NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1611-21

RICHARD LIPSKY, and MHA, LLC d/b/a MEADOWLANDS HOSPITAL,

Plaintiffs-Respondents,

v.

THE NEW JERSEY ASSOCIATION OF HEALTH PLANS, INC., HEALTH PROFESSIONALS AND ALLIED EMPLOYEES UNION, JEANNE OTERSEN, ANN TWOMEY, ADRIEN DUMOULIN-SMITH, HARRIET RUBENSTEIN, AMERIGROUP, INC., AMERIHEALTH INSURANCE COMPANY OF NEW JERSEY, AMERIHEALTH HMO, INC., UNITED HEALTHCARE SERVICES, INC., UNITED HEALTHGROUP INCORPORATED, AETNA, INC., HORIZON BLUE CROSS BLUE SHIELD INSURANCE COMPANY, and NEW JERSEY HEALTH CARE QUALITY INSTITUTE,

Defendants-Respondents.

NEW JERSEY DEPARTMENT OF HEALTH,

APPROVED FOR PUBLICATION

January 18, 2023

APPELLATE DIVISION

Appellant.

Argued January 11, 2023 – Decided January 18, 2023

Before Judges Haas, Gooden-Brown and Mitterhoff.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3723-16.

Michael R. Sarno, Deputy Attorney General, argued the cause for appellant (Matthew J. Platkin, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Michael R. Sarno, Deborah Shane-Held, and Patrick Jhoo, Deputy Attorneys General, on the briefs).

William J. Hughes, Jr., argued the cause for respondent MHA, LLC d/b/a Meadowlands Hospital (Porzio, Bromberg & Newman, PC, attorneys; Vito A. Gagliardi, Jr., and Brett S. Moore, of counsel and on the joint brief; Thomas J. Reilly, on the joint brief).

Robert A. Agresta argued the cause for respondent Dr. Richard Lipsky (The Agresta Firm, PC, attorneys; Robert A. Agresta and Anthony K. Modafferi, III, of counsel and on the joint brief).

The opinion of the court was delivered by

HAAS, P.J.A.D.

In this opinion, we address the novel issue of whether a party to a pending litigation may compel a non-party State agency to turn over its employees' State-issued and personal cell phones to that party's expert for forensic examination, even when the agency has already produced the relevant

records from the devices. Having reviewed this issue in light of the record, the arguments of the parties, and the applicable law, we conclude that the trial court misapplied its discretion when it required the New Jersey Department of Health (Department) to give the cell phones to plaintiffs' expert for evaluation. The trial court's order violated civil discovery rules and case law by requiring the production of materials not in the Department's possession, custody, or control, not allowing for privilege and confidentiality review, and being unnecessary and unduly burdensome. The order also contravened the employees' constitutional right to privacy. Therefore, we reverse the court's order mandating that the Department turn over any State-issued or personal electronic devices for examination by plaintiffs' expert, and remand for resolution of any outstanding issues relating to the completeness of the Department's response to plaintiffs' subpoena.

I.

Plaintiffs Richard Lipsky, MD, and MHA, LLC d/b/a Meadowlands Hospital, initiated this litigation in federal court. In 2016, the federal court severed a number of claims, which plaintiffs then pursued in State court.

In July 2017, plaintiffs served a subpoena duces tecum on the Department, with an attached copy of their November 2016 State-court amended complaint. This subpoena is not at issue in this appeal. For the most

part, this subpoena sought documents and communications relating to plaintiffs and several other named individuals from January 2010 to the present. Plaintiffs issued a modified subpoena in April 2018, and in May 2018 the court issued an order granting plaintiffs' motion to compel the production of responsive documents.

