FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D2022-0960

BETTY PITTS and TREVOR BROWN,

Petitioners,

v.

JEANETTE NEPTUNE,

Respondent.

Petition for Writ of Certiorari—Original Jurisdiction.
Gloria R. Walker, Judge.

March 6, 2024

LONG, J.

Petitioners seek a writ of certiorari quashing the trial court's order compelling the disclosure of certain expert witness discovery. Because Petitioners fail to meet the jurisdictional requirements warranting certiorari review, we dismiss the petition.

This Court has jurisdiction to issue a writ of certiorari pursuant to Article V, Section 4(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(b)(2)(A). 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).

Petitioners must show that the order below will result in a material injury that cannot be corrected on postjudgment appeal. *Shands Teaching Hosp. & Clinics, Inc. v. Beylotte*, 357 So. 3d 307, 308 (Fla. 1st DCA 2023) (citing *Emed Urgent & Primary Care, P.A. v. Rivas*, 335 So. 3d 766, 767 (Fla. 1st DCA 2022)). "The correctability is a jurisdictional question" and must be considered first. *Jordan v. State*, 350 So. 3d 103, 105 (Fla. 1st DCA 2022).

We dismiss because the petition fails to demonstrate that the alleged error could not be corrected on direct appeal. But even if it demonstrated irreparable harm, the petition also fails to show a departure from the essential requirements of the law.

Relying on *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993 (Fla. 1999), Respondent sought financial bias discovery related to the relationship between Petitioners' law firm, Morgan & Morgan, P.A., and what Petitioners refer to as its "hybrid expert/treating physicians." Petitioners refused to provide that discovery, citing *Worley v. Cent. Fla. Young Men's Christian Ass'n, Inc.*, 228 So. 3d 18 (Fla. 2017). To the extent that *Worley* remains, it said that a lawyer's referral of a client to a treating physician was a confidential communication protected by the attorney-client privilege. *Id.* at 25. It also limited discovery of the financial relationship between a non-party law firm and a plaintiff's treating physician. *Id.*

Worley addressed only treating physicians, not hired experts. "While an expert witness assists the jury to understand the facts, a treating physician testifies as a fact witness 'concerning his or her own medical performance on a particular occasion and is not opining about the medical performance of another.'" *Buzby v. Turtle Rock Cmty. Ass'n, Inc.*, 333 So. 3d 250, 253–54 (Fla. 2d DCA 2022) (citing *Fittipalidi USA, Inc., v. Castroneves*, 905 So. 2d 182, 186 (Fla. 3d DCA 2005)). Treating physicians do not acquire their "expert knowledge for the purpose of litigation but rather simply in the course of attempting to make [their] patient well." *Frantz v. Golebiewski*, 407 So. 2d 283, 285 (Fla. 3d DCA 1981).

A party's label for a witness matters little. Instead, the substance of the testimony drives the analysis. The trial court distinguished *Worley* because Petitioners' "hybrid experts/treating physicians" were acting as experts retained for the purpose of trial.

We agree. These physicians were given litigation binders that contained various medical records from Petitioners' other providers and planned to offer testimony based on their review of those records and their treatment of Petitioners. This is the work of an expert witness, not an ordinary treating physician.

Certiorari is not available unless the trial court order violates a "clearly established principle of law" and would result in a "miscarriage of justice." *Balzer v. Ryan*, 263 So. 3d 189, 191 (Fla. 1st DCA 2018). Because the trial court did not depart from any clearly established principle of law, Petitioners cannot meet the threshold requirements for certiorari. We dismiss Petitioners' writ. We provisionally grant Respondent's motion for fees, conditioned on the trial court's determination of entitlement under section 768.79, Florida Statutes. Respondent has prevailed in this writ petition. The trial court shall determine whether Respondent is eligible for fees and, if so, the appropriate amount.

DISMISSED.

