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IN THE
COURT OF APPEALS OF INDIANA

Marjorie K. Fox, Stephanie Heggemeier, James Kahrhoff, and Nancy Owens,

Appellants-Plaintiffs,

v.

Franciscan Alliance, Inc. d/b/a Franciscan Health – Indianapolis,

Appellee-Defendant.

February 23, 2023

Court of Appeals Case No. 22A-CT-2114

Appeal from the Marion Superior Court

The Honorable Kurt M. Eisgruber, Judge

Trial Court Cause No. 49D06-1810-CT-43502

Opinion by Judge Tavitas
Chief Judge Altice and Judge Brown concur.

Tavitas, Judge.

Case Summary

[1] Marjorie Fox, Stephanie Heggemeier, James Kahrhoff, and Nancy Owens ("Plaintiffs") appeal the trial court's grant of summary judgment to Franciscan Alliance, Inc. d/b/a Franciscan Health Indianapolis ("Franciscan"). Plaintiffs contend that Laura Vardaman, an employee of Franciscan, improperly accessed Plaintiffs' medical records. Plaintiffs filed a complaint against Franciscan, and the trial court granted summary judgment to Franciscan. On appeal, Plaintiffs argue that the trial court erred by granting summary judgment and that the trial court abused its discretion during the discovery process. We conclude that the trial court properly granted summary judgment and did not abuse its discretion during the discovery process. Accordingly, we affirm.

Issues

[2] Plaintiffs raise multiple issues, which we revise and restate as:

I. Whether the trial court properly granted summary judgment on Plaintiffs' claims for negligence, invasion of privacy via intrusion, invasion of privacy via public disclosure of private facts, and intentional infliction of emotional distress.

II. Whether the trial court's discovery orders constituted an abuse of discretion.

Facts

[3] Beginning in 2008, Vardaman was employed by Franciscan as a scheduling assistant. Vardaman's position required that she have "access to patient

records." Appellant's App. Vol. II p. 168. Franciscan provided Vardaman with training on patient privacy and the Health Insurance Portability and Accountability Act ("HIPAA"), and Vardaman "signed an agreement acknowledging that she would only access patient information for business reasons." *Id.*

[4] Vardaman was married to Tad Brewer until 2016. Prior to the divorce, Vardaman often told Brewer about the private health information of their friends and family members. Vardaman learned this information through her employment with Franciscan.

[5] In June 2018, Vardaman sent harassing emails to Brewer, which led Brewer to suspect that Vardaman accessed the medical records of his then-girlfriend, Stephanie Heggemeier. Brewer reported his concerns to Franciscan and other friends and family members. Franciscan discovered that Vardaman improperly accessed the medical records of: (1) Heggenmeier on four occasions in 2016 and 2017; (2) Marjorie Fox, Brewer's mother, on thirteen occasions in 2013 and 2014; (3) Nancy Owens, Brewer's sister, on one occasion in 2013; and (4) James Kahrhoff, Heggenmeier's ex-husband, on one occasion in 2017. Franciscan then terminated Vardaman's employment.

[6] In October 2018, Plaintiffs filed a complaint against Franciscan before both the trial court and the Indiana Department of Insurance. The complaint included the following counts: (1) vicarious liability for Vardaman's "invasion of privacy via public disclosure of private facts, invasion of privacy via intrusion,

traditional negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of professional duty, and breach of fiduciary duty"; (2) negligent supervision and retention; (3) negligence by breach of a non-delegable duty; and (4) punitive damages. Appellant's App. Vol. II p. 29, 52. The matter was stayed until May 2019 due to the Department of Insurance filing.

[7] On December 28, 2018, Plaintiffs propounded sixteen interrogatories and seventeen requests for production of documents to Franciscan. Franciscan objected to many of the interrogatories and requests for production, and in July 2019, Plaintiffs filed a motion to compel. The trial court granted the motion to compel and gave Franciscan twenty days to supplement its responses to address the concerns raised in the motion to compel. The discovery dispute, however, continued.