In August 2018, plaintiffs filed a third amended complaint in their State-court litigation, in which they asserted claims for violations of New Jersey's racketeering and antitrust statutes, tortious interference with prospective and ongoing economic advantage, civil conspiracy, common law and statutory unfair competition, and aiding and abetting. In a nutshell, plaintiffs alleged that defendants[1] conspired to target Meadowlands Hospital for elimination. They alleged:

> 44. . . . Meadowlands, a private for-profit OON [out-of-network] Provider, and its owners, have been targeted by the [d]efendants with the goal of eliminating Meadowlands as a competitor to in-network not-for-profit medical providers because Meadowlands generally refused to join all existing insurance companies networks, and also generally refused to voluntarily accept reduced payments from those insurers that Meadowlands does not have an in-network agreement with. As such, Meadowlands did not enable the health insurance companies to engage

[1] Plaintiffs describe defendants as including a health insurance trade organization, a health care labor union and several of its employees, a number of health insurance companies, and a health care related organization.

> in an illegal scheme to pay themselves fees from the health insurance plans they are paid to administer. Furthermore, unhappy with how a for-profit health care facility must operate, Meadowlands and its owners were targeted by [defendant Health Professionals and Allied Employees Union ("HPAE")] and its members who intentionally coordinated efforts with health insurance companies through [defendant the New Jersey Association of Health Plans ("NJAHP")] to inflict financial and reputational harm on Meadowlands and its owners.
>
> 45. The [d]efendants targeted Meadowlands and its owners in a coordinated manner by engaging in a continuous negative media campaign to disparage Meadowlands and its owners, as well as using various measures to exert financial pressure on Meadowlands and its owners resulting in substantial damages to Meadowlands . . . .

As relates to the Department, which is not a party to the litigation, plaintiffs alleged that defendants: encouraged the Department to conduct inspections of Meadowlands Hospital for health-related violations; and used public records requests to obtain data about Meadowlands from the Department, as follows:

> 187. HPAE, and one or more of the other [d]efendants encouraged the [Department] to conduct frequent and unjustified inspections at Meadowlands for alleged health related violations. From the date that Dr. Lipsky and his fellow owners purchased Meadowlands in December 2010, the [Department] conducted over sixty-six inspections for alleged health violations (approximately one per month), and also compelled Meadowlands to hire a financial consultant resulting in the forced disclosure of additional financial and

> other information about Meadowlands' business operations. The [d]efendants were then able to obtain this information using "Transparency" as a messaging device, and used it to assist in their efforts to reduce reimbursements and strangle the hospital financially.
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> 188. This number of inspections is far from common and well in excess of the number of inspections performed at most New Jersey hospitals.
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> 189. For example, on January 29, 2014, Brenden Peppard of United Healthcare emailed Ward Sanders to ask him who he should contact at the [Department] to discuss Meadowlands Hospital.
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> 190. Furthermore, HPAE, along with the NJAHP and other industry trade groups took steps, both in the media, and through direct communications to New Jersey State officials, to have a manager appointed to oversee Meadowlands' business operations.

A little over a year after the third amended complaint, in October 2019, the Department conducted an inspection survey at Columbus Hospital in Newark, which is one of plaintiffs' facilities. On October 23, 2019, plaintiffs' counsel wrote to Department Assistant Commissioner Stefanie Mozgai seeking an explanation as to the factual and legal basis for the inspection. Shortly thereafter, in November 2019, in response to counsel's letter, the Department advised certain Department employees to preserve documents and electronic data regarding the October 2019 inspection and also a June-July 2019 licensure survey.

On April 27, 2020, plaintiffs served a subpoena duces tecum on the Department in care of Mozgai. This subpoena, which the trial court and the parties to this appeal sometimes referred to as the "Columbus Subpoena," is the subpoena at issue. Through the subpoena, plaintiffs sought twenty categories of documents and communications, mostly (but not exclusively) concerning Columbus Hospital, inspections and surveys at Columbus Hospital, and any complaints made about Columbus Hospital.

In the "Definitions and Instructions" portion of the subpoena, plaintiffs made it clear that they were seeking data from both work and personal accounts and work and personal electronic devices. Indeed, plaintiffs defined "documents and communications" as including "all Documents and Communications wherever they may be stored including in personal devices, personal accounts, cloud-based accounts, corporate accounts, CD or DVD discs, government data storage of any kind, USB or other forms of attachable storage devices." (emphasis added).

