136 So.3d 640
District Court of Appeal of Florida,
Second District.

Jennifer BELLEVUE, Appellant,
v.
FRENCHY'S SOUTH BEACH CAFÉ, INC., Appellee.

No. 2D12–4537. | Dec. 4, 2013.

Synopsis

Background: Bartender's roommate filed negligence action against restaurant where bartender worked to recover for injuries sustained in attack inside restaurant by one or more intoxicated patrons. Following jury trial, the Circuit Court, Pinellas County, George M. Jirotka, J., entered judgment for restaurant. Bartender's roommate appealed.

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

[1] admissible evidence on foreseeability issue was not limited to evidence of similar incidents inside four walls of restaurant;

[2] trial court erred in excluding, as evidence of foreseeability, prior incidents that included the night cook being stabbed in front of the restaurant after he got off work, patrons being kicked out for harassing or threatening employees or for fighting, and multiple instances of having to stop serving alcohol to "out-of-control" patrons; and

[3] error in excluding relevant prior incidents was not harmless.

Altenbernd, J., concurred, with opinion.

West Headnotes (6)

[1] Appeal and Error

Proceedings

Preliminary to Trial

Generally, rulings on motions in limine are reviewed for an abuse of discretion.

Cases that cite this headnote

[2] Appeal and Error

Cases

Triable in Appellate Court

Appeal and Error

Proceedings

Preliminary to Trial

Ruling on motion in limine would be reviewed de novo, despite general abuse-of-discretion standard of review, because it was based on an erroneous interpretation of applicable case law.

Cases that cite this headnote

[3] Negligence

Similar

facts and transactions; other accidents

Admissibility of prior incidents proffered on issue of foreseeability, in negligence action by bartender's roommate against restaurant where roommate was attacked inside the premises by intoxicated patrons when she came to pick up bartender near closing time, depended not on whether the incidents occurred inside the four walls or restaurant or whether they were similar to what occurred in present case, but on whether they put restaurant on notice that the attack in question was foreseeable.

Cases that cite this headnote

[4] Negligence

Similar

facts and transactions; other accidents

Trial court erred, in negligence action by bartender's roommate against restaurant where roommate was attacked by intoxicated patrons when she came to pick up bartender near closing time, in excluding, as evidence of foreseeability, incidents dating back four-and-a-half years that included the night cook being stabbed in front of the restaurant after he got off work, patrons being kicked out for harassing or threatening

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employees or for fighting, and multiple instances of having to stop serving alcohol to "out-of-control" patrons.

Cases that cite this headnote

[5] Appeal and Error

Negligence and torts in general

Error in excluding multiple incidents relevant to foreseeability issue was not harmless in negligence action by bartender's roommate against restaurant where roommate was attacked by intoxicated patrons when she came to pick up bartender near closing time; roommate's expert was prevented from discussing the relevant excluded incidents and providing an opinion based upon them, and restaurant improperly took advantage of the erroneous ruling by repeatedly casting itself as a family restaurant.

Cases that cite this headnote

[6] Trial

Comments on failure to produce evidence or call witness

It is improper for a lawyer, who has successfully excluded evidence, to seek an advantage before the jury because the evidence was not presented.

Cases that cite this headnote

Attorneys and Law Firms

***641** Celene H. Humphries and Maegen P. Luka of Brannock & Humphries, Tampa; Cory A. Baird of Baird Law Group, Tampa; and Jeffery Gordon of Maney & Gordon, P.A., Tampa, for Appellant.

John A. Guyton, III, Gregory D. Jones, and David P. Mitchell of Rywant, Alvarez, Jones, Russo & Guyton, P.A., Tampa, for Appellee.

Opinion

BLACK, Judge.

Jennifer Bellevue sued Frenchy's South Beach Café, Inc. ("Frenchy's"), for personal injury damages that she sustained when she was attacked inside Frenchy's premises by one or more intoxicated patrons who had been consuming alcohol there for several hours prior to "last call" when the attack occurred. Before trial, following a hearing on Frenchy's motion in limine, the court ruled that only twelve of sixty prior incidents occurring in and around Frenchy's would be admissible at trial. Benefitting from the court's ruling, ***642** Frenchy's successfully advanced its principal defense that Frenchy's was a family restaurant and that the attack on Ms. Bellevue was unforeseeable. The jury returned a verdict in favor of Frenchy's. Because the trial court's ruling as to the admissibility of the prior incidents was contrary to Florida law, we reverse.

