IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA **CIVIL ACTION**

K. A. F.,
Petitioner,

vs. **Case No. 00 DR XXX N**
T. J. F.,
Respondent,

ORDER ON WIFE'S MOTION TO COMPEL PRODUCTION

This matter having come before the court today on the wife's "Motion to Compel Production" filed 12/3/2010, it is ordered:

The wife served a request for production of documents under rule 1.350 on 7/9/2010. It asks for documents, such as income tax returns and bank account records, that are covered by the disclosure requirements of Rule 12.285. To the extent that it asks for the same documents again, it is duplication of effort and a redundant request and therefore improper. Further, in general, many of the paragraphs of the request are over broad.

The motion says the requests in paragraphs 23, 40, 42 and 49 were not complied with. With regard to 23, in the response filed 10/20/2010 the husband's counsel said: "Records are available for inspection, and may be inspected at (the office of husband's counsel) within 30 days." This is a legally sufficient response. Wife's counsel can give the notice and go there and inspect.

With regard to 40, 42 and 49, the same response was made. These are also legally sufficient. The rule requires the requested documents to be made available for inspection. To date, no inspection has been made by the wife's counsel at the designated place so the court has no basis for finding that the documents were not produced.

With regard to 40, 42, and 49, however, these requests, like many others not the subject of today's hearing, are over broad. These are "fishing expeditions," looking for no particular, designated document but rather broad categories of documents just to see what might turn up. In other words, a "fishing expedition."

For instance, "account payable" is an accounting concept, it is not a designated document. Likewise, "account receivable." These are ideas, not things. A request for "accounts receivable" is not asking for a thing. On the other hand, a request to inspect a "promissory note received from Mr. Smith in exchange for the sale of a 2003 Chevrolet Malibu" is a designated document. An "I.R.S. 1040 return for 2009" is also a designated document, although that document must be disclosed under Rule 12.285 and it should not be requested again in a request to produce documents.

A perennial problem in family litigation is over broad discovery requests that ask for voluminous and burdensome productions of documents about a party's income, assets and liabilities. These discovery requests, such as this one, go beyond the scope of discovery allowed by law. Over broad discovery requests delay litigation and unreasonably and unnecessarily drive up fees and costs.

Paragraphs 40, 42 and 49 of this request are requests for broad general categories of documents. This is not permitted by Rule 1.350 or Rule 1.351. It is also not permitted in a subpoena under Rule 1.410 or a request to a party to produce at trial under Rule 1.410(c). This request is not reasonable, it is burdensome, it is over broad. It does not seek a document designated with sufficient particularity to suggest it exists. Therefore, this is a fishing expedition looking for nothing in particular

and everything in general. This is a blindfolded hunter firing his shotgun into the sky to see if perhaps something will be knocked down. It is a dragnet sweeping every fish in its path to see if a particular species turns up in the net. It is not a rifle aimed at a known target or a fishing rod cast to hook a particular species of fish believed to be where the bait is cast. *See, e.g., Devereux Forida Treatment Network, Inc., v McIntosh*, 940 So.2d 1202, 1204 - 1205 (Fla. 5th DCA 2006): "...McIntosh's broad subpoena was a 'fishing expedition.' In fact, McIntosh never even attempted to articulate why the subpoenaed documents were needed for trial. Instead, he argued that the documents might ultimately lead to the discovery of admissible evidence. ...Since McIntosh admitted that he could not even assess whether the documents would be relevant to any issue in the litigation unless they were first produced for review, he certainly could not demonstrate their necessity for trial."

Discovery requests must (1) be "related to any pending claim or defense", *Walter v. Page*, 638 So.2d 1030, 1031 (Fla. 2d DCA 1994), and **(2) must be "reasonably calculated to lead to the discovery of admissible evidence."** *American Honda Motor Company, Inc., v. Votour*, 435 So.2d 368 (Fla. 4th DCA 1983).

Further, requests for documents or papers **must be directed at specific documents that are likely to be in the possession of the other party**. General, sweeping requests are improper. As the Second District Court of Appeal said in *Walter v. Page*, 638 So.2d 1030 (Fla. 2d DCA 1994):

> "We agree with the appellant that the subpoena duces tecum was too broad. The rule authorizing a subpoena duces tecum requires some degree of specificity, and *the documents or papers sought should be designated with sufficient particularity to suggest their existence and materiality*. *Palmer v. Servis*, 393 So.2d 653 (Fla. 5th DCA 1981); Fla.R.Civ.P. 1.350(a). *The subpoena in the instant case was too broad in seeking virtually all of appellant's personal financial documents*. The subpoena duces tecum is not the equivalent of a search warrant, and should not be used as a fishing expedition to require a witness to produce broad categories of documents which the party can search to find what may be wanted. *Palmer*." *Id.* at 1031. (*Emphasis supplied*).

