DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

STEPHEN PETZOLD and BRIDGET PETZOLD,

Petitioners,

v.

JOHN S. CASTRO and LAUREN E. CASTRO,

Respondents.

No. 2D22-4024

June 16, 2023

Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Emmett Lamar Battles, Judge.

Nicholas L. Sellars of Peterson & Myers, P.A., Lakeland, for Petitioners.

Brian A. Leung and Shannon L. Hunter of Holcomb & Leung, P.A., Tampa, for Respondents.

KHOUZAM, Judge.

This is Stephen and Bridget Petzold's timely petition for writ of certiorari challenging an order granting in part John and Lauren Castro's motion to compel discovery on the basis of a limited waiver of attorney-client privilege. We grant the petition and quash the order.

The Petzolds brought claims against the Castros for breach of contract for sale of real property and fraud in the inducement. The Petzolds later moved for summary judgment with an affidavit by Bridget Petzold in support. Attached as an exhibit to the affidavit was a series of emails between defendant John Castro and the Petzolds' then-attorney, Kelly Overfield. This correspondence was quoted and relied upon in the summary judgment motion.

In addition to these emails, a follow-up email between Ms. Petzold and Attorney Overfield was included. Therein, Attorney Overfield forwarded her conversation with Mr. Castro to Ms. Petzold and advised her about the timing of mediation and related litigation strategy. The email did not address the substance of the case, and it was not cited or otherwise discussed in the Petzolds' summary judgment motion.

Based on that single nonsubstantive attorney-client email, the Castros sought in discovery copies of (a) *all* communications with Attorney Overfield or her office; (b) *all* communications with the Petzolds' current attorney, Nicholas Sellars, or his office; and (c) *all* communications with any attorney regarding the issues presented in the complaint. After the Petzolds objected based on the attorney-client privilege, the Castros moved to compel production of all such attorney-client communications.

A hearing was held, at which the Castros' attorney argued that the Petzolds had voluntarily waived attorney-client privilege "with regard to the subject matter of this lawsuit" by attaching the email between Ms. Petzold and Attorney Overfield as part of an exhibit to a motion filed with the court. The Castros' attorney further argued that the Petzolds could no longer claim that the disclosure was inadvertent because they had failed to follow the procedures set forth in Florida Rule of Civil Procedure

1.285(a) for asserting privilege over inadvertently disclosed materials. Finally, the Castros' attorney asserted that the Petzolds were "using these communications for their benefit, but preventing me from even having access to the [rest of the] communications, which is not how it's supposed to work. It should cut both ways."

Attorney Sellars responded that he was the one who had mistakenly included the privileged follow-up email from Attorney Overfield to her then-clients, the Petzolds, in the attachment; Ms. Petzold had not instructed or authorized him to include it. He stated that it was apparent that the inclusion of this email was inadvertent, because it "has nothing to do with the claims in this case," nor did the motion for summary judgment mention or otherwise rely on it. And as it was not being relied on in any way, it was not self-serving. Finally, Attorney Sellars admitted that he did not comply with rule 1.285(a), stating, "I didn't follow an inadvertent disclosure process because, frankly, I didn't care about the material that was disclosed."

The circuit court found a limited waiver of the attorney-client privilege on the basis that the privileged email had been "used and attached to th[e] affidavit" in support of the summary judgment motion. The court entered an order directing the production of *all* communications between Attorney Overfield or her office and the Petzolds. The Petzolds then filed the instant petition for writ of certiorari seeking to quash the circuit court's order.

