Dwyer's testimony taken from his brief filed in his initial appeal concerning the shooting involving Norris (the bullet actually hit Lawson):

> Dwyer then testified as to the actual shooting. He came into contact with Norris as he reached for the radio wires. [Dwyer was afraid that Norris would

> call for help.] He did not point the gun at Norris and fire. Rather Norris' movement caused the gun to go off. The gun was leaning against the back of Norris' shoulder and went off when Norris moved. He did not know why the gun went off, but it was not because he pulled the trigger.

This testimony simply does not justify the majority's position that appellant was defending himself at the time of the accident. As for waiting for help, as suggested in the majority's footnote 3, instead of using the radio to call the police, appellant was, according to his testimony, attempting to disable it. Self-defense should not be so broadly defined or applied that it becomes a license for murder.

As to the self-defense claim urged by appellant concerning Norris, it is improbable, for two reasons, that informing the jury of Lawson's violent nature would have affected the verdict. Both reasons are contained within the jury instruction on justifiable use of deadly force.

> The fact that the defendant was wrongfully attacked cannot justify his use of force likely to cause death or great bodily harm if by retreating he could have avoided the need to use that force. However, if the defendant was placed in a position of imminent danger of death or great bodily harm and it would have increased his own danger to retreat, then his use of force likely to cause death or great bodily harm was justifiable.

By Dwyer's admission, the victims were overcome and disarmed. There was no evidence that they had access to any other weapons. Dwyer and Perkins had the only weapons shown by the record and were in control of the scene. Nothing prevented them, except perhaps a desire for retribution, from then getting into their vehicle and driving away. Indeed that is exactly what they say they did *after* the shooting and after a car passed which observed the incident and might well have sent help. Nothing in the record indicates why they could not have done so *before* the shooting. Lawson's reputation for violence, even if known by the jury, would not change this at all.

> If you find that [the victim] had a reputation of being a violent and dangerous person and that his reputation was known by the defendant, you may consider this fact in determining whether the actions of the defendant were those of a reasonable person in dealing with an individual of that reputation.

First, of course, Dwyer was unaware of any such reputation. But even if he knew of Lawson's reputation, it could have no bearing on the Norris incident. He does not contend that his concern about Lawson played any role in the "accidental" shooting involving Norris. Dwyer claims the gun accidently discharged when he bent over Norris to disable the radio because Norris moved. Lawson's reputation would not change this at all. There was no testimony that at the time of the shooting Dwyer believed that Norris (or Lawson) posed any imminent danger to either himself or his co-defendant, Perkins, the only two who possessed guns.

It is not appropriate to shoot even violent people after they are disarmed. The ***51** only purpose of admitting Lawton's reputation evidence under the facts of this case would be to prejudice the jury against the victims.

Dwyer's second conviction for attempted murder was based on the aider and abetter theory involving Perkins' action relating to Lawson. Lawson testified that Perkins pointed his weapon at Lawson and pulled the trigger but the gun misfired. *Perkins' defense to this charge was that it did not happen.* He never pulled the trigger and the gun did not misfire. The majority does not indicate how Lawson's reputation could affect this count. Again, Lawson's reputation for violence, even if Perkins knew about it, would be irrelevant to this defense. It is highly improbable that the jury would find self-defense to the attempted shooting when Perkins claimed it never happened.

Because of the defenses chosen by Dwyer, accident in the case involving Norris and denial in the case involving Lawson, the newly discovered evidence of Lawson's reputation for violence, even if submitted

to the jury, would not "*probably* produce an acquittal on retrial" and therefore the trial judge was right in denying relief.

I would affirm the trial court.

Parallel Citations

24 Fla. L. Weekly D1946

Footnotes

1 Rule 3.850 has supplanted the writ of coram nobis as the means of seeking post-conviction relief on the basis of newly discovered evidence. *Scott v. Dugger,* 604 So.2d 465 (Fla.1992).

