IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO. 12-034123(07)

P & S ASSOCIATES GENERAL
PARTNERSHIP, etc. et al.,

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.

Defendants.

_____/

**DEFENDANT MICHAEL BIENES'
RESPONSE IN OPPOSITION TO PLAINTIFFS'
EXPEDITED MOTION TO COMPEL DEFENDANTS
FRANK AVELLINO AND MICHAEL BIENES TO PRODUCE
COMPUTERS FOR INSPECTION AND TO PRODUCE DOCUMENTS**

Defendant, Michael Bienes ("Mr. Bienes"), hereby files this Response in Opposition to Plaintiffs' Expedited Motion to Compel Defendants to Produce Computers for Inspection and to Produce Documents (the "Motion"), stating:

INTRODUCTION

Plaintiffs' Motion must be denied because it improperly seeks the unrestricted turn-over and carte blanche search of Mr. Bienes's personal computer[1] without even approaching any of the many rigorous standards to be met to be granted such relief. Turn-over or inspection of a personal computer (or other electronic device for that matter) is permissible only under very limited and strictly controlled circumstances. In fact, so rare is this relief granted and upheld in the Fourth District, it borders on theoretical. Plaintiffs cite and Defendant has located no case in

[1] Which could contain protected, privileged, or other confidential information pertaining to other non-party members of his family.

which a trial court situated in the Fourth District granted this sort of relief, but was not later reversed on *certiorari* review.

A search of another party's computer *might* be approved *if* the requesting party **proves** three things:

- Destruction of evidence or thwarting of discovery;
- Likelihood the relevant information exists on the computer or electronic device and can be retrieved;
- No less intrusive means of obtaining the information.

All three of the foregoing elements are threshold requirements before this Court may even entertain the thought of ordering a turn-over of Mr. Bienes's personal computer. None of them are present here. As such, and as detailed below, the Motion must be denied.

I. Standard on an Order for Production of a Computer

Requests for turn-over or examination of a personal computer or other device are permissible "only in limited and strictly controlled circumstances." *See Menke v. Broward County School Board*, 916 So. 2d 8 (2005). If the standards which govern those limited and strictly controlled circumstances are not met, the Fourth DCA has *certiorari* jurisdiction to review a discovery order that requires production of even potentially privileged information. *Strasser v. Yalmamanchi*, 669 So. 2d 1142, 1146 (1996). In such a situation, like the one with which the Court is currently faced, where Plaintiffs request surrender of Mr. Bienes's personal computer, "[t]he harm [there] is irreparable because once confidential information is disclosed, it cannot be 'taken back,' and once the wholesale invasion into the defendant's computer system has occurred, the damage … may be irreversible." *Id.*

Thus, for this Court to enter an order like the one Plaintiffs seek, the burden rests squarely on Plaintiffs to prove three elements: (i) intentional destruction of relevant evidence; (ii)

a likelihood of retrieving the allegedly deleted information; and (iii) that there are no less intrusive means of obtaining the information. *Menke*, 910 So. 2d at 12. Plaintiffs have not and cannot prove a single one of these elements in this case.[2]

II. Plaintiffs have failed to prove destruction of evidence.

The sole argument backing Plaintiffs' request for an obtrusive and unfettered turn-over of Mr. Bienes's personal computer is his deposition testimony where he stated that since acquiring his first computer in approximately 2007 it has been his common practice to regularly delete his personal e-mails. In Plaintiffs' view of discovery and motion practice, that testimony justifies a turning over of Mr. Bienes's personal computer because they believe, also mistakenly, that Mr. Bienes was under a duty to preserve evidence from the time "Madoff was revealed as a fraud to the world" on December 8, 2008. Neither view has any basis in fact or grounding in the law governing turn-over of protected, private information, in particular a person's computer or mobile device.