"Certiorari review of a discovery order is appropriate when it 'departs from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal.' " *Harborside Healthcare, LLC v. Jacobson*, 222 So. 3d 612, 615 (Fla. 2d DCA 2017)

(quoting *Bright House Networks, LLC v. Cassidy*, 129 So. 3d 501, 505 (Fla. 2d DCA 2014)). "Only if the challenged order causes irreparable harm to the petitioner, conferring jurisdiction to this court, do we consider whether the trial court departed from the essential requirements of the law in entering it." *Id.* (citing *Bright House Networks*, 129 So. 3d at 505). In particular, "[c]ertiorari relief is . . . appropriate in cases which allow discovery of privileged information because once such information is disclosed, there is 'no remedy for the destruction of the privilege available on direct appeal.' " *Id.* (quoting *Coates v. Akerman, Senterfitt & Eidson, P.A.*, 940 So. 2d 504, 506 (Fla. 2d DCA 2006)).

Here, the circuit court departed from the essential requirements of law by treating the *inadvertent* disclosure of a single privileged email bearing upon no substantive issues in the case as a *voluntary* waiver of the privilege over all attorney-client communications with that counsel's entire office. There was no evidence that the disclosure was voluntary, much less strategic. Inadvertent disclosure of attorney-client communications does not automatically constitute a waiver of attorney-client privilege. *See Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Decor, Inc.*, 698 So. 2d 276, 278 (Fla. 3d DCA 1997) ("[O]ne cannot be deemed to have waived a privilege upon the inadvertent production of documents."). "In Florida, waiver of the attorney-client privilege is not favored" and is inappropriate where "the record does not show a clear, intentional waiver of the privilege." *Markel Am. Ins. v. Baker*, 152 So. 3d 86, 92 (Fla. 5th DCA 2014). Indeed, section 90.507, Florida Statutes (2022), specifically provides that waiver of privilege must be voluntary:

> 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.

(Emphasis added.)

The Petzolds' failure to thereafter assert privilege over the single inadvertently disclosed email does not alter our conclusion. It is true that rule 1.285(a) provides the procedures for asserting privilege over inadvertently disclosed materials and specifies that "[i]n order to assert the privilege, the party, person, or entity shall, within 10 days of actually discovering the inadvertent disclosure, serve written notice of the assertion of privilege on the party to whom the materials were disclosed." Attorney Sellars admitted at the hearing that he did not comply with this rule. So the privilege has been waived as to the contents of the single already-disclosed email. *Cf. Delap v. State*, 440 So. 2d 1242, 1247 (Fla. 1983) ("[W]hen a party himself ceases to treat the matter as confidential, it loses its confidential character."); *Hamilton v. Hamilton Steel Corp.*, 409 So. 2d 1111, 1114 (Fla. 4th DCA 1982) ("It is black letter law that once the privilege is waived, and the horse out of the barn, it cannot be reinvoked."). But it does not follow that that discrete waiver applies to *all* communications between the Petzolds and their attorney's office. Rather, waiver of privilege as to the single email here was limited to the email itself. *See S.H.Y. v. P.G.*, 320 So. 3d 797, 802 (Fla. 2d DCA 2021) ("[R]einstatement of the privilege is incapable of protecting privileged matters previously disclosed. However, any waiver is limited and is not so broad-sweeping to encompass privileged communications not already disclosed." (citations omitted)).

Finally, the "selective disclosure" doctrine—on which the Castros and, apparently, the circuit court relied—does not apply here. This

doctrine provides that "a party may not insist upon the protection of the privilege for damaging communications while disclosing other selected communications because they are self-serving." *Coates*, 940 So. 2d at 511 (second emphasis added) (quoting *Int'l Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 185 (M.D. Fla. 1973)). In other words, "the privilege was intended as a shield, not a sword." *Id.* (quoting *Int'l Tel.*, 60 F.R.D. at 185). The email here does not pertain to any substantive issue in the case, and—unsurprisingly—the Petzolds did not rely on it in any way. Under these circumstances, it cannot be said that its disclosure was self-serving or that the privilege was being used as a sword.

Because the circuit court departed from the essential requirements of law, we grant the Petzolds' petition for writ of certiorari and quash the circuit court's order to the extent it is inconsistent with this opinion.

Petition granted; order quashed.

VILLANTI and BLACK, JJ., Concur.

Opinion subject to revision prior to official publication.