[8] Franciscan sought reconsideration of the order granting the motion to compel, and Plaintiffs responded by filing a motion for default judgment due to Franciscan's failure to obey the trial court's discovery order pursuant to Indiana Trial Rule 37. The trial court stayed all discovery and set the matter for a hearing. At the hearing, the trial court denied Plaintiffs' motion for default judgment and set the matter for a follow-up hearing. Franciscan then filed a motion for a protective order. The trial court held a hearing on November 4, 2019, and ordered the parties to submit a joint order, but the trial court did not issue an order regarding the pending discovery matter.

[9] In March 2020, Plaintiffs filed a praecipe for withdrawal of the submission from the trial court judge due to the trial court's delay in ruling on the discovery matters pursuant to Indiana Trial Rule 53.1. The trial court then issued a discovery order on March 20, 2020. The trial court held a hearing on July 21, 2020, and issued an order on July 22, 2020, which directly addressed certain of the interrogatories and requests for production. The trial court's order gave Franciscan thirty days to comply with the order. Franciscan supplemented its discovery on August 21, 2020, but Plaintiffs alleged the responses were unsatisfactory and filed a second motion to compel on September 14, 2020. Franciscan then filed an additional response to the discovery requests. After a hearing, the trial court denied Plaintiffs' second motion to compel.[1]

[10] In November 2020, Franciscan filed a motion for summary judgment, but the trial court stayed the proceedings pending our Supreme Court's decision in *Community Health Network, Inc. v. McKenzie*, 185 N.E.3d 368 (Ind. 2022). In May 2022, following the *McKenzie* decision, Franciscan filed an amended motion for summary judgment. Based upon *McKenzie*, Franciscan argued that it was entitled to summary judgment on: (1) all negligence claims because Plaintiffs failed to satisfy the modified-impact rule; (2) the public disclosure of private facts claim because the facts were not disclosed to the public or a large group and there is no evidence that the facts were highly sensitive; (3) the

[1] We were not provided with a transcript from this hearing or any of the other hearings regarding discovery disputes and, thus, are unable to determine the trial court's reasoning for the denial of the second motion to compel.

invasion of privacy via intrusion claim because such a claim is not recognized under these circumstances; and (4) the intentional infliction of emotional distress claim because there was no intent to cause severe emotional harm.

[11] Plaintiffs responded and argued that: (1) Franciscan failed to meet its burden of demonstrating it was entitled to summary judgment on the intentional infliction of emotional distress claim; and (2) Franciscan was likely entitled to summary judgment on the public disclosure of private facts claim, negligence-based claims, and intrusion claim but encouraged the "examination/reconsideration" of these issues. Appellant's App. Vol. III p. 181.

[12] The trial court granted Franciscan's motion for summary judgment because: (1) as to the negligence-based claims, the Plaintiffs' damages were limited to emotional, non-pecuniary loss; (2) as to the intentional infliction of emotional distress claim, Vardaman did not act with the requisite intent to cause the Plaintiffs emotional distress; (3) as to the claim of invasion of privacy via public disclosure of private facts, the medical information was not disclosed to the public and the Plaintiffs were not "seriously aggrieved" by the disclosure; (4) Plaintiffs' claim for invasion of privacy via intrusion is not recognized in Indiana; and (5) the claim for punitive damages is moot. Appellant's App. Vol. II p. 25. Plaintiffs now appeal.

Discussion and Decision

I. Summary Judgment

[13] Plaintiffs challenge the trial court's grant of summary judgment to Franciscan. "'When this Court reviews a grant or denial of a motion for summary judgment, we stand in the shoes of the trial court.'" *Minser v. DeKalb Cnty. Plan Comm'n*, 170 N.E.3d 1093, 1098 (Ind. Ct. App. 2021) (quoting *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020)). "Summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id*. (quoting *Murray v. Indianapolis Public Schools*, 128 N.E.3d 450, 452 (Ind. 2019)); *see also* Ind. Trial Rule 56(C).

[14] The summary judgment movant invokes the burden of making a *prima facie* showing that there is no issue of material fact and that it is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden then shifts to the non-moving party to show the existence of a genuine issue of material fact. *Id*. On appellate review, we resolve "[a]ny doubt as to any facts or inferences to be drawn therefrom . . . in favor of the non-moving party." *Id*.