First, meeting the argument head on, Mr. Bienes's testimony about his personal e-mail maintenance habits is not evidence of any thing or relevant or germane to the Motion. Plaintiffs have to show actual evidence of destruction, not just unhealthy skepticism piled on top of unsupported inferences. The only "evidence" Plaintiffs offer to, they believe, suggest that Mr. Bienes destroyed relevant information are 3 e-mails exchanged between Mr. Bienes's wife, Dianne, and Matthew Carone. To make matters worse, one of those 3 e-mails actually *predates* even the premature date Plaintiffs suggest Mr. Bienes's duty to preserve first arose (December 8, 2008). Plaintiffs have presented absolutely **no evidence** that Mr. Bienes destroyed relevant evidence or thwarted its discovery. That failure alone justifies denial of their Motion.

[2] *Menke* and *Strasser* are attached for the Court's reference as **Exhibit A**.

Second, Mr. Bienes must first have been under a duty to preserve evidence before he can be accused (albeit falsely and without any evidence) of having intentionally destroyed it. And that simply is not the case on our facts under Florida law.[3] In Florida, there is no common law duty to preserve evidence in anticipation of litigation. *Royal & Sunalliance v.Lauderdale Marine Center*, 877 So.2d 843, 846 (Fla. 4th DCA 2004). A duty to preserve arises only after a lawsuit has been filed and pursuant to contract, statute, or a properly served request to preserve. *Id.* at 845 (holding that the litigant entity leasing marine spaces had no common law duty to preserve the debris collected from a fire in the marina which partially burned a vessel); s*ee also, Gayer v. Fine Line Construction & Electric, Inc.,* 970 So.2d 424, 426 (Fla. 4th DCA 2008).

Plaintiffs are going in the wrong direction down the wrong track. No duty to preserve attached in this case until Mr. Bienes was served with original process, which the record reflects occurred at approximately 9:15 in the morning on October 10, 2013. As such, what Mr. Bienes did or did not do with any information prior to that date or time is irrelevant to Plaintiffs' Motion, and yet it is only Mr. Bienes's e-mail maintenance practices concerning his personal e-mails dating back to some unspecified date in 2007, combined with 3 e-mails between his wife Dianne, a non-party, and Matthew Carone, another non-party, which receive *any* attention. *See* Exhibit B to Plaintiffs' Motion, which is comprised of relevant excerpts from Mr. Bienes's deposition transcript, and portions of Composite Exhibit E, which contain 3 e-mails between Dianne Bienes and Matt Carone. Further, and most importantly, Plaintiffs should not be entitled

[3] Plaintiffs, mistakenly relying on *American Hospitality Management Co. of Minnesota v. Hettiger*, 904 So.2d 547 (Fla. 4th DCA 2005), argue that the duty to preserve evidence arises when the defendant could reasonably have foreseen the claim. That is not so. What Plaintiffs fail to advise the Court is that *American Hospitality* is inapplicable and the standard for which they offer it is not the controlling standard in the Fourth District when it comes to a duty to preserve. *American Hospitality* addresses only the issue of when a spoliation instruction to a jury is appropriate. It has nothing whatever to do with when a duty to preserve evidence arises.

to turn-over or inspection of his personal computer in any event, because there is **no record evidence** whatsoever that Mr. Bienes even used his personal computer after approximately 2012, which predates the date upon which any duty to preserve would have attached. *See* Bienes Dep. Tr. Vol. II, 91:14-92:9, a copy of which is attached as Exhibit B to Plaintiffs' Motion.

Because Plaintiffs have failed to come forward with **any** evidence that Mr. Bienes destroyed evidence remotely relevant to this case, the Motion must be denied.