I. Background

Frenchy's is a popular restaurant and beach bar located in Clearwater just one block from the beach. On the night Ms. Bellevue was attacked she arrived at Frenchy's just before it closed, planning to give a ride home to her roommate, Shelly Kneuer, one of the bartenders. Testimony at trial established that a family of tourists from Ireland ("the Irish family") who had been drinking heavily and were rowdy and disorderly remained inside the restaurant. The only other people in the restaurant at this time were Ms. Bellevue's friend Christopher Malek, a manager named Jonathan Kirby, and Ms. Kneuer.

Just prior to the fight that resulted in Ms. Bellevue's injuries, words were exchanged between one of the Irish family members and Mr. Malek. The restaurant manager told Mr. Malek to let Ms. Kneuer, the bartender, handle the issue as he walked upstairs to begin his closeout routine for the night. This left Ms. Kneuer, a petite woman, as the only employee managing the escalating rowdiness. The verbal exchange intensified, and soon thereafter Ms. Kneuer was physically bumped or shoved by one of the Irish family members. Mr. Malek and Ms. Bellevue entered the fray, which became physically violent. By the time the police arrived, Ms. Bellevue had been severely beaten. The Irish family was arrested but subsequently jumped bail and left the country.

Ms. Bellevue filed suit against Frenchy's for her injuries. The essence of the complaint is that Frenchy's was on notice that its patrons had a propensity to become rowdy or violent and that it failed to maintain adequate security to protect its patrons.

II. Frenchy's Motion in Limine

Prior to trial, Frenchy's moved in limine to preclude Ms. Bellevue from introducing into evidence sixty incidents that occurred either in Frenchy's or near its premises. Frenchy's contended that these incidents were inadmissible because they were not similar crimes or were not probative of the issue of foreseeability. Ms. Bellevue argued that the incidents, which dated back four-and-a-half years prior to the subject attack, were relevant on the issue of whether the attack was reasonably foreseeable and whether Frenchy's took reasonable measures to prevent the attack. The incidents were obtained either from police reports or from Frenchy's management logs. It was Ms. Bellevue's intention to elicit testimony from her security expert that based upon the volume and nature of these prior incidents, Frenchy's was negligent in not taking adequate measures to protect against the type of attack suffered by Ms. Bellevue.

The court ruled that only those incidents "involving damage to persons or property" and "starting [on], ending [on], or involving the premises" would be admitted. As a result, only twelve of the sixty incidents were admitted. The court cited no case law in support of its ruling; however, the transcript of the motion in limine hearing reflects a misinterpretation of Florida law as to prior incidents which are probative of foreseeability.

III. Analysis

A. Case law

[1] **[2]** Generally, rulings on motions in limine are reviewed for an abuse of discretion. ***643** *See, e.g., SourceTrack, LLC v. Ariba, Inc.,* 958 So.2d 523, 526 n. 2 (Fla. 2d DCA 2007). However, because the court's ruling in this case was based upon an erroneous interpretation of the applicable case law, our review is de novo. *See Sottilaro v. Figueroa,* 86 So.3d 505, 507–08 (Fla. 2d DCA 2012) (citing *Pantoja v. State,* 59 So.3d 1092, 1095 (Fla.2011) (reviewing a trial judge's ruling on a motion in limine)).

The issue of admissibility of prior incidents to establish foreseeability and risk of harm in this context has not been previously addressed by this district. As they did below, the parties have cited instructive case law from the Florida Supreme Court and each of the other four districts. These cases have produced a set of guiding principles.

The starting point is a trilogy of Florida Supreme Court cases: *Hall v. Billy Jack's, Inc.,* 458 So.2d 760 (Fla.1984), *Allen v. Babrab, Inc.,* 438 So.2d 356 (Fla.1983), and *Stevens v. Jefferson,* 436 So.2d 33 (Fla.1983). In each case, the plaintiff sued a bar or bar operator for injuries sustained during a criminal attack in or around the bar. *Stevens* and *Allen* hold that foreseeability may be established "by proving that, based on past experience, a proprietor knew of or should have recognized the likelihood of disorderly conduct by third persons in general which might endanger the safety of the proprietor's patrons." *Allen,* 438 So.2d at 357; *accord Stevens,* 436 So.2d at 35 ("A tavern owner's actual or constructive knowledge, based upon past experience, that there is a likelihood of disorderly conduct by third persons in general which may endanger the safety of his patrons is also sufficient to establish foreseeability."). The court in *Hall* further elucidated:

> For[e]seeability may be established by proving that a proprietor had actual or constructive knowledge of a particular assailant's inclination toward violence or by proving that the proprietor had actual or constructive knowledge of a dangerous condition on his premises that was likely to cause harm to a patron. A dangerous condition may be indicated if, according to past experience (i.e., reputation of the tavern), there is a likelihood of disorderly conduct by third persons in general which might endanger the safety of patrons or if security staffing is inadequate. These indicia are not exhaustive.