The appellate court's citation to Rule 1.350(a) is instructive, because it makes no difference whether the documents are sought by a subpoena duces tecum or a request to produce documents under Rule 1.350. The same standards apply.

The Second District gave further instruction in *Palmer v. Servis, supra*:

> "The rule[3] authorizing a subpoena duces tecum provides that the subpoena may command the witness to produce books, papers, documents or tangible things designated" therein. *The word "designated" is also the qualifying word used to describe the documents a party can be required to produce*.[4] Petitioners are mere third persons subpoenaed as witnesses in this dissolution action. *Designation requires some degree of specification.*[5] *A blanket request for a general category is insufficient. The subpoena duces tecum should not become a search warrant, requiring a witness to produce broad categories of items which the party can search to find what may be wanted*. The desired documents, books or papers should be designated with sufficient particularity as to affirmatively suggest their existence and materiality and so describe them that any reasonable person can identify them.
>
> [3] Fla.R.Civ.P. 1.410(b).
> [4] Fla. R.Civ.P. 1.350(a).
> [5] See Annotation: Necessity and sufficiency ... of "designation" of documents, etc., in applications or motions, 8 A.L.R.2d 1134 (1949). "

Id. at 654, 655. (*Emphasis supplied.*)

That ruling by the appellate court bears repeating: **"A blanket request for a general category is insufficient. The subpoena duces tecum should not become a search warrant, requiring a witness to produce broad categories of items which the party can search to find what may be wanted. The desired documents, books or papers should be designated with sufficient particularity as to affirmatively suggest their existence and materiality and so describe them that any reasonable person can identify them."**

The requests at issue, in particular, paragraphs 40, 42 and 49, violate this limitation on discovery. Therefore, these are over broad. These are a dragnet and a fishing expedition, a sweep through the waters to see if something interesting might show up. These are not directed at particular documents designated with sufficient particularity that suggests their existence and materiality to the proper scope of discovery.

For instance, paragraph 49 asks for car registrations, etc., but the husband's financial affidavit does not show that he owns a car or other motor vehicle. So, this is not a request for a designated document in his possession that is likely to exist. This is a "fishing expedition" just to see if he owns a car that he did not disclose on his financial affidavit.

Further, Rule 12.285 requires the disclosure of certain financial documents and information. The documents required by that Rule are a sufficient record for nearly every financial issue in this litigation. The relevance and materiality for further specific, designated documents that are likely to be in the other party's possession is not presumed and must be demonstrated.

So, a request for general categories of all conceivable documents within general categories is not permitted by Rule 1.350 or Rule 1.351 or Rule 1.410. These rules do not permit a search warrant for everything a party or witness may have. All of the requested documents are not related to a pending claim or issue or likely to lead to admissible evidence at trial, which is the proper scope of discovery. Some of them might be, but all of them cannot be.

Further, there is no rule or case law requiring the responding party to make copies of any document for the requesting party. Under the rules, once a proper request to produce is made it is enough for the responding party to say: "This is at this location. Come and inspect it. I will show you where the categories requested are located and you can look through them and you can copy what you want." If the request is to bring a designated document to trial under Rule 1.410(c), the responding party must bring the original document to the trial. Producing a copy does not comply with the Rule.

So, there is no rule or case law requiring a party to make copies of properly requested documents, even if that is a local custom for the convenience of the lawyers and their experts. Rule 1.350(a)(1) allows a party to request "*to inspect and copy any designated documents*..." (*Emphasis supplied.*) The rule does not require the recipient of the request to make copies of all of the requested documents. *See, e.g., Grinnell Corp. v. Palms 2100 Ocean Blvd., Ltd.*, 924 So.2d 887 (Fla. 4th DCA 2006), in which the court said: "Florida Rule of Civil Procedure 1.350(b) requires that a response under the rule only produce items 'as they are kept in the usual course of business or ... identify them to correspond with the categories in the request.' " *Id.* at 895. *Compare* Rule 1.410(e)(1): "... the person to whom the subpoena is directed may serve written objection to inspection or copying of any of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court..." So, inspection and copying by the requester is what these rules allow. They do not require the responding party to make any copies. Further, the requester has to pay for any copies, at reasonable cost, of course, if the recipient provides the copier at the place designated.