2 We agree with the trial court that the state did not withhold exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

3 The dissent attempts to isolate the shooting and treat it separately from the entire event. We find it impossible to do so. If victim Lawson was an armed aggressor, Dwyer's subsequent act of disarming Lawson was an act of self-defense. Once Dwyer and his codefendant were in possession of the victims' firearms, (although it does not appear to be clear how many weapons or firearms Lawson and his companion possessed, either on themselves or in their vehicle), the transaction was not at an end; Dwyer was entitled to hold Lawson and the other victim at bay until Dwyer either could safely depart or lawful assistance arrived. The fact that Dwyer alleges he shot Lawson by accident while exercising the right of self-defense does not eliminate the "self-defense against an aggressor" principle. *Williams v. State,* 588 So.2d 44 (Fla. 1st DCA 1991) (defendant entitled to self defense instruction where defendant alleged that during the course of the altercation in which he was defending another, his knife slipped open and struck victim in the shoulder). The principle continues until some intervening act occurs, such as a departure and return or an unreasonable expiration of time between disarmament and departure, or some other factual scenario which makes it no longer reasonable for a jury to conclude that an accident resulted from a justifiable use of force. Here, each side of the altercation vigorously accused the other of being the initial aggressor and disagreed over the course and cause of events that followed. The jury was entitled to hear evidence of Lawson's reputation in order to fully evaluate the conflicting contentions regarding the identity of the initial aggressor, *Fine v. State,* 70 Fla. 412, 70 So. 379 (1915); *Pino v. Koelber,* 389 So.2d 1191, 1193 (Fla. 2d DCA 1980), as well as the ensuing actions and intentions of Lawson. *Hodge v. State,* 315 So.2d 507 (Fla. 1st DCA 1975).

1 *Jones v. State,* 591 So.2d 911, 915 (Fla.1991).

2 There is an exception when the accidental infliction of injury or death is inextricably intertwined with one's act in defense of himself or another. For example, "I hit him in the head with a gun to keep him from reaching the knife but the gun accidently went off, hitting him between the eyes." *See generally Williams v. State,* 588 So.2d 44 (Fla. 1st DCA 1991). Although the testimony in this case does not support the exception, the claim is not that a self-defense instruction was not given (it was given at least in the Perkins case); it seems to be Dwyer's position that the self-defense claim would have been bolstered by this newly discovered evidence.

3 He was also convicted of robbery and criminal mischief.

4 The majority's footnote 3 infers that the victims may have had other weapons hidden on themselves or in their vehicle. There is no record support for this supposition.

5 Dwyer's co-defendant, not involved in this appeal, was also convicted of aggravated battery for a beating inflicted on Lawson during the time a weapon was being taken from him. Even though self-defense would be a legitimate response to this charge, the issue is not before us.

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351 So.2d 1071
District Court of Appeal of
Florida, Fourth District.

Willie BANKS, Appellant,
v.
STATE of Florida, Appellee.

No. 76-19. | Aug. 23, 1977.

Defendant was convicted in the Circuit Court, Broward County, Humes T. Lasher, J., of manslaughter, and he appealed. The District Court of Appeal, Anstead, J., held that when defendant seeks only to prove that his actions were based on deceased's reputation for violence, it is necessary that defendant establish prior knowledge of such reputation before evidence of reputation is admissible, but prior knowledge is not necessary in order to introduce reputation evidence on issue of deceased's conduct at time of incident in question, and that refusal to admit evidence of reputation was reversible error where defendant's only defense was that he shot deceased because "he was pulling his gun to shoot me."

Reversed and remanded.

West Headnotes (5)

[1] **Homicide**
Character and Habits of Victim
203 Homicide
203IX Evidence
203IX(D) Admissibility in General
203k1049 Self-Defense
203k1051 Character and Habits of Victim
203k1051(1) In General
(Formerly 203k188(1))
Evidence of a deceased's violent character is admissible when self-defense is asserted if there is an issue as to either conduct of deceased or reasonableness of defendant's belief as to imminent danger from deceased.

4 Cases that cite this headnote

[2] **Homicide**
Knowledge of Defendant as to Victim's Character
203 Homicide
203IX Evidence
203IX(D) Admissibility in General
203k1049 Self-Defense
203k1051 Character and Habits of Victim
203k1051(2) Knowledge of Defendant as to Victim's Character
(Formerly 203k188(2))
When defendant seeks only to prove that his actions were based on deceased's reputation for violence, it is necessary that defendant establish prior knowledge of such reputation before evidence of reputation is admissible.