458 So.2d at 761–62 (citations omitted).

Recognizing and applying the holdings of *Stevens, Allen,* and *Hall,* the Fourth District concluded that "[f]oreseeability is determined in light of all the circumstances of the case rather than by a rigid application of a mechanical 'prior similars' rules." *Holiday Inns, Inc. v. Shelburne,* 576 So.2d 322, 331 (Fla. 4th DCA) (citation omitted), *dismissed,* 589 So.2d 291 (Fla.1991), *and disapproved on other grounds, Angrand v. Key,* 657 So.2d 1146 (Fla.1995).

> While evidence of prior similar incidents [is] helpful, a rule limiting evidence of foreseeability to prior

> similar incidents deprives the jury of its role in determining the question of foreseeability. Although evidence of a violent crime against a person may be necessary initially to establish the issue of foreseeability, evidence of lesser crimes against both persons and property is also relevant and admissible to determining that issue.

Id. (citations omitted); *accord* *Czerwinski v. Sunrise Point Condo.,* 540 So.2d 199, 201 (Fla. 3d DCA 1989).

[3] In *Shelburne,* the plaintiffs were shot in the Rodeo Bar parking lot after they and others involved had been drinking at the bar. The defendant argued that in order to establish foreseeability, ***644** the plaintiffs had to demonstrate that the owner had actual or constructive knowledge of "similar criminal acts against invitees on their property." 576 So.2d at 331. The court rejected the argument and allowed into evidence fifty-eight offense reports pertaining to prior criminal incidents on the bar's premises. In affirming the trial court's ruling, the Fourth District stated that had the trial court excluded the fifty-eight offense reports at the Rodeo Bar, "the exclusion effectively would have prevented [the victims] from showing foreseeability through [the proprietors'] knowledge of their patrons' dangerous and 'disorderly conduct.' " *Id.* The court concluded that "a ruling limiting admissibility to those reports containing only similar criminal activity would be irreconcilable with the supreme court's holdings in *Stevens, Allen,* and *Hall.*" *Id.* We agree with this statement of the law.

The First and Fifth Districts have also recognized and applied the holdings in *Stevens, Allen,* and *Hall,* as well as *Shelburne.* *See* *Hardy v. Pier 99 Motor Inn,* 664 So.2d 1095, 1097–98 (Fla. 1st DCA 1995); *Foster v. Po Folks, Inc.,* 674 So.2d 843, 844 (Fla. 5th DCA 1996).

Frenchy's relies heavily on a pair of Third District cases, *Admiral's Port Condominium Ass'n v. Feldman,* 426 So.2d 1054 (Fla. 3d DCA 1983), and *Ameijeiras v. Metropolitan Dade County,* 534 So.2d 812 (Fla. 3d DCA 1988). The *Admiral's Port* court concluded that the trial court erred in admitting evidence of "violent crime[s] which had occurred substantial distances away from the premises," and generally that "[e]vidence of similar crimes committed off the premises and against persons other than the landowner's invitees is not probative of foreseeability." 426 So.2d at 1055. *Admiral's Port,* decided in January 1983, is of questionable validity in light of the later decided *Stevens, Allen,* and *Hall.* The *Ameijeiras* court more specifically held that "[t]he landowner's duty arises only when he has actual or constructive knowledge of *similar* criminal acts committed on his premises." 534 So.2d at 813. *Ameijeiras* has been referred to as "an anomaly" given that "its requirement of similar acts in light of *Hall, Stevens* and *Allen* is not explained." *See* *Mulhearn v. K–Mart Corp.,* No. 6:01–cv–523–Orl–31KRS, 2006 WL 2460664 (M.D.Fla. Aug. 23, 2006). Indeed, one year after writing the *Ameijeiras* opinion the Third District held that "knowledge of prior crimes—against both persons and property—is relevant to the issue of foreseeability, even if the prior crimes are lesser crimes than the one committed against the plaintiff." *Czerwinski,* 540 So.2d at 201. Further, it appears the Third District has narrowed the application of *Ameijeiras* to those cases involving a public park. *See* *Hill v. City of N. Miami Beach,* 613 So.2d 1356, 1357 (Fla. 3d DCA 1993).