III. Plaintiffs have not proved a likelihood of recovering relevant information.

A. There is no proof the information sought exists.

With each hurdle Plaintiffs must cross to obtain the relief they seek, their Motion's failure becomes more complete. Plaintiffs have offered **no evidence** to suggest there is a likelihood that the e-mails and other unspecified information/documents they are seeking exist on Mr. Bienes's computer:

- Plaintiffs have presented **no evidence** that Mr. Bienes communicated to Mr. Carone or anyone else about information relevant to this case since his duty to preserve evidence arose in October 2013, or **ever**.
- Plaintiffs have presented **no evidence** that Mr. Bienes even used e-mail as a primary means of communication, or **ever**.
- Plaintiffs have presented **no evidence** that Mr. Bienes even had e-mail communications with any of the parties to this lawsuit on any regular basis, or **ever**.
- Plaintiffs have presented **no evidence** that any of the e-mails they presumptively alleged were deleted would have related to this litigation or the issues raised in this lawsuit.

Further compounding this litany of evidentiary failures is the fact that Plaintiffs could have, yet failed, to make any inquiry into these matters at Mr. Bienes's deposition. Moreover,

Plaintiffs also have produced **no evidence** that e-mail communications between Mr. Bienes and anyone related to this matter ever occurred.

B. There is no proof the information sought could be recovered.

Plaintiffs fail equally in the second aspect of this hurdle: Plaintiffs have offered **no evidence** the e-mails and other unspecified information/documents they seek to obtain could be recovered:

- Plaintiffs have presented **no evidence** regarding the method by which they intend to seek "recovery" of this "information" and whether there is any reason to believe they should be successful in "recovering" this "information."
- Plaintiffs have presented **no evidence** in the record as to what operating system Mr. Bienes uses or how they intend to navigate through it in a way that would protect his confidential, private, or privileged information.
- Plaintiffs have presented **no evidence** was to who they intend will serve as their "expert" or computer information technician.
- Plaintiffs have presented **no evidence** regarding the qualifications of or the manner in which the expert or technician would attempt to recover the e-mails and other unspecified information/documents.

In sum, there is no record evidence that Mr. Bienes ever possessed evidence relevant to this case, and Plaintiffs have been unable over the near 36 month course of this litigation to create one. Moreover, there is no evidence any such information could be recovered, assuming it existed in the first place. With this glaring lack of evidence that anything relevant could be recovered even if a search or turn-over of Mr. Bienes's computer were allowed, the relief Plaintiffs seek cannot be granted. Accordingly, the Motion must be denied.

IV. There are less intrusive means to obtain the information, if any, Plaintiffs seek.

Plaintiffs do no better to surmount their third hurdle—showing no less intrusive means of obtaining the information they seek—than they have done with the first two. Again, Plaintiffs are asking this Court to compel Mr. Bienes to produce his entire computer so that an intrusive search of all the data that exists can be conducted, including privileged communications, and other personal and confidential information. Such an intrusive search is not permitted. *See, Menke*, 916 So.2d at 10-11.[4] The fact that Plaintiffs say they only seek to have an "independent referee" search Mr. Bienes's entire computer to locate e-mails and other unspecified documents/information does them no good and brings them no closer toward meeting their third and final evidentiary hurdle. Simply put, Plaintiffs again provide **no evidence** to give the Court or Mr. Bienes comfort they are seeking the least intrusive means possible to obtain the information they seek.[5]

Indeed, quite the opposite is true—they seek to be as intrusive as possible. And Plaintiffs undermine their own argument on this point by having themselves showed that there are indeed less intrusive methods to obtain information. Plaintiffs, for instance, have obtained e-mails between Mrs. Bienes and Mr. Carone. If there were any e-mails between Mr. Bienes and any of the partners of the Plaintiff Partnerships, Plaintiffs could certainly obtain those e-mails from their own clients. Assuming only for the sake of argument there were e-mails between Mr. Bienes and

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[4] The court in *Menke* compares such a broad request to a party being asked to produce its business or personal filing cabinets for inspection by its adversary to see if they contain any information useful to the litigation. *Id*. at 10.

[5] The Fourth DCA has been unequivocal on this point: only if there is a factual finding that there is no less intrusive manner to obtain the information, may there be an order permitting a computer search, but even then "the parameters of time and scope" and "sufficient access restrictions" must be in place. *Strasser*, 669 So. 2d at 1145. These issues go veritably unaddressed by Plaintiffs.

other parties related to this litigation, Plaintiffs could seek those e-mails, if they exist, from the other specific parties. The bottom line, again, is this: Plaintiffs have provided **no evidence** that Mr. Bienes communicated with any other party by e-mail, and particularly not with regard to any information, subject, or topic relevant to this case.