So, for properly requested documents the requesting party must go to the place designated by

the responding party and inspect them there. Of course, the responding party must make the place available for inspection, and the responding party must point out where the categories are located when the requester arrives for the inspection. If the responding party chooses to send copies of properly requested documents in order to avoid an inspection, that is an effort that is not required by the rules.

A further question is whether a request like this one is a reasonable and necessary expenditure of a lawyer's time and effort for which the lawyer may ask to be paid. There is a cost and benefit analysis in all litigation. There is also a law of diminishing returns when the object is to find income or assets and other financial information. The cost and the effort may far exceed the benefit and the return may diminish to nothing, which draws into question whether the effort was a wise idea in the first place. The intelligent, thoughtful, and efficient use of the discovery rules to locate relevant and material evidence are what make a lawyer worth the fee. Anyone with a computer can turn out routine documents that accomplish little or nothing, a lawyer is not needed for this. Such an effort is not worth a fee.

Great effort and much time invested in proving some slight increase in income above that reported on a tax return or a financial affidavit, or proving some marginal enhancement in the value of an asset may not be worth the effort and the expense. The court may later find that a lawyer's time and effort on depositions or requests to produce that turn up little or nothing probative or in sifting through voluminous pages of records just to see what might turn up was an unnecessary and unreasonable expenditure of the lawyer's time.

The document trail only goes so far and it soon bumps into a person and then the urge may be for discovery to proceed with the deposition of many witnesses who have very little to contribute. Depositions are very expensive. The search could conceivably extend far beyond the known horizon, but the question is always whether the search was reasonable and necessary at every point. Pursuing every possible inquiry is not reasonable or necessary. However, pursuing inquiries that are "related to any pending claim or defense" and "reasonably calculated to lead to the discovery of admissible evidence" are reasonable and may be necessary.

A motion to compel over broad discovery requests should be denied and a motion for a "protective order should be granted when the pleadings indicate that the documents requested are not related to any pending claim or defense and are not reasonably calculated to lead to the discovery of admissible evidence." *Richard Mulholland and Associates v. Polverari*, 698 So.2d 1269 (Fla. 2d DCA 1997) at 1270.

So, with regard to 40, 42 and 49, they are all over broad fishing expeditions. Nevertheless, in response to these requests the husband said he has made copies "every check" and other documents from his business for some years and they are available at the Staples store on Pine Island Road. By going there and paying the copying bill, wife's counsel can have those documents. After those have been examined, the wife's counsel may renew this motion and set it for another hearing, if necessary.

In passing, the court notes that it would have been helpful if the husband had responded to 42 by noting: "I am the only employee of my business and I use a payroll company to pay me," which is another way of saying: "I have no payroll records other than a check to the payroll company," so there is nothing to be produced under 42. This is what the husband said at the hearing, anyway.

Likewise, it would have been helpful if he had similarly responded to 49 by saying: "I do not own a motor vehicle," as he said at the hearing. Therefore, there is no designated document regarding a motor vehicle that he can produce.

The court orders the husband to amend his response to so reply to 42 and 49.

As for 23, at the hearing the husband said he has two corporate books, one that was for his law practice in New York, which he closed some years ago and which is still in New York, and another for his used car business, which is at that place of business. The corporate book on his law practice

is irrelevant to the scope of discovery, or, no nexus has been shown. As for the book on his used car business, the husband's response was legally sufficient, that this book may be examined at his lawyer's office "upon 30 days notice." Nevertheless, the court cannot see how examining that book and the articles, bylaws and minutes is "reasonably calculated to lead to the discovery of admissible evidence at trial." On the contrary, it looks like a fishing expedition just to see what might turn up in the book, which is an expedition the rules do not permit. *See, e.g., Devereux Forida Treatment Network, Inc., v McIntosh, supra*. Nevertheless, the wife's counsel may inspect these documents at the office of the husband's counsel, as stated in the response to the request to produce.

Done and ordered in Fort Myers, Lee County, Florida, this _____

_____
R. Thomas Corbin, Circuit Judge

Copies provided to:
, Esq., and , Esq.