

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-509

Filed 5 March 2024

Durham County, No. 18CVD4282

CHRISTIAAN HEIJMEN, Plaintiff,

v.

LINZY HEIJMEN, Defendant.

Appeal by defendant from order entered 28 November 2022 by Judge Dorothy H. Mitchell in Durham County District Court. Heard in the Court of Appeals 6 February 2024.

Patrick Law, PLLC, by Kirsten A. Grieser and Cheri C. Patrick, for defendant-appellant.

Gailor Hunt Davis Taylor & Gibbs, PLLC, by S. Nicole Taylor and Jonathan S. Melton, for plaintiff-appellee.

DILLON, Chief Judge.

Defendant appeals from an order compelling the production of documents. We affirm the trial court's order.

I. Background

Plaintiff Christiaan Heijmen ("Father") and Defendant Linzy Heijmen (now

Linzy Kurien) (“Mother”) are the parents of minor children Alex and Alice.¹

Following their separation and divorce, Mother and Father reached an agreement concerning child custody and child support. Two years later, in December 2020, Father moved to modify the child custody agreement. Mother subsequently also moved to modify child custody. On 8 June 2022, after a hearing on the matter, the trial court entered an order ruling on both Father’s and Mother’s motions for temporary custody modification.

During this litigation, Father served Mother requests for production of documents. Mother failed to fully comply with those requests. On 28 November 2022, the trial court entered an Amended Order to Compel. Mother appeals.

II. Appellate Jurisdiction

“An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment.” *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). However, when “a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right” and is immediately appealable. *Id.* at 166, 522 S.E.2d at 581.

¹ Pseudonyms used for protection of minors and ease of reading.

Here, it appears that Mother has sufficiently argued in her brief that the order compelling discovery violates her statutory privileges because the documents may contain “potentially attorney-client privileged, work product doctrine, and FERPA protected information[.]” But to the extent Mother has failed to meet her burden, we grant *certiorari*. N.C. Gen. Stat. § 7A-32 (2022).

III. Analysis

Mother presents multiple arguments on appeal, which we address in turn. We review discovery orders compelling production under the abuse of discretion standard. *Crosmun v. Trs. of Fayetteville Tech. Cmty. Coll.*, 266 N.C. App. 424, 435, 832 S.E.2d 223, 233 (2019).

A. Privilege Review

First, Mother argues that the protocols outlined in the Amended Order to Compel protect her statutory privileges only “in theory” and in actuality prevent her from conducting a privilege review, thus denying her “meaningful protection of her privileged information.” She requests that we vacate that order and remand to the trial court with instructions to narrow the search terms and communication recipients to prevent the overinclusion of irrelevant documents and allow meaningful and affordable review by the parties. Father contends that Mother’s privileged information is protected by the safeguards provided in the order’s forensic examination protocol.

Our Court previously heard a case involving the discovery of electronically

stored information (“ESI”) in *Crosmun*. In that case, we concluded the trial court abused its discretion and violated the defendants’ privileges when it compelled the defendants to produce documents (1) directly to the plaintiffs’ expert, instead of an independent third party, and (2) directly to plaintiffs without allowing the defendants to first conduct a privilege review. *Id.* at 441, 832 S.E.2d at 236–37.

Here, the trial court crafted its Amended Order to Compel to avoid the errors in *Crosmun*. Specifically, the order requires that (1) Mother’s documents are delivered first to an independent, court-appointed forensic expert to conduct the forensic examination, rather than directly to Father, and (2) Mother has an opportunity to conduct a privilege review. Further, any dispute about privileged information obtained in the forensic examination may be inspected *in camera* by the trial court to make a determination. These safeguards protect Mother’s privileged information.