Beyond their own conduct, however, Plaintiffs make it difficult for Mr. Bienes or his counsel to fully address the issue of whether there are less intrusive methods to obtain the "other information and documents" Plaintiffs are seeking because they never specify what the "other information and documents" are. There is **no evidence** in the first instance that there are any "other" documents or information relevant to this litigation on Mr. Bienes's computer. Merely because Mr. Bienes deleted e-mails on his computer as common practice, does not mean there is likely to be other relevant information still on it that has not been produced. And even if it were, that cannot legally require the drastically disfavored remedy of ordering a surrender and turn-over of a personal computer. Worse still, Plaintiffs have provided **no evidence** that Mr. Bienes maintained or stored any other documents or information on his computer which would be relevant to this litigation, and it raises an earlier point that merits repeating: this is a subject that Plaintiffs could have explored at Mr. Bienes's deposition, but they did not. Accordingly, Plaintiffs have yet again failed to prove that it is likely the e-mails and other unspecified documents or information they seek exists on Mr. Bienes's computer or that it could be recovered.

Plaintiffs' request to have Mr. Bienes's entire computer searched for other unspecified information and documents is a clear violation of both Mr. Bienes constitutional privacy rights. More obviously still, in addition to the violation of his constitutional privacy rights, Mr. Bienes communicates with his legal counsel for this litigation through e-mail. The Fourth DCA has been

unequivocal that applicable privileges under Rule 1.280(b)(5), Florida Rules of Civil Procedure, and a party's privacy and even Fifth Amendment Rights *must* be protected in such a situation. *Menke*, 916 So. 2d at 11-12.

V. Plaintiffs should not be permitted to obtain Mr. Bienes's e-mails "directly."

For the reasons stated above, Mr. Bienes should not be compelled to provide consent that Plaintiffs obtain his e-mails from AOL or any other e-mail server for that matter. Plaintiffs have failed to show a legal basis for this relief, and any such e-mails would necessarily contain personal and confidential e-mails, potentially including privileged communications with his counsel.

CONCLUSION

For the reasons detailed above, the Motion must be denied.

Respectfully submitted,

/s/ Shane P. Martin
Mark F. Raymond (373397)
mraymond@broadandcassel.com
ssmith@broadandcassel.com
Jonathan Etra (686905)
jetra@broadandcassel.com
msoza@broadandcassel.com
Shane P. Martin (056306)
smartin@broadandcassel.com
msanchez@broadandcassel.com
BROAD AND CASSEL
One Biscayne Tower, 21st Floor
2 South Biscayne Boulevard
Miami, Florida 33131
Telephone: 305.373.9400
Facsimile: 305.373.9443
Counsel for Defendant, Michael Bienes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 23, 2015, the foregoing document was served via E-mail to: **(i)** Thomas E. Messana, Esq., Thomas Zeichman, Esq., Messana, P.A., 401 East Las Olas Boulevard, Suite 1400, Ft. Lauderdale, FL 33301 (tmessana@messana-law.com, tzeichman@messana-law.com) (Counsel for Plaintiffs); **(ii)** Leonard K. Samuels, Esq., Etan Mark, Esq., Steven D. Weber, Esq., Zachary P. Hyman, Esq., Berger Singerman LLP, 350 East Las Olas Boulevard, Suite 1000, Fort Lauderdale, FL 33301 (lsamuels@bergersingerman.com,emark@bergersingerman.com, sweber@bergersingerman.com, zhyman@bergersingerman.com) (Counsel for Plaintiff Margaret Smith); **(iii)** Peter G. Herman, Esq., Tripp Scott, 110 S.E. 6th Street, 15th Floor, Ft. Lauderdale, FL 33301 (pgh@trippscott.com) (Counsel for Steven Jacob and Steven F. Jacob CPA and Associates); **(iv)** Paul V. DeBianchi, Esq., Paul V. DeBianchi, P.A., 111 S.E. 12th Street, Ft. Lauderdale, FL 33316 (Debianchi236@bellsouth.net); **(v)** Gary A. Woodfield, Esq., Haile, Shaw & Pfaffenberger, P.A., 660 U.S. Highway One, Third Floor, North Palm Beach, FL 33408 (gwoodfield@haileshaw.com, bpetroni@haileshaw.com, eservice@haileshaw.com) (Counsel for Defendant Frank Avellino); **(vi)** Harry Winderman, Esq., One Boca Place, 2255 Glades Road, Boca Raton, FL 33431 (harry4334@hotmail.com); **(vii)** Matthew Triggs, Esq., Andrew Thomson, Esq. Proskauer Rose LLP, 2255 Glades Road, Suite 421 Atrium, Boca Raton, FL 33431 (mtriggs@proskauer.com, athomson@proskauer.com, florida.litigation@proskauer.com); and **(viii)** Robert J. Hunt, Esq., Debra D. Klingsberg. Esq., Hunt & Gross, P.A., 185 Spanish River Boulevard, Suite 220, Boca Raton, FL 33431 (bobhunt@huntgross.com, dklinsgberger@huntgross.com, eService@huntgross.com, Sharon@huntgross.com).