ROBERTS, J., concurs; TANENBAUM, J., concurs in part and dissents in part.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

TANENBAUM, J., concurring in part and dissenting in part.

Dismissal is the proper disposition here because this court does not have jurisdiction to grant the relief sought by the petitioners. The petitioners seek quashal of a discovery order, which by its nature is procedural and interlocutory. As a non-final order, it is *not* constitutionally reviewable by us on appeal, while the underlying suit remains pending in the trial court, except as provided by rule adopted by the supreme court. *See* Art. V, § 4(b)(1), Fla. Const. The discovery order is not one of the

appealable non-final orders listed in the rule adopted for that purpose. *See* Fla. R. App. P. 9.130. The petitioners, then, no doubt are pursuing the only avenue they have at this point.

In the light of the constitutional constraints on our review, however, the *extraordinary* writ of certiorari is reserved for interlocutory orders that threaten legally cognizable harm that cannot be sufficiently addressed on direct appeal at the end of the case. *Cf. Mintz Truppman, P.A. v. Cozen O'Connor, PLC*, 346 So. 3d 577, 579 n.6 (Fla. 2022) (characterizing the writ as an extraordinary remedy" that "may be granted for review of a nonfinal order only when the order, departing from the essential requirements of law, will injure a party such as to leave no adequate remedy on appeal" (internal quotations and citation omitted)). This is so because certiorari stems from the constitutional guarantee that the courts will be open to redress "*any* injury" suffered by a person. Art. I, § 21, Fla. Const. (1968 rev.) ("The courts shall be open to every person for redress of *any injury*, and justice shall be administered without sale, denial or delay." (emphasis supplied)).

Indeed, the supreme court has recognized that certiorari is a vehicle to fulfill this guarantee when there is no other avenue to an adequate remedy. *See Kilgore v. Bird*, 6 So. 2d 541, 544 (Fla. 1942) (describing certiorari as "a discretionary common-law writ" that may issue in the absence of any other "adequate" legal remedy to cure an unauthorized or unlawful order "that results or reasonably may result in an injury which section 4 of the Declaration of Rights of the Florida constitution commands shall be remedied by the due course of law in order that right and justice shall be administered"); *see also* Decl. of Rights § 4, Fla. Const. (1885 rev.) ("All courts in the State shall be open, so that every person for *any injury done him in his lands, goods, person or reputation* shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay." (emphasis supplied)). For there to be a legally cognizable harm to support our certiorari jurisdiction, then, there must be an infringement of some constitutional or statutory right (*i.e.*, a judicially enforceable right). *Cf. Broward Cnty. v. G.B.V. Intern., Ltd.*, 787 So. 2d 838, 842 (Fla. 2001) ("The writ functions as a safety net and gives the upper court the prerogative to reach down

and halt a miscarriage of justice where no other remedy exists."). It is incumbent upon the petitioners to demonstrate such an infringement to properly invoke this court's writ authority. The petitioners fail to meet this burden.

The petitioners rely on the supreme court's decision in *Worley v. Cent. Florida Young Men's Christian Ass'n, Inc.*, 228 So. 3d 18, 26 (Fla. 2017), to argue both that the trial court's discovery order is overbroad (because it orders the production of information beyond what the supreme court said in that case was permissible under the discovery rules) and that it encroaches on the attorney-client privilege. Here is what the trial court's order states, in pertinent part:

> [The petitioners] shall produce complete responses to Defendant's discovery requests for any individual identified in Plaintiff's Expert Witness Disclosure as a witness from whom Plaintiff intends to elicit expert opinions at the time of trial, including "hybrid treating physician" expert witnesses. [The petitioners] shall produce a response to [the respondent's] financial bias discovery requests, to include the total amount of money paid by Morgan and Morgan, P.A. to [the petitioners'] listed expert witnesses, including "hybrid treating physician" expert witnesses.