[15] We review the trial court's ruling on a motion for summary judgment de novo, and we take "care to ensure that no party is denied his day in court." *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). "We limit our review to the materials designated at the trial level." *Gunderson v. State, Ind. Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*, 139 S. Ct. 1167 (2019). Because

the trial court entered findings of fact and conclusions of law, we also reiterate that findings of fact and conclusions of law entered by the trial court aid our review, but they do not bind us. *Matter of Supervised Estate of Kent*, 99 N.E.3d 634, 637 (Ind. 2018).

[16] Before addressing the parties' arguments, we note that the outcome here is largely controlled by our Supreme Court's opinion in *Community Health Network, Inc. v. McKenzie*, 185 N.E.3d 368 (Ind. 2022). In *McKenzie*, Katrina Gray, a medical records coordinator with Community, accessed and disclosed information from the confidential medical records of several individuals as part of a "long-running family feud." *McKenzie*, 185 N.E.3d at 373. The plaintiffs filed a complaint against Gray and Community and brought claims of "respondeat superior and negligent training, supervision, and retention against Community and claims of negligence and invasion of privacy against Gray." *Id.* at 374. The trial court denied Community's motion to dismiss and motion for summary judgment.

[17] On appeal, our Supreme Court concluded that the Medical Malpractice Act did not apply to the plaintiffs' claims. The Court then held that an employee's conduct may fall within the scope of employment for vicarious liability purposes even though the conduct was unauthorized and violates the employer's policies. Genuine issues of material fact existed, however, regarding whether Gray's conduct fell within the scope of her employment. As for the plaintiffs' other claims, our Supreme Court held: (1) Community was entitled to summary judgment on the negligence-based claims because plaintiffs

did not demonstrate compensable damages; and (2) although Indiana recognizes a tort for public disclosure of private facts, plaintiffs did not demonstrate the requisite publication of private facts. Accordingly, our Supreme Court concluded that Community was entitled to summary judgment as to all of plaintiffs' claims. With *McKenzie* in mind, we will now address Plaintiffs' claims.

A. Negligence

[18] The trial court granted summary judgment to Franciscan on all of Plaintiffs' negligence-based claims based upon *McKenzie*. In *McKenzie*, the Supreme Court determined that summary judgment was appropriate on the plaintiffs' negligence-based claims due to the plaintiffs' lack of compensable damages. The plaintiffs alleged only emotional distress damages, and the Court held that "emotional-distress damages are recoverable in negligence-based claims only when a party can satisfy (1) the modified-impact rule or (2) the bystander rule." *McKenzie*, 185 N.E.3d at 379. The modified-impact rule requires that "the plaintiff personally sustained a physical impact," and the bystander rule requires that "the plaintiff contemporaneously perceived a loved one's negligently inflicted death or serious injury." *Id.* Neither of these circumstances applied to the plaintiffs. Accordingly, the Supreme Court concluded that Community was entitled to summary judgment on all of plaintiffs' negligence-based claims. *Id*.

[19] Here, in interrogatories, each Plaintiff identified his or her damages as: "**Loss of privacy**, emotional distress, embarrassment, humiliation, mental anguish

and suffering, and harm to reputation from the date Laura Vardaman first violated each plaintiff's privacy to the end-date of each plaintiff's life expectancy. . . ." Appellant's App. Vol. III p. 122, 133, 144, 155 (emphasis added). On appeal, Plaintiffs argue that "loss of privacy" damages, as opposed to emotional damages, should be allowed in negligence actions without being subject to the modified-impact rule. Plaintiffs also argue that the modified-impact rule should not apply to medical breaches.

[20] Plaintiffs, in essence, argue that we should reconsider our Supreme Court's decision in *McKenzie*. "It is not our role to reconsider or declare invalid decisions of the Indiana Supreme Court." *Cont'l Ins. Co. v. Wheelabrator Techs., Inc.*, 960 N.E.2d 157, 162 (Ind. Ct. App. 2011), *trans. denied*. "In fact, we are bound by our supreme court's decisions, and its precedent is binding on us until it is changed by our supreme court or legislative enactment." *Id.*

[21] *McKenzie* held that such negligence claims are subject to the modified-impact rule, which requires that the plaintiff sustain a physical impact. Loss of privacy does not consist of a physical impact, and it is undisputed that Plaintiffs here did not sustain physical impacts. Accordingly, Franciscan established that it was entitled to summary judgment on Plaintiffs' negligence-based claims.