/s/ Shane P. Martin
Shane P. Martin

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

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

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

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

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

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

ALJ in disciplinary proceeding against high school teacher accused of exchanging

EXHIBIT
tabbies
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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

***9** Karen Coolman Amlong of Amlong & Amlong, P.A., Fort Lauderdale, for petitioner.

Mark A. Emanuele and Marcy E. Abitz of Panza, Maurer & Maynard, P.A., Fort Lauderdale, for respondent.

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.

All Citations

916 So.2d 8, 205 Ed. Law Rep. 541, 23 IER Cases 936, 30 Fla. L. Weekly D2311

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669 So.2d 1142
District Court of Appeal of Florida,
Fourth District.

EUGENE J. **STRASSER**, M.D., P.A., Petitioner,
v.
BOSE YALAMANCHI, M.D., P.A., a Florida Professional Corporation, et al., Respondents.

No. 96–0147. | March 20, 1996.

In breach of contract suit between plastic surgeons, defendant's objections to plaintiff's request for entry on defendant's premises for inspection of defendant's **computer** system were overruled by the Seventeenth Judicial Circuit Court, Broward County, Harry G. Hinckley, Jr., J., and defendant petitioned for writ of certiorari. The District Court of Appeal, Pariente, J., held that: (1) court had certiorari jurisdiction; (2) scope of discovery rules was broad enough to encompass request; but (3) alleged conduct of defendant in thwarting discovery did not necessarily invite intrusive discovery absent evidence to establish any likelihood that purged documents could be retrieved, and though **computer search** might be appropriate if plaintiff could present such evidence, order must define parameters of time and scope, and place sufficient access restrictions to prevent compromising patient confidentiality and prevent harm to defendant's **computer** and databases.

Petition granted and order quashed, and remanded.

West Headnotes (4)

[1] Pretrial Procedure
Objects and tangible things; entry on land

Scope of discovery rules is broad enough to encompass request by party to enter opponent's **computer** system to **search** for financial information that opponent claims has been purged from **computer** and is no longer in opponent's possession; request does not fit squarely within rule allowing request to produce documents, but comes within scope of rule requiring party to permit entry on designated land or other property, subject to restrictions, for purposes of inspection and measuring, surveying, photographing, testing, or sampling the property. West's F.S.A. RCP Rules 1.280, 1.350(a)(1, 3).