We are also persuaded by the Fourth District's opinion in *Odice v. Pearson,* 549 So.2d 705 (Fla. 4th DCA 1989), where the court reversed a final judgment in favor of the restaurant and remanded for a new trial, concluding that the trial court erred by excluding reference to police reports concerning prior crimes committed off the restaurant's property. The court ruled that "[i]n order for a jury to determine if a property owner took reasonable precautions to protect persons on or about the premises from foreseeable criminal activity, a plaintiff must be given the opportunity to establish the type of neighborhood where the incident took place." 549 So.2d at 706.

B. Application

[4] The effect of the court's ruling in this case was to preclude Ms. Bellevue ***645** from introducing into evidence a substantial number of incidents that were relevant to the foreseeability issue, including (1) the night cook being stabbed in front of the restaurant after he got off work; (2) multiple instances of patrons being kicked out of the bar for harassing employees, being vulgar, being rude, threatening employees, or being so drunk they fell off of a bar stool; (3) patrons being kicked out for fighting; (4) patrons drunk and fighting on the deck; (5) a car being broken into in the parking lot; (6) a minor in possession of alcohol who was armed with a knife out front; (7) a near-fight between two patrons and a waiter; (8) multiple instances of having to stop serving alcohol to patrons because they were "out of control"; (9) multiple instances of drunk patrons being loud and vulgar

or threatening; and (10) the police having to be called because two patrons were about to fight.

These incidents, sought to be introduced by Ms. Bellevue, are evidence of Frenchy's knowledge of "a likelihood of disorderly conduct by third persons in general which may endanger the safety of the patrons." *Hall,* 458 So.2d at 762. [1] The ultimate weight accorded those incidents in determining foreseeability is to be decided by the trier of fact—the jury in this case. *See, e.g., id.*

[5] **[6]** We cannot say that the court's erroneous ruling was harmless. The sheer number of relevant but excluded events precludes such a conclusion based not only on the fact that the jury was deprived of knowing about the other incidents but also because Ms. Bellevue's expert witness was prevented from discussing the incidents and providing an opinion based upon those incidents. It is " 'reasonably probable that a result more favorable' " to Ms. Bellevue " 'would have been reached' by the jury" had the court applied the correct law in ruling on the motion in limine. *Cf. Southstar Equity, LLC v. Chau,* 998 So.2d 625, 631 (Fla. 2d DCA 2008) (quoting *Damico v. Lundberg,* 379 So.2d 964, 965 (Fla. 2d DCA 1979)). Additionally, Frenchy's improperly took advantage of the court's erroneous ruling by repeatedly casting Frenchy's as a family restaurant. " '[I]t is improper for a lawyer, who has successfully excluded evidence, to seek an advantage before the jury because the evidence was not presented.' " *State Farm Mut. Auto. Ins. Co. v. Thorne,* 110 So.3d 66, 74 (Fla. 2d DCA 2013) (quoting *JVA Enters., I, LLC v. Prentice,* 48 So.3d 109, 115 (Fla. 4th DCA 2010)).

IV. Conclusion

Because the jury is the ultimate arbiter of foreseeability and, in this case, whether Frenchy's was negligent in not providing sufficient security on the evening in question, it was entitled to consider evidence that "based on past experience, a proprietor knew of or should have recognized the likelihood of disorderly conduct by third persons in general which might endanger the safety of the proprietor's patrons." *See Allen,* 438 So.2d at 357; *Shelburne,* 576 So.2d at 331.

In reversing this case for a new trial, we are not mandating that all sixty incidents Ms. Bellevue listed should be admitted into evidence. Rather, the trial court must consider each incident based on the parameters of the case law set forth herein. The admissibility of a given incident should not be based on whether it occurred within the four walls of Frenchy's or whether it ***646** was similar to what occurred in this case. Rather, it must be based on whether or not the event put Frenchy's on notice that the attack resulting in Ms. Bellevue's injury was foreseeable.

Reversed and remanded for a new trial.

CASANUEVA, J., Concurs.

ALTENBERND, J. Concurs with opinion.