B. Invasion of Privacy Via Intrusion

[22] Plaintiffs also argue that the trial court erred by granting summary judgment on their claim for invasion of privacy via intrusion. The *McKenzie* Court noted: "An 'invasion of privacy' encompasses four distinct injuries: (1) intrusion upon

seclusion; (2) appropriation of likeness; (3) public disclosure of private facts; and (4) false-light publicity." *McKenzie*, 185 N.E.3d at 380 (citing Restatement (Second) of Torts § 652A). Plaintiffs' argument concerns the first category—intrusion upon seclusion.

[23] Our Supreme Court held in *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991), that: "When the invasion of a plaintiff's right to privacy takes the form of intrusion, it consists of an intrusion upon the plaintiff's physical solitude or seclusion as by invading his home or conducting an illegal search." Indiana courts have continued to require an intrusion of a physical space for this tort. *See, e.g., Curry v. Whitaker*, 943 N.E.2d 354, 358 (Ind. Ct. App. 2011) ("There have been no cases in Indiana in which a claim of intrusion was proven without physical contact or invasion of the plaintiff's physical space such as the plaintiff's home."). Plaintiffs point out that certain treatises and cases from other jurisdictions advocate for the applicability of this tort to an intrusion into a person's private affairs or concerns, and Plaintiffs argue that this Court's opinions on this issue have been erroneous.

[24] We note, however, that in *McKenzie*, the Court stated that the plaintiffs "styled" their claim as an "intrusion" claim. *McKenzie*, 185 N.E.3d at 380 n.2. The Court held that plaintiffs' "allegations relate solely to the public disclosure of private facts" and determined that, despite the intrusion argument, plaintiffs' claims fell into the third category of public disclosure of private facts. *Id.* Thus, the *McKenzie* Court refused to analyze plaintiffs' claim as an intrusion claim. Given our Supreme Court's explicit refusal to analyze this type of claim as an

intrusion, we decline Plaintiffs' invitation to do so here. We again note that we are bound by our Supreme Court's decisions. *See Cont'l Ins. Co.*, 960 N.E.2d at 162. The trial court properly granted summary judgment to Franciscan on this claim.

C. Invasion of Privacy Via Public Disclosure of Private Facts

[25] Plaintiffs argue that the trial court erred by granting summary judgment on their claim of invasion of privacy via public disclosure of private facts. In *McKenzie*, our Supreme Court recognized the viability of a claim for public disclosure of private facts. The Court noted that this tort "offers a meaningful way to deter unauthorized disclosures of private information." *McKenzie*, 185 N.E.3d 381.

[26] The Court explicitly adopted the disclosure tort as articulated in the Restatement (Second) of Torts § 652D, which establishes four requirements: "(1) the information disclosed must be private in nature; (2) the disclosure must be made to the public; (3) the disclosure must be one that would be highly offensive to a reasonable person; and (4) the information disclosed is not of legitimate public concern." *Id.* at 382.

> The first requirement—private facts—means that the information is both factually true and privately held. [Restatement (Second) of Torts § 652D] cmt. b. Thus, if the information is left "open to public inspection" or if "the defendant merely gives further publicity to information about the plaintiff that is already public," this element is not satisfied. *Id.*
>
> The second requirement—publicity—means that the information must be communicated in a way that either reaches or is sure to

> reach the public in general or a large enough number of persons such that the matter is sure to become public knowledge. *Id.* cmt. a. Yet there is no threshold number that constitutes "a large number" of persons. *See id*. The facts and circumstances of each case must be taken into consideration in determining whether the communication gave sufficient "publicity" to support a public-disclosure claim. *See id*.
>
> The third requirement—highly offensive to a reasonable person—means the disclosure must be one that offends society's accepted, communal norms and social mores. *See id.* cmt. c. In recognition that complete privacy is illusory, this element is satisfied when publicity is given to private information "such that a reasonable person would feel justified in feeling seriously aggrieved by it." *Id.*
>
> The fourth requirement—lack of newsworthiness—means that the information disclosed is not of legitimate concern to the public. *Id*. cmt. d. . . . .

