DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PUBLIX SUPER MARKETS, INC.,

Petitioner,

v.

COLIN ROTH,

Respondent.

No. 2D22-2124

February 17, 2023

Petition for Writ of Certiorari to the Circuit Court for Pinellas County; Cynthia J. Newton, Judge.

Edward G. Guedes of Weiss Serota Helfman Cole & Bierman, P.L., Coral Gables, for Petitioner.

Samuel Alexander of Alexander Appellate Law P.A., DeLand for Respondent.

MORRIS, Chief Judge.

Publix Super Markets, Inc. (Publix), seeks certiorari review of a discovery order denying Publix's objections and motion for protective order in an underlying slip-and-fall lawsuit filed against Publix by Colin Roth. We grant the petition because the trial court departed from the

essential requirements of law in ordering carte blanche to discovery without applying the proper standard applicable to Roth's claim.

In 2021, Roth filed a complaint for negligence against Publix, alleging Roth suffered injuries when he slipped and fell in the produce section of one of Publix's stores. Roth alleged that Publix failed to exercise reasonable care in the maintenance of its property by failing to remove a liquid substance from its store in a timely manner and that Publix failed to warn Roth of the dangerous condition. In April 2022, Roth served a notice of video deposition duces tecum of Publix, pursuant to Florida Rule of Civil Procedure 1.310(b)(6). The notice set the deposition of Publix's corporate representative and directed him or her "to testify about matters known or reasonably known and reasonably available to the organization, as outlined in Schedule A attached." Schedule A listed nine categories of inquiry, with approximately seventy-nine subcategories. The notice also directed Publix's representative to produce, prior to the deposition, all documents and information listed in the attached subpoena duces tecum pursuant to Florida Rule of Civil Procedure 1.350. The attached subpoena duces tecum listed seven categories of materials, with sixteen subcategories.

Publix filed objections and a motion for protective order, arguing that the notice invaded the work-product doctrine and was grossly overbroad in violation of *Publix Supermarkets, Inc. v. Santos*, 118 So. 3d 317 (Fla. 3d DCA 2013), which limits discovery to the statutory burden of proof in section 768.0755, Florida Statutes (2017).[1] After a hearing, the trial court took the issue under advisement and later issued a written order generally denying Publix's objections and motion for protective

[1] Publix raised other objections not relevant to this proceeding.

order and directing Publix's representative to be prepared to discuss the requested matters and to produce the requested materials prior to the deposition. The trial court did not set forth its rationale or address Publix's specific objections.

In its petition for writ of certiorari, Publix contends that the trial court departed from the essential requirements of law by failing to apply the standard of proof for slip-and-fall cases in section 768.0755(1), as analyzed by the Third District in *Santos*. "Certiorari review 'is appropriate when a discovery order 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.' " *Avatar Prop. & Cas. Ins. v. Jones*, 291 So. 3d 663, 665 (Fla. 2d DCA 2020) (quoting *Harley Shipbuilding Corp. v. Fast Cats Ferry Serv., LLC*, 820 So. 2d 445, 448 (Fla. 2d DCA 2002)). "Although overbreadth by itself is not a sufficient basis for certiorari jurisdiction, the Florida Supreme Court has held that certiorari review is appropriate where the discovery order effectively grants 'carte blanche' to irrelevant discovery." *Santos*, 118 So. 3d at 319 (citing *Bd. of Trs. of Internal Improvement Tr. Fund v. Am. Educ. Enters., LLC*, 99 So. 3d 450, 457 (Fla. 2012)).

"[W]here a business invitee slips and falls on a 'transitory substance' in a business establishment . . . , proof of the breach element of the [negligence] claim against an owner of the establishment is statutorily constrained by section 768.0755 . . . ." *Encarnacion v. Lifemark Hosps. of Fla.*, 211 So. 3d 275, 278 (Fla. 3d DCA 2017). Section 768.0755 provides as follows:

> (1) If a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business establishment had actual or

> constructive knowledge of the dangerous condition and should have taken action to remedy it. Constructive knowledge may be proven by circumstantial evidence showing that:
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> (a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or
>
> (b) The condition occurred with regularity and was therefore foreseeable.
>
> (2) This section does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises.