5 Cases that cite this headnote

[3] **Homicide**
Knowledge of Defendant as to Victim's Character
203 Homicide
203IX Evidence
203IX(D) Admissibility in General
203k1049 Self-Defense
203k1051 Character and Habits of Victim
203k1051(2) Knowledge of Defendant as to Victim's Character
(Formerly 203k187)
Prior knowledge is not necessary in order to introduce reputation evidence on issue of deceased's conduct at time of incident in question.

8 Cases that cite this headnote

[4] **Homicide**
Manner of Proving Character or Habits
203 Homicide
203IX Evidence
203IX(D) Admissibility in General
203k1049 Self-Defense
203k1051 Character and Habits of Victim
203k1051(5) Manner of Proving Character or Habits
(Formerly 203k188(5))

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Reputation is one way to prove character and it is decedent's character that is actually sought to be proven by reputation testimony in order to shed light on his conduct at time of incident in question.

1 Cases that cite this headnote

[5] **Homicide**
Character and Habits of Victim
Criminal Law
Exclusion of Evidence
Homicide
Knowledge of Defendant as to Victim's Character
203 Homicide
203IX Evidence
203IX(D) Admissibility in General
203k1049 Self-Defense
203k1051 Character and Habits of Victim
203k1051(1) In General
(Formerly 203k188(2))
110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1170 Exclusion of Evidence
110k1170(1) In General
(Formerly 203k339)
203 Homicide
203IX Evidence
203IX(D) Admissibility in General
203k1049 Self-Defense
203k1051 Character and Habits of Victim
203k1051(2) Knowledge of Defendant as to Victim's Character
(Formerly 203k188(2))
Refusal to allow evidence respecting reputation of victim of fatal shooting for violence was reversible error regardless of prior knowledge where defendant's only defense was that he shot victim because "he was pulling his gun to shoot me."

2 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

ANSTEAD, Judge.

This is an appeal from a judgment and conviction of manslaughter. The defendant was tried on a two count information for second degree murder involving the death of Lawrence Bradley and aggravated assault involving Beatrice Bradley, Lawrence's mother. A verdict of not guilty was returned on the aggravated assault charge. The defendant appeals on the grounds that the trial court erred in refusing to allow testimony as to the deceased's reputation for violence and in instructing the jury as to flight. We find no error with reference to the instruction on flight but reverse because of the exclusion of testimony as to reputation.

The defendant admitted shooting Bradley and his mother but claimed self defense. The defendant testified he shot the deceased because ". . . he was pulling his gun to shoot me." The defendant called his wife and his sister-in-law as witnesses and attempted to have each testify as to the reputation of the deceased. The prosecutor objected each time on the ground that the defendant himself had not established he had prior knowledge of the deceased's reputation. Each time the trial court ruled that such testimony was not admissible absent a showing of the defendant's prior knowledge. At the close of the case the trial court did instruct the jury that the deceased's character or reputation for violence might be considered if such fact was known to the defendant when the incident took place.

[1] [2] Evidence of a deceased's violent character is admissible when self defense is asserted if there is an issue as to either the conduct of the deceased or the reasonableness of the defendant's belief as to imminent danger from the deceased. Garner v. State, 28 Fla. 113, 9 So. 835 (1891); Fine v. State, 70 Fla. 412, 70 So. 379 (1915); Copeland v. State, 41 Fla. 320, 26 So. 319 (1899); Williams v. State, 252 So.2d

243 (Fla. 4th DCA 1971). Both issues were present in this case. When the defendant seeks only to prove that his actions were based on the deceased's reputation for violence it is necessary that the defendant establish prior knowledge of such reputation before evidence of reputation is admissible.

[3] [4] However, prior knowledge is not necessary in order to introduce reputation evidence on the issue of the deceased's conduct at the time of the incident in question. Cole v. State, 193 So.2d 47 (Fla. 1st DCA 1967). Reputation testimony is one way to prove character and it is the decedent's character that is actually sought to be proven by reputation testimony in order to shed light on his conduct at the time of the incident involved.

[5] In this case where the defendant's only defense was self defense we are unable to say that the failure to admit reputation evidence was harmless error. For this reason the judgment of conviction is reversed and this cause is remanded for a new trial.

ALDERMAN, C. J., and LETTS, J., concur.

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