2 Cases that cite this headnote

[2] Certiorari
Particular proceedings in civil actions

District Court of Appeal has certiorari jurisdiction to review discovery order that requires disclosure of information that is alleged to be confidential or to address discovery requests which constitute overly broad and unwarranted intrusions into party's business where potential for irreparable harm is demonstrated.

1 Cases that cite this headnote

[3] Certiorari
Particular proceedings in civil actions

District Court of Appeal had certiorari jurisdiction to review trial court's order overruling objections to discovery request for entry onto opponent's premises for inspection of opponent's **computer** system, as alleged harm was irreparable in that once confidential information is disclosed, it cannot be taken back, unrestricted access to plastic surgeon's **computer** system would involve access to patients' confidential records, and possible damage to system might be irreversible. West's F.S.A. § 455.241(2).

5 Cases that cite this headnote

[4] Pretrial Procedure
Objects and tangible things; entry on land

Even if defendant in contract dispute between plastic surgeons was thwarting discovery process, such conduct did not necessarily invite intrusive discovery into defendant's **computer** system absent evidence to establish any likelihood that purged documents could be

retrieved, but if plaintiff could present evidence to demonstrate likelihood of retrieving purged information and if trial court found that there was no other less intrusive manner to obtain the information, **computer search** might be appropriate, but order must define parameters of time and scope and must place sufficient access restrictions to prevent compromising patient confidentiality and to prevent harm to the **computer** and databases. West's F.S.A. RCP Rule 1.350(a)(3).

4 Cases that cite this headnote

***1143** Petition for writ of certiorari to the Circuit Court of the Seventeenth Judicial Circuit, Broward County; Harry G. Hinckley, Jr., Judge. No. 93–22433–8.

Attorneys and Law Firms

Daniel R. Levine of Muchnick, Wasserman & Dolin, Hollywood, for petitioner.

William E. Blyler of William E. Blyler, P.A. and Thomas D. Lardin, P.A., Fort Lauderdale, for respondent Bose Yalamanchi, M.D., P.A.

Opinion

PARIENTE, Judge.

The subject of this petition for writ of certiorari is a trial court's order overruling petitioner's objections to respondent's (plaintiff) request for entry on petitioner's (defendant) premises for inspection of defendant's **computer** system. We grant the petition because the order allowed plaintiff unrestricted access to defendant's **computer** system, including all of his programs and directories, without protection for any privileged or confidential information and without safeguards or restrictions to minimize any potential harm to the **computer** system.

[1] The discovery dispute in this case is clearly one for the nineties. Plaintiff seeks permission to enter defendant's **computer** system to **search** for financial information that defendant claims has been purged from his **computer** and therefore no longer in defendant's possession. The scope of our discovery rules is broad enough to encompass this request, but the circumstance of allowing entry into a party's **computer** system to attempt to access information no longer in the ***1144** party's possession may not have been fully envisioned by the drafters of the rules.

This request does not fit squarely within Florida Rule of Civil Procedure 1.350(a)(1), which allows a party to request any other party to produce "documents, including writings, drawings, graphs, charts, photographs, phono-records and other data compilations." Instead it comes within the scope of rule 1.350(a)(3), which requires a party "to permit entry upon designated land or other property," subject to the restrictions of rule 1.280, "for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property."

The underlying dispute in this case arises out of the termination of a contractually-based working arrangement between plaintiff and defendant, both plastic surgeons. Their contract provided that plaintiff was to receive 50% of the collections of his gross billings. The parties operated under this contract until August 31, 1991, when plaintiff terminated the contract to begin his own practice.

In December 1995, plaintiff filed a Request for Entry on Designated Property for Inspection and Other Purposes pursuant to rule 1.350. Through this request, plaintiff sought to inspect and test defendant's **computer** system. Defendant filed an objection alleging that the request called for information that is "irrelevant, immaterial, overbroad, burdensome, harassing, invasive of confidential proprietary information, and not reasonably calculated to lead to the discovery of admissible evidence."