(Emphasis added.) "[S]ection 768.0755 requires the plaintiff prove that the business establishment had actual or constructive notice of the dangerous condition before liability may be found." *N. Lauderdale Supermarket, Inc. v. Puentes*, 332 So. 3d 526, 530 (Fla. 4th DCA 2021).

In *Santos*, the Third District considered a petition for writ of certiorari to review an order allowing a slip-and-fall plaintiff to discover information relating to incidents in all Publix stores in Florida during the three years preceding her fall at a Publix store. 118 So. 3d at 318–19. The court held that the term "business establishment," as used in section 768.0755(1), "refers to the actual place of business where the slip and fall occurred, not the total network of stores" which Publix "owns and operates." 118 So. 3d at 320. And because a plaintiff must prove that the business establishment had actual or constructive knowledge of the dangerous condition, discovery is restricted to information on the particular business establishment at issue. *Id.* at 319. The court compared the language of section 768.0755 to the language of its predecessor, section 768.0710, Florida Statutes (2009):

> The use of the term "business establishment" found in the current section 768.0755, instead of the use of the term "person or entity" found in the repealed section 768.0710,

> evidences the legislature's intent to reject the previous language in the repealed section and construe premises liability based on the actual or constructive knowledge of the particular place or business establishment where the accident occurred.

118 So. 3d at 320.[2] Accordingly, the court held that the plaintiff's "discovery requests of accidents . . . in other Publix stores within the State of Florida are no longer proper." *Id.* The Third District concluded that "the trial court departed from the essential requirements of law and misconstrued section [768.0755] when it required Publix to provide incident information relating to all Publix stores located in Florida" because such information was "irrelevant with respect to her burden of proof under the applicable statute." *Id.* at 319. The court granted certiorari because the discovery order granted the plaintiff carte blanche to irrelevant discovery. *Id.* at 320.

In *Publix Super Markets, Inc. v. Blanco*, No. 3D22-852, 2023 WL 379630 (Fla. 3d DCA Jan. 25, 2023),[3] the Third District applied *Santos* to a discovery order similar to the one in this case. The discovery order "require[d] Publix's corporate representative to address areas of inquiry related to Publix's corporate-wide operations, which include[d] not only the operations in the store where the alleged incident occurred but operations in over 1,300 stores throughout the country." *Id.* at *2. The

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[2] *See also Puentes*, 332 So. 3d at 530 ("Notably, section 768.0755 differs from its predecessor, section 768.0710, by not allowing for liability based solely on the business establishment's general failure to maintain the premises."); *Pembroke Lakes Mall Ltd. v. McGruder*, 137 So. 3d 418, 424 (Fla. 4th DCA 2014) (recognizing that section 768.0755 requires "actual or constructive knowledge of the dangerous condition" and "does not contain any language regarding the owner's negligent maintenance, inspection, repair, warning, or mode of operation").

[3] Publix filed a notice supplemental authority citing to *Blanco*.

plaintiff argued that "such information [wa]s discoverable because it [wa]s relevant to show negligent mode of operation." *Id.* The Third District disagreed, holding that "negligent mode of operation is not a viable theory of recovery in slip-and-fall cases." *Id.* The court concluded that because section 768.0755 no longer contains language "regarding negligent maintenance, inspection, repair, warning, or mode of operation," section 768.0755 "does not permit proof of liability under the negligent mode of operation theory." *Id.* at *2–3 (discussing *Pembroke Lakes Mall Ltd. v. McGruder*, 137 So. 3d 418, 424–26 (Fla. 4th DCA 2014)). The Third District held that the discovery order departed from the essential requirements of the law "to the extent it grant[ed] corporate-wide discovery." *Id.* at *3.

The discovery request in this case is even more broad than the discovery request held to be improper in *Santos* and is similar to the discovery request in *Blanco*. Roth sought information regarding similar incidents at any Publix store (not just in Florida) for the ten years preceding his slip and fall. In addition, Roth sought information regarding the layout of the store after the incident; information regarding Publix's policies, procedures, and training before the incident and after the incident; and information regarding prevention of such incidents at Publix's stores (including information regarding flooring similar to that used in Target stores). For the reasons explained in *Santos* and *Blanco*, Roth is limited to information regarding the actual or constructive knowledge of the dangerous condition that allegedly caused Roth's slip and fall at the Publix store at issue and Roth is not entitled to information regarding negligent mode of operation. Unless Roth can show that the information he requested is relevant to Publix's actual or constructive knowledge of the dangerous condition that caused Roth to

slip at the Publix store at issue, Roth is not entitled to the information. By failing to limit Roth's requests to the standard set forth in section 768.0755, resulting in carte blanche to discovery of irrelevant information, the trial court departed from the essential requirements of law. *See Santos*, 118 So. 3d at 320. Accordingly, we grant the portion of Publix's petition seeking certiorari relief on this basis and quash the order overruling Publix's objections and denying its motion for protective order.