Id.

[27] The trial court here found that the second (publicity) and third (offensiveness) requirements were not satisfied in this case. We need not address the offensiveness prong because Plaintiffs have failed to satisfy the publicity prong. In *McKenzie*, the Court determined that the publicity element failed because the record was "devoid of evidence that Gray disclosed the information to, or in a way that was sure to reach, the public or a large number of people." *McKenzie*, 185 N.E.3d at 383. Evidence that Gray divulged information to members of her family was insufficient because "a communication to a small group of

persons is generally not actionable." *Id.* (citing Restatement (Second) of Torts § 652D cmt. a).

[28] Similarly, here, Franciscan designated evidence demonstrating the following: (1) Fox claimed that Vardaman told Brewer about Fox's medical records, Appellants' App. Vol. III p. 124; (2) Heggemeier claimed that Vardaman told Brewer about Heggemeier's medical records, *id.* at 135; (3) Kahrhoff does not "know with whom Laura Vardaman shared [his] information," *id.* at 146; and (4) Owens claimed that Vardaman told Brewer about Owens's medical records. Brewer told Owens that Vardaman "had disclosed this medical information about [Owens] to other people, but he did not reveal the identifies of these other people to [Owens]." *Id.* at 157.

[29] The designated evidence fails to demonstrate that Vardaman communicated the information in a way that either reached or was sure to reach the public in general or a large enough number of persons such that the matter was sure to become public knowledge. *See, e.g.*, *Rubendall v. Cmty. Hosp. of Anderson & Madison Cnty.*, __ N.E.3d __, __, 2023 WL 1458054, at *5 (Ind. Ct. App. Feb. 1, 2023) (holding that "there is no designated evidence that the Hospital disclosed the information to, or in a way that was sure to reach, the public or a large number of people"). Accordingly, the trial court properly granted Franciscan's motion for summary judgment on Plaintiffs' public disclosure of private facts claim.

D. Intentional Infliction of Emotional Distress

[30] The trial court granted summary judgment to Franciscan on Plaintiffs' intentional infliction of emotional distress claim because Vardaman did not act "with the requisite intent to cause emotional distress."[2] Appellants' App. Vol. II p. 24. In *Cullison v. Medley*, 570 N.E.2d 27 (Ind. 1991), our Supreme Court recognized the tort of intentional infliction of emotional distress as defined by the Restatement (Second) of Torts § 46 (1965). The tort of intentional infliction of emotional distress is defined as: "'one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. . . .'" *Lachenman v. Stice*, 838 N.E.2d 451, 456 (Ind. Ct. App. 2005) (quoting *Cullison*, 570 N.E.2d at 31), *trans denied*. "It is the intent to harm the plaintiff emotionally which constitutes the basis for the tort of intentional infliction of emotional distress." *Id.*

[31] The tort of intentional infliction of emotional distress requires proof of four elements—the defendant: (1) engages in extreme and outrageous conduct (2) which intentionally or recklessly (3) causes (4) severe emotional distress to another." *Id.* "The requirements to prove this tort are rigorous." *Id.* "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

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[2] The *McKenzie* Court noted that the plaintiffs in that case did not bring an intentional infliction of emotional distress claim. *McKenzie*, 185 N.E.3d at 379 n.1. Accordingly, *McKenzie* does not control this claim.

Id. at 456-57. In the appropriate case, however, the question can be decided as a matter of law. *Id.* at 457.