Moreover, plaintiffs provided instructions for how individuals should conduct searches of various messaging applications on their personal and work devices. For example, the subpoena instructed:

> K. In performing searches for communications of Apple iMessage or Messages, WhatsApp, Facebook Messenger, Instagram, Snapchat, [Gmail], [GChat] or [WeChat] data it is expressly requested that you

> conduct the relevant data request directly from each of these providers through your account and search each of the relevant data downloads from these providers and certify specifically that you have searched each of these downloads for relevant data and to the extent that you have erased any data, it is expressly requested that you certify as to any data which was erased either by automated processes or by yourself including deleting messages on your personal device or otherwise cancelling, disabling, suspending or deleting your accounts with any of these providers.
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> L. Apple iMessage and Messages data may reside on your personal devices including both computers and mobile phones as well as in iCloud Backups. It is expressly requested that you search message data on all devices which have access to your iMessage or Messages accounts as well as all iCloud backups or local backups on your computer. iCloud backups may be downloaded from https://www.icloud.com. It is expressly requested that you certify that you have performed this process and searched this data.

The subpoena did not demand that any electronic devices be turned over to an expert for forensic analysis.

In May 2020, the Department moved to quash the subpoena, and plaintiffs filed a cross-motion to enforce litigant's rights. By orders dated July 21, 2020, the trial court denied the Department's motion and granted plaintiffs' cross-motion to comply with the first subpoena, as modified, and the Columbus subpoena, while permitting the Department to submit to the court documents as to which it asserted a privilege, along with a privilege log with respect to such documents.

Dissatisfied with the Department's production of documents, and the adequacy of the agency's privilege log, plaintiffs filed a motion to compel and for sanctions, which the Department opposed.

On February 19, 2021, the trial court issued an oral opinion and order, granting plaintiffs' motion to compel, but denying their motion for sanctions. In its oral opinion, the court found that the Department's privilege log was deficient, and not in compliance with the July 21, 2020 order because the Department had not provided a sufficient legal basis with respect to the privileges asserted. The court also found that the Department must conduct searches, including of electronic devices, in accordance with the terms of the subpoena, stating:

> [T]he [Department] must conduct a search of the devices, communications, documents concerning each named individual in the subpoena in accordance with the searches set forth in the subpoena. Here, the subpoena was addressed to and served on the New Jersey Department of Health, c/o Stephanie Mozgai. The [Department] asserts that as the individual served, only Stephanie Mozgai's device and emails are subject to the subpoena. The [Department] explains "you", according to the subpoena, is defined as the person upon whom the subpoena is served.
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> Contrary to [the Department's] position, the [c]ourt does not interpret this to mean that because the subpoena was served on Stephanie Mozgai, that only Stephanie Mozgai's devices and emails are subject to the subpoena. Instead, the [c]ourt finds the subpoena was served on the [Department], and the [Department]

> must conduct a search of the devices and communications of each individual named in the subpoena and employed by the [Department].
>
> The searches shall include the relevant devices and communications of -- and I'll give the last names . . . as well as any other individual names, persons employed by the [Department].

In the corresponding order, the court required the Department, within forty-five days, to produce new privilege logs that complied with the July 21, 2020 order, and file under seal all documents withheld on the basis of privilege.

The court also went beyond the terms of its oral opinion, and mandated that electronic devices be turned over to plaintiffs' e-discovery expert for inspection. The court issued that mandate without including any limitations on the type of searches that could be conducted, or the amount of time the Information Technology (IT) expert could possess the individuals' electronic devices, nor any provisions for the protection of confidential or privileged information. Specifically, the court ordered:

> [A]ll persons identified in the subpoenas SHALL identify their electronic devices, personal or otherwise for emails, text messages and other forms of communication, and SHALL produce all relevant communications as set forth in the subpoenas attached to this [c]ourt's enforcement Order dated July 21, 2020; and . . .