Publix further argues that the order departs from the essential requirements of law because it requires Publix to disclose postincident information that is protected under the work product doctrine. We recognize that "[i]ncident reports, internal investigative reports, and information gathered by employees to be used to defend against potential litigation are generally protected by the work[ ]product privilege." *Marshalls of M.A., Inc. v. Witter*, 186 So. 3d 570, 573 (Fla. 3d DCA 2016) (first citing *Royal Caribbean Cruises, Ltd. v. Doe*, 964 So. 2d 713, 718 (Fla. 3d DCA 2007), *disapproved on other grounds by Bd. of Trs. of Internal Improvement Tr. Fund*, 99 So. 3d 450; then citing *Metric Eng'g, Inc. v. Small*, 861 So. 2d 1248, 1250 (Fla. 1st DCA 2003); and then citing *Fed. Express Corp. v. Cantway*, 778 So. 2d 1052, 1053 (Fla. 4th DCA 2001)); *see also Publix Super Mkts., Inc. v. Anderson*, 92 So. 3d 922, 923 (Fla. 4th DCA 2012) (recognizing that incident report and witness statement regarding a slip and fall constitute privileged work product). Roth responds that Publix waived its work product objection by failing to file a privilege log, as required by Florida Rule of Civil Procedure 1.280(b)(6).

Publix was not obligated to file a privilege log until the trial court ruled on Publix's other objections and determined that the information

was "otherwise discoverable" under rule 1.280(b)(6). *See Jones*, 291 So. 3d at 667 ("[Petitioner's] obligation to file a privilege log did not mature until the asserted non-privilege objection—overbreadth—was resolved."). The trial court did not specifically address privilege or a privilege log; thus, the trial court's ruling was equivalent to an initial determination that all of the documents were "otherwise discoverable" under rule 1.280(b)(6). That determination triggered Publix's obligation to file a privilege log in order to raise the work product privilege. *See State Farm Fla. Ins. Co. v. Coburn*, 136 So. 3d 711, 711–12 (Fla. 2d DCA 2014) ("The circuit court's order denying State Farm's motion for protective order did not specifically address State Farm's scope of discovery objections nor did the circuit court find that State Farm had waived any of its assertions of privilege or protection. We conclude that the general denial of State Farm's motion was equivalent to a determination that all of the documents were 'otherwise discoverable.' At that point, State Farm's claims of privilege and protection under the work product doctrine became mature." (footnote omitted)). However, for the reasons explained above, we have now determined that the trial court's ruling that the information was "otherwise discoverable" departed from the essential requirements of law. If the trial court later applies the correct standard of relevancy under section 768.0755 and determines that certain information is "otherwise discoverable," Publix will have an opportunity to file a privilege log. Accordingly, there is no irreparable harm at this point and we decline to grant certiorari on the issue of work product privilege. *See Coburn*, 136 So. 3d at 712 (denying petition for writ of certiorari because there was no irreparable harm where trial court had not ruled on the issue of privilege and petitioner still had opportunity to file a privilege log); *cf. Brinkmann v. Petro Welt Trading Ges.M.B.H.*, 324

So. 3d 574, 579 n.5 (Fla. 2d DCA 2021) (noting that petitioners had not waived privilege claim by failing to file privilege log and that their claims of privilege were not premature where trial court had recognized that petitioners should file privilege log but then specifically overruled privilege objections without giving them an opportunity to file privilege log); *Jones*, 291 So. 3d at 667–68 (holding that petitioner was not obligated to file privilege log until trial court resolved other objections to discovery and granting certiorari relief where trial court ordered discovery on the basis that petitioner failed to file privilege log).

Petition granted in part; petition denied in part; order quashed.

SILBERMAN and LABRIT, JJ., Concur.

Opinion subject to revision prior to official publication.