IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

THE NEMOURS FOUNDATION D/B/A
NEMOURS CHILDREN'S HOSPITAL, ORLANDO,

Petitioner,

v. Case No. 5D19-817

XIOMARA MARTINEZ ARROYO, INDIVIDUALLY
AND AS NATURAL GUARDIAN OF RAMON APONTE,
A MINOR, AND RAMON LUIS APONTE, INDIVIDUALLY,

Respondents.

_____/

Opinion filed August 30, 2019

Petition for Certiorari Review
of Order from the Circuit Court
for Orange County,
Heather L. Higbee, Judge.

Francis E. Pierce, III and Susan E. Sewell, of Mateer Harbert, P.A., Orlando, for Petitioner.

Kansas R. Gooden, of Boyd & Jenerette, PA, Jacksonville, Edward J. Carbone and Jacqueline R. A. Root, of Pennington, P.A., Tampa, Amicus Curiae for Florida Defense Lawyers Association, in support of Petitioner.

Andrew S. Bolin, of Bolin Law Group, Tampa, Amicus Curiae, for The Florida Hospital

Association, in support of Petitioner.

Christopher V. Carlyle, of the Carlyle Appellate Law Firm, Orlando, for Respondents.

SASSO, J.

Petitioner, The Nemours Foundation d/b/a Nemours Children's Hospital, seeks certiorari relief from an order requiring it to produce five documents that it claims are protected by the attorney-client privilege. The order was rendered after this Court quashed, without prejudice, a prior order requiring production of the documents because that order lacked the requisite detailed findings necessary for meaningful appellate review. *Nemours Found. v. Arroyo (Nemours I)*, 262 So. 3d 208 (Fla. 5th DCA 2018). We reject without further discussion Petitioner's argument that the order under review fails to comply with this Court's mandate in *Nemours I*. We hold the discovery order does not depart from the essential requirements of the law; therefore, we deny the petition.

Respondents, Xiomara Martinez Arroyo and Ramon Luis Aponte, sued Petitioner for medical negligence following injuries their minor child, Ramon Aponte, allegedly sustained while undergoing a procedure at Nemours Children's Hospital. During discovery, Respondents requested that Petitioner produce, among other things, "all Amendment 7 records."[1] Over Petitioner's objection, the trial court ordered Petitioner to

[1] "In the November 2004 election, the voters were tasked with deciding, among other things, whether the Florida Constitution should be amended to provide patients with 'a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident.' Listed as Amendment 7 on the ballot (hence, the reference to 'Amendment 7 records'), it was approved by the electorate and is now Article X, Section 25 of the Florida Constitution." *Nemours I*, 262 So. 3d at 210 n.1.

produce written statements of five of its employees that had been provided to its in-house counsel.[2]

On remand from *Nemours I*, the trial court conducted a second in-camera review of the five employee statements at issue. Concluding that Petitioner had failed to sustain its burden of proving the statements were protected by the attorney-client privilege, the trial court again entered an order overruling Petitioner's objection. Petitioner requests this Court to quash that order, arguing as it did below and in *Nemours I*, that the employee statements are protected by the attorney-client privilege and not subject to disclosure.

Certiorari lies to review a trial court's order compelling production of documents claimed to be protected by the attorney-client privilege, due to the potential for irreparable harm. *Montanez v. Publix Super Mkts., Inc.*, 135 So. 3d 510, 512 (Fla. 5th DCA 2014). Even so, an appellate court may grant certiorari relief only where the petitioner demonstrates that the discovery order at issue constitutes a departure from the essential requirements of the law. *Finn Law Grp., P.A. v. Orange Lake Country Club, Inc.*, 206 So. 3d 169, 170 (Fla. 5th DCA 2016). Departure from the essential requirements of the law is more than mere legal error and instead occurs "when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Combs v. State*, 436 So. 2d 93, 95-96 (Fla. 1983). Under this framework, we consider whether the discovery order at issue so departs.