> . . . [E]ach of the persons identified in the subpoenas attached to this [c]ourt's enforcement Order dated July 21, 2020 shall turn over all of their electronic devices containing information in the Subpoenas to [p]laintiffs' forensic IT Professional for inspection and evaluation for all relevant communications identified in the subpoenas . . . .

The Department moved for reconsideration and to amend the February 19, 2021, order: (1) to exclude the production of data from personal electronic devices; and (2) to eliminate the paragraph that required electronic devices be turned over to plaintiffs' forensic expert for inspection and evaluation. By opinion and order dated April 16, 2021, the trial court denied the motion.

Explaining its decision, the court stated:

> The personal devices are subject to the subpoena, and I'm going to give some guidance on that because there's some great concerns . . . first off, I think it goes without saying that if one has an issued government phone, that's easy. You know, . . . where the information may be contained for discovery purposes, but people often use their own devices for work. I have. . . . I mean, so, you know, it's not unheard of. So, that's where discoverable information shall be.
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> But I am concerned that if someone has a phone and it's theirs and they have to take a call from their son who is playing soccer, where is that phone? I mean, it's almost become part of what we need, like wearing a pair of shoes or a watch or a set of keys for the car
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> . . . .

The [Department] argues that the third-party forensic [IT] professional issue was not briefed or raised at oral argument. [The Department], therefore, asks the [c]ourt to reconsider the contested paragraph. Again, the [c]ourt considered the use of a third-party forensic [IT] expert as evidence[d] [by] the language provided in the order. However, this [c]ourt should have provided further explanation when rendering its decision.

As noted by plaintiffs in opposition during oral argument, a third-party forensic [IT] professional will ensure reliability when the search is done and eliminate the possibility of inadvertent production of irrelevant or privileged material. The [c]ourt agrees. Also important, the independent forensic professional, Mr. Tino . . . Kyprianou of Axiana Digital Forensics and Cyber Security can acquire the data from the devices either at their lab or . . . Morristown or other location designated by the [Department].

With respect to the [Department's] confidentiality and constitutional concerns, the disclosure of data required by the third party will be limited to that company and the [Department] attorney of record. Therefore, the [Department], upon review of privilege will turn over the relevant documents to the plaintiff[s]. The [c]ourt finds that the process is reasonable and necessary in light of the discovery – (indiscernible – speech garbled).

With respect to any disagreements whether the subpoena applies to both [S]tate-issued and personal devices, the [c]ourt, again, must agree with the plaintiff[s]. Neither the subpoena nor the court order limits the search of communications on state-issued devices. Why? Again, I think I said this earlier. People have used these devices interchangeably. On [S]tate-issued devices, they're probably calling the . . . restaurant for takeout for dinner. Likewise, on their

> personal devices, they might be calling the Commissioner of Health to talk about something that recently happened in the world of New Jersey health issues.
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> So, they have become not -- and we would hope that these things would be kept separate because then you wouldn't have these issues, but they have not. So, both [S]tate-issued and personal devices must be turned over to the third-party forensic professional for inspection. The [c]ourt will limit the duration of the search during this hearing.
>
> So, the motion is denied pursuant to Rule[s] 1:13-1 and 4:49-2. Neither a clerical error [nor] a mistake of law applies in this case. The paragraph which explains each of the persons defined in the subpoena attached to this [c]ourt's enforcement order dated July 21, 2020 shall turn over all of the electronic devices containing information identified in the subpoenas
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> . . . .
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> to a . . . forensic IT professional for inspection and evaluation of all relevant communications identified in the subpoenas.

However, the court expressed concerns over the length of time that individuals would be required to turn over their devices, as well as the need to protect personal information contained on the devices. In response, plaintiffs' counsel indicated that the third-party vendor would: (1) copy the entire contents of the individuals' devices and return the devices "intact" within a few hours; (2) thereafter, the vendor would search the contents of the copied devices to discover information responsive to the subpoena; and (3) the vendor

would produce only the relevant materials to plaintiffs, and would not provide any personal data.