ALTENBERND, Judge, Concurring.

On remand, when the trial court evaluates which prior incident reports to admit into evidence, it seems to me that it may be useful for the court to consider more thoroughly the plaintiff's theories of liability in this case. The theories may affect the extent to which some prior incidents are relevant, admissible evidence.

There is no debate that the relationship between a restaurant and its patron is one that invokes a duty of care under negligence law on the part of the restaurant. In *Allen v. Babrab, Inc.,* 438 So.2d 356 (Fla.1983), the supreme court announced that a restaurant has a general standard of care to protect a patron from the tortious conduct of another patron or third party if (1) the restaurant is on notice of the dangerous propensities of the particular third party or (2) there has been a sufficient history of violent conduct by third parties, in general, to require the restaurant to foresee the likelihood of such violent conduct and protect patrons from the known risk.

This two-part general standard of care, which is a proposition of law created by the court, can generate, as a matter of case-specific fact, a variety of specific standards of care. *See, e.g., Butala v. Automated Petroleum & Energy Co., Inc.,* 656 So.2d 173 (Fla. 2d DCA 1995) (discussing the relationship of a general standard of care created by the judiciary and the specific standard of care established by the jury). The specific standard of care depends in large part upon the risks that were foreseeable in light of all the circumstances by an ordinary reasonable person at the time of the occurrence.

In this case, the evidence suggested several different specific standards of care. First, the Irish family may have been sufficiently rowdy earlier in the day such that it should have been foreseeable to a restaurant manager that they were likely to become a risk to patrons later in the evening. If so, a jury could decide that the patrons were owed a specific standard

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of care requiring the restaurant to remove or deny entrance to the family before the incident occurred.

Second, the family may have been sufficiently rowdy near the time of last call such that a reasonable manager, who had actual knowledge of the family, would have foreseen the risk of violence such that he would not have left one small waitress to handle the situation by herself. If so, a jury could decide that the patrons were owed a specific standard of care requiring the manager either to stay downstairs as added protection or to arrange on the spot for additional protection.

Third, the restaurant may have had a sufficient history of violent conduct by third parties during the late night hours immediately preceding last call such that the restaurant could be reasonably expected to foresee the likelihood that violent conduct would occur during those limited hours. If so, the restaurant might owe a specific standard of care to provide extra security to protect patrons from the known risk at that time.

Finally, the restaurant may have had enough incidents of violent conduct by third parties throughout the entire day to require the restaurant to foresee a broader ***647** risk of violence. If so, a jury might conclude that the restaurant owed a specific standard of care to provide additional security whenever the restaurant was open.

As to the first two theories, the incident reports have limited, if any, relevance. Possibly they could demonstrate prior experiences of this manager that might heighten his ability to foresee that the circumstances presented by the family were likely to become a risk. As to the third theory, in order to be relevant, it would seem that the incident reports would need to concern events toward the end of the business day. As to the final theory, a much broader approach to the reports would seem appropriate.

We reverse because the limitations placed on the admissibility of these incident reports, at a minimum, affected the ability of the plaintiff to litigate the third and fourth theories.

Parallel Citations

38 Fla. L. Weekly D2537

Footnotes

1 In ruling on the motion in limine, the trial court admitted twelve incidents. We make no comment on the correctness of the court's ruling as to those incidents. On remand, each incident sought to be introduced by Frenchy's must be reconsidered in light of this opinion.

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DISTRICT COURT OF APPEAL OF THE STATE 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

[January 7, 2015]

Petition for writ of certiorari to the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John J. Murphy, III, Judge; L.T. Case No. 10-45572 (21).

John H. Pelzer of Greenspoon Marder, P.A., Fort Lauderdale, and Victor Kline of Greenspoon Marder, P.A., Orlando, for petitioners.

Nicolette N. John and Thomas W. Paradise of Vernis & Bowling of Broward, P.A., Hollywood, for respondent, Target Corporation.

GROSS, J.

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.

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 **<u>provide copies or screenshots of all photographs associated with that account during the two (2) years prior to the date of loss.</u>**

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

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

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

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-10PRI, 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).

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

[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.

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

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).

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.

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

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

[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

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.

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

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.

> the possession, custody, or control of the party to whom the request is directed . . . .

(Emphasis added).

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)).

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).
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> 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).

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).

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.,* 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.*, 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).

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.

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 (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.

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Not final until disposition of timely filed motion for rehearing.