Florida's attorney-client privilege "protects only those disclosures necessary to obtain informed legal advice." *Genovese v. Provident Life & Accident Ins. Co.*, 74 So. 3d 1064, 1067 (Fla. 2011) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)); *see*

[2] The five employee statements have been filed under seal in this Court.

also § 90.502(2), Fla. Stat. (2019) (protecting confidential communications made "in the rendition of legal services to the client"). While this privilege applies to corporations to promote full and frank conversations between corporations and their counsel, claims of the privilege in the corporate context are subjected to a heightened level of scrutiny. *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994) (requiring heightened level of scrutiny for claims of privilege in corporate context to minimize threat of corporations cloaking information with attorney-client privilege to avoid discovery). Thus, to establish whether a document is protected by the attorney-client privilege in the corporate context, a corporation must show:

> (1) the communication would not have been made but for the contemplation of legal services;
>
> (2) the employee making the communication did so at the direction of his or her corporate superior;
>
> (3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
>
> (4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;
>
> (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Id. The burden of establishing attorney-client privilege rests with the party claiming it. *Id.*

Here, in weighing Petitioner's objection, the trial court reviewed the five employee statements and considered an affidavit from Petitioner's in-house counsel. After doing so, the trial court determined the statements did not constitute confidential attorney-client communications. The trial court specifically noted that the statements were created shortly after the procedure at issue, state nothing about attorney involvement, do not

mention in-house counsel in any way, and include no legal analysis. The trial court went on to find that "there is nothing contained in any of the five documents in question that indicate[s] a lawyer's involvement, *that it was in furtherance of the rendition of legal services to the client,* or that they were in response to an inquiry from in-house counsel." (Emphasis added).

Upon review, we examine whether the trial court's determination that the statements *were not* made in the rendition of legal services comports with the essential requirements of law. *Paton v. GEICO Gen. Ins. Co.*, 190 So. 3d 1047, 1052 (Fla. 2016) ("Simple disagreement with the decision of the trial court is an insufficient basis for certiorari jurisdiction."); *Chicken'N'Things v. Murray*, 329 So. 2d 302, 304 (Fla. 1976) (stating that on certiorari, "the reviewing court will not ordinarily weigh the effect of the evidence, or consider its probative force if the conflicting evidence is legally sufficient to sustain the judgment"). Here, four of the five statements are written on blank paper, undated, unsigned, and, as the trial court observed, lack any indication that they were made in furtherance of legal services. The statements fail to provide any context surrounding their creation. The fifth statement also is written on blank paper, but it is signed and dated almost a year after the incident. While that statement specifically references in-house counsel, it makes no reference to counsel's provision of legal services.

We recognize that in-house counsel's affidavit attempts to track the *Southern Bell* factors and each statement contains an averment that it was prepared "in anticipation of litigation." However, considering the heightened scrutiny placed on a corporation's claims of privilege, the trial court justifiably determined that these conclusory statements, viewed

in context, did not sustain Petitioner's burden. *See, e.g.*, *Burrow v. Forjas Taurus S.A*., 334 F. Supp. 3d 1222, 1236 (S.D. Fla. 2018) (explaining that proponent of attorney-client privilege must show "the primary purpose of the communication was to relay, request, or transmit legal advice"). To the contrary, the trial court appropriately noted that the employee statements in this case are more like "fact work product," which this Court has determined is no longer protected after the passage of Amendment 7. *Fla. Eye Clinic, P.A. v. Gmach*, 14 So. 3d 1044 (Fla. 5th DCA 2009).

In sum, there is nothing about the statements or affidavit at issue that so clearly demonstrates they were made in the rendition of legal services as to compel us to declare that a miscarriage of justice occurred. Petitioner fails to demonstrate entitlement to the extraordinary relief requested. In light of our holding, we decline to address whether Amendment 7 mandates the production of documents allegedly protected by attorney-client privilege.

PETITION for WRIT of CERTIORARI DENIED.

LAMBERT and EDWARDS, JJ., concur.