Mother attempts to distinguish her situation from the defendants’ situation in *Crosmun* by pointing to the parties’ differences in resources, as Mother is a “dependent spouse in custody litigation” and the defendants in *Crosmun* were the trustees of a community college with funds to conduct a large-scale privilege review. However, Mother fails to note the vastly different scale of discoverable ESI in the two cases. Here, the ESI search is limited to Mother’s devices, whereas the ESI search in *Crosmun* allowed access to a college’s entire computer system. *See id.* at 426, 832 S.E.2d at 228. Given the smaller amount of ESI in this case—which inherently

requires less time and fewer resources to conduct a privilege review—we are not persuaded by Mother’s comparison. Accordingly, Mother’s argument about her inability to conduct a meaningful privilege review is without merit.

B. Search Parameters & Privacy Concerns

Second, Mother argues that the trial court abused its discretion when it ordered document production that is “not reasonably calculated to lead to discoverable material” and is “so overbroad that it implicates [her] privacy[.]”

The amended order allows the independent forensic expert to conduct a forensic collection and examination of Mother’s electronic devices, “identifying files, data, and/or ESI that contain information responsive to [Father’s discovery requests] and searching for evidence of deletions of files and documents.” The independent forensic expert will “limit their search to extract[ing] information set forth in the search terms set forth in Exhibit A [attached to the order].” There are 215 search terms, one of which is Mother’s first name (“Linzy”). Because Mother’s name is included in her email signature, Mother argues that the inclusion of her first name as a search term will result in every single one of her emails being flagged in the forensic examination. She further argues that some of the search terms are overbroad and include common words; for example, she points to search terms such as “hate,” “baby,” “white,” “cry,” “summer,” and “ring.”

Mother contends that the search term list exceeds the relevancy limits of discovery under Rule 26 of our Rules of Civil Procedure. However, “[t]he test of

relevancy under Rule 26 is not, of course, the stringent test required at trial. The rule is designed to allow discovery of any information ‘reasonably calculated to lead to the discovery of admissible evidence[.]’ ” *Willis v. Duke Power Co.*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976). Additionally, the trial court is “vested with broad discretion in child custody matters . . . based upon the trial court[s] opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges.” *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (cleaned up).

Here, the trial court ordered the production of evidence that it believed was relevant to the child custody matter. One of Father’s allegations supporting a substantial change in circumstances that warrants the modification of custody under N.C. Gen. Stat. § 50-13.7 is that

[Mother] has a long-standing pattern of alienating and disparaging [Father’s] character to: friends, family, [Father’s] work colleagues, members of the community, representatives of the children’s school, teachers, and the minor children themselves. [Mother’s] bitterness and resentment toward [Father] is so deep-seated, it prevents her from parenting the minor children in a healthy manner.

Thus, the production of communications between Mother and various parties that contain the specified search terms is reasonably calculated to lead to the discovery of admissible evidence proving or disproving Father’s allegation that Mother alienates and disparages Father’s character. Further, the trial court was able to see and hear

the parties at the hearings and use its discretion to determine the credibility of the witnesses, including Mother. In its amended order, the trial court found that Mother's responses to Father's requests were deficient, and that Mother testified to deleting communications that fell under the scope of Father's discovery requests, even though she was on notice not to delete those communications. Those findings were supported by competent evidence in the Record.

Mother also contends that the ordered document production implicates her privacy due to its breadth. Because of the difficulty in proving whether Mother made disparaging comments about Father without looking at Mother's communications, the discovery in this case necessarily invades Mother's privacy to a degree; however, that is often the reality of child custody disputes, where private information about the parents is needed to determine the best outcome for the children. In this case, the amended order contains safeguards (in addition to those discussed above) that protect Mother's privacy, such as requiring the independent forensic expert's agency to secure Mother's information so it cannot be accessed by anyone other than the parties' counsel and requiring all parties to keep the document production strictly confidential.

Thus, we cannot say the trial court abused its discretion in compelling the production of documents as directed in the Amended Order to Compel.

IV. Conclusion

We affirm the trial court's Amended Order to Compel.

HEIJMEN V. HEIJMEN

Opinion of the Court

AFFIRMED.

Judges ZACHARY and FLOOD concur.

Report per Rule 30(e).