Ultimately, the court ordered the parties to meet and confer, to see if they could reach an agreement about these issues.

Consistent with the court order, over the next six months, through October 2021, counsel conferred, as did their respective e-discovery experts: Complete Discovery Source (CDS) on behalf of the Department, and Axiana on behalf of plaintiffs.

The State-issued devices were then searched by CDS, with input from Axiana, pursuant to an agreement between the parties. However, the parties and their experts disagreed about whether the parties' agreement had been complied with, and whether the searches were sufficiently thorough.

The experts' disputes were highly technical. Suffice it to say that the Department's expert, CDS, maintained that it performed a thorough forensic search from State-issued devices, using best practices in the industry for civil discovery, as well as agreed-upon search terms and protocols, and produced all responsive, non-privileged information discovered. On the other hand, plaintiffs' expert, Axiana, disagreed with that assessment, believing that the search and production could have been more thorough, with additional techniques and software used, and Axiana believed the parties' agreement

required that it be more involved with the search. For example, in email correspondence dated September 30, 2021, Axiana wrote:

> My clients want the phones re-imaged with the objective of extracting all data available by any means necessary, such as but not limited to, physical extractions, bootloaders, Cellebrite Premium (through State law enforcement), Cellebrite Advanced Services, or any other tools available to you.
>
> [(emphasis added).]

As discussed at oral argument on the subsequent motion to enforce litigant's rights, the differences between the experts regarding the extensiveness of the search appeared to be how to treat the case: with the Department's expert using methods applicable to civil discovery, and plaintiffs' expert wanting to use more invasive physical imaging methods applicable to criminal cases, which according to the Department had the possibility of harming or altering the devices.

The parties also had ongoing disputes about the accessibility of certain individuals' devices. Specifically: certain Department employees did not have any State-issued devices; certain individuals identified in the subpoena either did not work for the Department, or they no longer did so; one unidentified Department employee did not recall the password for her State-issued device; and as to another Department employee, only her new State-issued device could be searched because, due to an administrative error, when she turned in

her old device in April 2020 it had been cleared of data and re-issued to another employee before data could be preserved.

And finally, the parties continued to disagree about the treatment of individuals' personal electronic devices, with the Department proposing that the employees search their own devices pursuant to instructions from the Department's IT department. The parties advised the trial court of their various disputes and the court held conferences on August 31, 2021, and October 22, 2021.

At some point before the October conference, the Department produced certifications from ten of its employees.[2] In these certifications, the employees indicated that they had conducted searches of their personal cellphones for the listed search terms "in accordance with the Search Instructions and Search Protocols provided by the Department's Office of Legal and Regulatory Compliance" (which were attached to the certifications), and they had turned over to the Department all responsive data from their text messages, personal email, and the applications referenced in the subpoena, to the extent applicable.

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[2] The Department states in its appellate brief that it has not yet produced materials from the Commissioner's personal phone, stating that the production was "pending legal review" at the time of the November 19, 2021 order from which this appeal has been taken.

The employees' searches of their devices appeared to have been consistent with the instructions set forth in the subpoena. However, plaintiffs' counsel argued that the production made by the employees was not reliable because: (1) it did not account for deleted information; and (2) the individuals had motive to not produce information that would make them look bad.

At the conferences, the trial court continued to reject the State's expressed privacy concerns with respect to the treatment of the Department employees' personal devices, stating "[t]hat ship has sailed a long time ago." The court conceded not knowing whether the employees actually used their personal devices for business purposes ("we don't know, maybe there aren't any -- using personal devices for government work").