[32] In Franciscan's amended motion for summary judgment, it designated, in part, Tad Brewer's affidavit and the plaintiffs' interrogatory responses. *See* Appellants' App. Vol. III p. 104. This evidence demonstrated that Vardaman shared private health information with her then husband, Brewer. In interrogatories: (1) Fox identified Brewer as the person Vardaman told about her medical records, *id.* at 124; (2) Heggemeier identified Brewer as the person Vardaman told about her medical records, *id.* at 135; (3) Kahrhoff does not "know with whom Laura Vardaman shared [his] information," *id.* at 146; and (4) Owens identified Brewer as the person Vardaman told about her medical records. Brewer told Owens that Vardaman "had disclosed this medical information about [Owens] to other people, but he did not reveal the identifies of these other people to [Owens]." *Id.* at 157.

[33] The trial court found:

> As outlined by Brewer's testimony, Vardaman was keeping her actions a secret from both the Hospital and Plaintiffs. It was not until Brewer told the Hospital about Vardaman's actions that the Plaintiffs learned what she had done. Insofar as Vardaman did not intend for Plaintiffs to discover her actions, she did not act with the requisite intent to cause emotional distress.

Appellants' App. Vol. II p. 24. We agree with the trial court. The designated evidence shows that Vardaman did not act with the requisite intent or recklessness to cause Plaintiffs severe emotional distress; rather, Vardaman

attempted to keep her conduct a secret from the Plaintiffs and others, except for Brewer. The trial court properly granted Franciscan's motion for summary judgment on this claim. *See, e.g., Lachenman*, 838 N.E.2d at 457 (granting summary judgment where there was "nothing in the record which would support a reasonable inference to the effect that the Stices intended to cause Lachenman emotional distress by their behavior").

II. Discovery

[34] Plaintiffs also challenge the trial court's discovery rulings. "Because trial courts have broad discretion on issues of discovery, we review discovery rulings—such as rulings on motions to compel—for an abuse of that discretion." *Minges v. State*, 192 N.E.3d 893, 896 (Ind. 2022). Trial courts, accordingly, "have wide discretionary latitude, and their orders carry a strong presumption of correctness." *Towne & Terrace Corp. v. City of Indianapolis*, 156 N.E.3d 703, 716 (Ind. Ct. App. 2020), *trans. denied*. "[W]e will find an abuse of discretion only where the result reached by the court is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable and actual deductions flowing therefrom." *Matter of Contempt of Myers*, 191 N.E.3d 912, 915 (Ind. Ct. App. 2022). We will not overturn a trial court's discovery decision "absent clear error and resulting prejudice." *Towne & Terrace Corp.*, 156 N.E.3d at 716.

[35] Plaintiffs claim that the trial court refused to hold Franciscan "to any deadline, to require [Franciscan's] compliancy with any court order, or to issue any ruling which might even remotely inconvenience the defense" and that "the trial court

rubber-stamp[ed] one of the most egregious patterns of discovery obstructionism ever witnessed by" Plaintiffs' counsel. Appellants' Br. p. 45. Plaintiffs' argument, however, focuses on Franciscan's refusal to provide "audit trails and [ ] investigatory interview(s)" during discovery. *Id.* at 51. Plaintiffs contend that the audit trails and investigatory interviews are not subject to a work-product privilege, that they have a substantial need for the information, and that they cannot obtain the information by other means. According to Plaintiffs, they need to know of Vardaman's other victims to assess liability in Count III (negligence by breach of non-delegable duty) and punitive damages in Count IV.

[36] Even if we assume the trial court abused its discretion by denying the second motion to compel regarding the audit trails and investigatory interviews, Plaintiffs have failed to demonstrate any prejudice. Plaintiffs' prejudice arguments relate to one of their claims of negligence, which did not survive summary judgment proceedings under *McKenzie* due to lack of compensable damages. The audit trails and investigatory interviews are irrelevant to the lack of compensable damages. Further, Plaintiffs' claims for punitive damages did not survive summary judgment proceedings because the remainder of their claims failed. Under these circumstances, Plaintiffs have failed to demonstrate any prejudice related to the trial court's rulings during the discovery process.

Conclusion

[37] The trial court properly granted Franciscan's motion for summary judgment as to all of Plaintiffs' claims, and Plaintiffs have failed to demonstrate any

prejudice related to the trial court's rulings during the discovery process. Accordingly, we affirm.

[38] Affirmed.

Altice, C.J., and Brown, J., concur.