Even if *Worley* could be read to suggest that this request at least in part seeks to uncover information that is beyond the scope of permissible discovery under Florida Rule of Civil Procedure 1.280(b), discovery is a *procedural* tool of the courts that is created by rule. A court rule by itself cannot give rise to a substantive right, and there is no constitutional or statutory right against being burdened with the expense and inconvenience of responding to overbroad discovery. For this reason, "[o]verbreadth is not a proper basis for certiorari review of discovery orders." *Bd. of Trustees of Internal Improvement Tr. Fund v. Am. Educ. Enterprises, LLC*, 99 So. 3d 450, 456 (Fla. 2012); *see also Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1100 (Fla. 1987) ("Litigation of a non-issue will always be inconvenient and entail considerable expense of time and money for all parties in the case. The authorities are clear that this type of harm is not sufficient to

permit certiorari review"). Reliance on *Worley* in this respect to support certiorari jurisdiction, then, is misplaced.

That leaves the petitioners' contention that the trial court's order invades the attorney-client privilege or some right to privacy or confidentiality regarding health information and medical records. Of course, these all *are* substantive rights. *See, e.g.*, Art. I, § 23, Fla. Const.; § 456.057, Fla. Stat.; Fla. Evid. Code § 90.502(2); *cf. Worley*, 228 So. 3d at 25 (finding "that the question of whether a plaintiff's attorney referred him or her to a doctor for treatment is protected by the attorney-client privilege").[*] Yet the petitioners fail to identify, with specificity, what privileged communications or other confidential information are presently subject to compelled disclosure by the court's order.

On its face, the order that is the subject of the current petition does not overrule any objection to disclosure of any cataloged documents or information claimed to be protected. Moreover, the appendix is devoid of a privilege log that was put before the trial court, setting out objectionable documents qualifying for protection from disclosure. The appendix also lacks any deposition transcripts that reveal certified privilege objections that the trial court has overruled. General claims of privilege or confidentiality do not suffice to identify the substantive harm requiring an immediate remedy from the court under the constitution. The petitioners fail to sufficiently invoke this court's authority to issue a writ of certiorari, so the petition must be dismissed.

* * *

While I concur in the disposition of the petition, I dissent from the majority's handling of the respondent's motion for attorney's fees. A "provisional" grant of a motion is no grant at all. *See Finch v. Cribbs*, Case No. 1D18-3815, 2021 WL 2547914, *4 n.2, *7 (Fla. 1st DCA June 22, 2021), *as clarified on denial of reh'g* (Nov. 2, 2022) (explaining that "a 'provisional' grant of a motion does not

[*] Notably, starting with suits filed after March 24, 2023, the Legislature has narrowed this right in the situations like that in *Worley* and here. *See* ch. 2023-15, §§ 6, 31, Laws of Fla.

really do anything," that "[i]t is a fiction"). Worse here, there is no authorization for any award of fees at this stage of the case. Section 768.79(1), Florida Statutes, does authorize an award of fees if certain conditions are met *after* there is a "judgment." Section 57.46, though, states that "any provision of a statute . . . providing for the payment of attorney's fees to the prevailing party shall be construed to include the payment of attorney's fees to the prevailing party *on appeal*." (emphasis supplied). There is no appeal here; this is an original writ proceeding. *Cf. Frosti v. Creel*, 979 So. 2d 912, 917 (Fla. 2008) ("The right to attorney fees pursuant to section 768.79 applies to fees incurred *on appeal*." (emphasis supplied)).

A declaration of the obvious from this court—that the respondent has prevailed in a writ proceeding that has been dismissed—is not required for the trial court to make the appropriate assessment of awardable fees under section 768.79 if the respondent succeeds in the case below. We should deny the motion for attorney's fees because this court lacks the statutory basis even to consider the request in the context of the current petition.

Brian Lee of Morgan & Morgan, Jacksonville, for Petitioners.

Lissette Gonzalez and Carly M. Weiss of Cole, Scott & Kissane, P.A., Miami, for Respondent.