Nevertheless, the court seemed to imply that the Department might be attempting a "coverup" that required the employees' personal devices to be seized. According to the court, permitting the cell phones to be examined by plaintiffs' expert might lead to the discovery of the "one piece of paper that is the most important" that "hasn't been given," while at the same time conceding, "I don't know if that's the case here."[3]

[3] In this regard, the court cited Richard Nixon and stated: "I was at . . . the Nixon Library in California recently, and I was sitting there going through that whole Watergate exhibit and I'm thinking, you know, maybe if he had just admitted at the beginning as opposed to trying this massive coverup, it would

The court also rejected the Department's contention that it did not have custody or control over employees' personal devices, and it had no authority to compel the employees to turn over their devices for examination by a third party. As to this issue, the court remarked that the Department could threaten to terminate any employees who refused to comply, as he had done with an employee when he was in private practice, and as governmental entities were doing with respect to employees who refused to "get shots"; or the court could order that the employees be arrested for failing to comply ("the idea of arresting people in the Department of Health during a pandemic is . . . I'm not saying we're anywhere near that, but . . . [w]e could get to that point").

Ultimately, plaintiffs pursued a motion to enforce litigant's rights, to compel compliance with the court's prior orders enforcing the subpoena. The court heard argument on the motion on November 17, 2021, and granted the motion. The court issued an order on November 19, 2021, and in relevant part ordered as follows:

> [T]he [Department] shall fully comply with the [c]ourt's July 21, 2020, February 19, 2021 and April 16, 2021 Orders, and this Order, within 30 days of service of this Order, and

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have . . . turned out differently. And I'm not suggesting anything here, but if there's something on the phones, so be it."

. . . . [T]he [Department] and its vendor, Complete Discovery Source, Inc. ("CDS") shall turn over all data previously extracted in unredacted form, including mirrored device information, from the cell phones produced to it pursuant to this Court's prior Orders, as identified in the subpoena attached to the Order(s); and both the [Department] and CDS shall now further produce the physical business and/or personal cell phones identified by the Columbus subpoena to the forensic expert retained by [p]laintiffs, Axiana Digital Forensics, c/o Tino Kyprianou, within 30 days of service of this Order; and

. . . . [A]ny individual named in the subpoena attached to the Orders above referenced who refuses to produce their business and/or personal device to [the Department], so that the [the Department] can comply with this Order, must be identified to the [c]ourt and [p]laintiffs by the [Department] within 30 days of service of this Order, and

. . . . [A]ll devices, business and/or personal, which are the subject matter of this Order and the previously mentioned Orders of this [c]ourt, are to be turned over to [p]laintiff's IT expert, Axiana Digital Forensics, for a period of 8 hours, so that [p]laintiffs' IT expert may conduct a forensic analysis of those devices using the methodology of its choice for accomplishing that task; the previous arrangement between counsel that permitted CDS to do the forensic analysis of the devices, with Axiana observing, is vacated and set aside; and

Regarding the personal telephones in accordance with the terms of the second paragraph of the correspondence dated November 3, 2021 written by Mr. Gagliardi, Jr.[; and]

> . . . . counsel for the [Department] [shall] immediately serve a copy of this Order by email and hard copy on each and every individual in the "Columbus" subpoena attached to the previous Orders of this [c]ourt so that they are fully aware of the mandates of this Order and the potential consequences of non-compliance with same[.]

The order did not impose any limitations on the work to be performed by plaintiffs' expert, nor any obligations to maintain confidentiality. However, in the November 3, 2021 letter that is cross-referenced in the order, plaintiffs' counsel agreed that: "Nothing will be turned over to [p]laintiff pending review by the [Deputy Attorney General] which will have the opportunity to withhold based upon a proper privilege log with Vaughn Index which shall be turned over to the [c]ourt with all information sought to be withheld upon proper privilege for in camera inspection."

The Department moved for leave to appeal from the November 19, 2021 order. At the trial court, the Department also filed a motion for a stay, which the court denied. The Department then moved for emergent relief from the Appellate Division, which this court granted, staying the November 19, 2021 order pending disposition of the motion for leave to appeal.