At the January 8, 1996 hearing on the objection, plaintiff presented the trial court with an affidavit of John M. Mann, a certified public accountant and licensed fraud examiner, who stated "that in [his] experience it has been possible to retrieve information from a **computer** system even though a 'purge' has occurred." There is no indication that Mann possesses any particular **computer** expertise.

Defendant presented the trial court with the contrary affidavit of Don Hoffrogge, a certified netware engineer. Hoffrogge stated that he had discussed the possibility of retrieving "purged" data from defendant's **computer** with one of the technical support engineers at the technical support company for Medifax. Medifax is the software program which contains patient billing, receivables and patient information. Hoffrogge stated that he learned that during the "purging" operation of data, the software itself **searches**

for accounts with zero balances and inactivity, and the master file is entirely rewritten deleting that information, thus automatically overwriting the deleted data. Hoffrogge explained that he was advised that there was absolutely "no way" to retrieve the purged data, and that it does not go into any other file or directory.

Additionally, Hoffrogge advised that he personally examined the **computer** system on January 4, 1996, and that the **computer** system's data bank, with a hard drive space minimal by today's standards (400 megabytes), was almost at full capacity. Hoffrogge stated that he logged onto the system and **searched** without success for any sign of files containing the purged data. It was his professional opinion that the purged data was irretrievable.

Defendant's employee, Shari Scarlett, testified through deposition that since 1986, she has purged defendant's **computer**, specifically the Medifax program, approximately 3–5 times. The information had been purged in the ordinary course of business to make room on the system's hard drive.

Initially, the trial court stated that it wanted to conduct a special hearing on the matter and take testimony. However, after being advised of the impending trial date, the trial court overruled defendant's objections and granted plaintiff's motion to have access to defendant's **computer** without any limitation.

In its petition for certiorari, defendant asserts that the discovery order allows carte blanche access to his **computer**—unlimited in scope, nature or purpose. Defendant protests the "wholesale intrusion into all of its proprietary business files and statutorily-protected patient information" and further voices concern about the potential for harm to his **computer** system through inadvertent deletion of files or the introduction of a virus. Plaintiff counters with a history of the discovery proceedings in this case from 1993 to the present to demonstrate that this request ***1145** was plaintiff's final attempt to obtain the relevant information due to defendant's efforts in thwarting all other discovery avenues.

[2] [3] We have certiorari jurisdiction to review a discovery order that requires disclosure of information that is alleged to be confidential or to address discovery requests which constitute overly broad and unwarranted intrusions into a party's business where the potential for irreparable harm is demonstrated. *See generally Blank v. Mukamal,* 566 So.2d 54 (Fla. 4th DCA 1990); *First City Devs. v. Hallmark of Hollywood Condo. Ass'n,* 545 So.2d 502 (Fla. 4th DCA 1989); *LeJeune v. Aikin,* 624 So.2d 788, 789 (Fla. 3d DCA 1993). The harm here is irreparable because once confidential information is disclosed, it cannot be "taken back," and once the wholesale invasion into the defendant's **computer** system has occurred, the damage to the system may be irreversible. *See Martin–Johnson, Inc. v. Savage,* 509 So.2d 1097 (Fla.1987). During an inspection as presently ordered, plaintiff would have unrestricted access to defendant's entire **computer** system with all of the patients' confidential records, *see* § 455.241(2), Fla.Stat. (1995), and all of the records of defendant's entire business, including those not involved in the instant action.

[4] Plaintiff's expert C.P.A. states retrieval of purged data is theoretically possible; whereas defendant's **computer** expert, after having actually logged onto the system and **searched** for any sign of the purged data, states that the purged data is irretrievably gone. Even if plaintiff represents accurately that defendant has been thwarting the discovery process, such conduct does not necessarily invite intrusive discovery where there has been no evidence to establish any likelihood that the purged documents can be retrieved.

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.

We therefore grant the petition and quash the order. We remand for the trial court to conduct further proceedings consistent with this opinion.

GLICKSTEIN and STONE, JJ., concur.

All Citations

669 So.2d 1142, 21 Fla. L. Weekly D703

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