On January 10, 2022, the Appellate Division denied the Department's motion for leave to appeal. The Department then sought emergent relief from the Supreme Court, for a stay and leave to appeal. By order dated January 25,

2022, the Supreme Court granted both applications and summarily remanded the case to the Appellate Division for consideration on the merits.

II.

Turning to the merits, "New Jersey's discovery rules are to be construed liberally in favor of broad pretrial discovery." Payton v. N.J. Tpk. Auth., 148 N.J. 524, 535 (1997). Indeed, "[o]ur court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts." Jenkins v. Rainner, 69 N.J. 50, 56 (1976). Discovery rulings are therefore reviewed for an abuse of discretion, Brugaletta v. Garcia, 234 N.J. 225, 240 (2018), and "appellate courts are not to intervene . . . absent an abuse of discretion or a judge's misunderstanding or misapplication of the law." Cap. Health Sys. v. Horizon Healthcare Servs., 230 N.J. 73, 79-80 (2017).

Rule 1:10-3 is a device enabling litigants to obtain enforcement of a court order. In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 17 (2015). If the court determines that a litigant has disobeyed an order, the court has discretion and flexibility in fashioning an appropriate remedy to compel compliance. Id. at 17-18; Milne v. Goldenberg, 428 N.J. Super. 184, 198 (App. Div. 2012). However, "[t]he scope of relief in a motion in aid of litigants' rights is limited

to remediation of the violation of a court order." Abbott v. Burke, 206 N.J. 332, 371 (2011).

We also review an order to enforce litigant's rights under Rule 1:10-3 for an abuse of discretion. Savage v. Twp. of Neptune, 472 N.J. Super. 291, 313 (App. Div. 2022); Wear v. Selective Ins. Co., 455 N.J. Super. 440, 458 (App. Div. 2018). That is, we consider whether the court's order was "'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Wear, 455 N.J. Super. at 459 (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

Our Court Rules provide for broad discovery between parties to a litigation, including electronic discovery, with Rule 4:10-2(a) stating:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. 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; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

Nevertheless, there are limits. Piniero v. N.J. Div. of State Police, 404 N.J. Super. 194, 204 (App. Div. 2008). In addition to the privilege and relevance limitations provided under Rules 4:10-2(a) and (e), Rule 4:10-2(g) addresses matters the court should consider when limiting discovery between parties, including whether:

> (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act pursuant to a motion or on its own initiative after reasonable notice to the parties.

Regarding document discovery, our rules provide for the production of documents that are in the "possession, custody or control" of a party to a litigation. R. 4:18-1(a); R. 4:10-1. This includes the production of "electronically stored information," that the requesting party "or someone acting on behalf of that party" may be permitted to "inspect, copy, test, or sample . . . ." R. 4:18-1(a).

Specifically, Rule 4:18-1(a) provides, in pertinent part:

> Any party may serve on any other party a request (1) to produce and permit the party making the request, or

> someone acting on behalf of that party, to inspect, copy, test, or sample any designated documents (including . . . electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, by the respondent into reasonably usable form), or to inspect, copy, test, or sample any designated tangible things that constitute or contain matters within the scope of R. 4:10-2 and that are in the possession, custody or control of the party on whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party on whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of R. 4:10-2.

With respect to requests for electronic information in particular, Rule 4:10-2(f) provides that the court should consider whether the request "presents undue burden or costs," as well as "the limitations of [Rule] 4:10-2(g)."

Of course, this case does not involve a discovery dispute between parties to the litigation. Rather, it involves a dispute regarding discovery obtainable from a non-party to the litigation.

Regarding non-parties, Rule 4:18-1(d) states: "This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land." The Court Rules also provide for subpoenas to be issued to non-parties, see Rules 1:9-1 to 1:9-6, and 4:14-7, including subpoenas for the production of documents, Rules

1:9-2 and 4:14-7(a) and (c). Indeed, the use of subpoenas is preferred to a proceeding under Rule 4:18-1(d). Trenton Renewable Power, LLC v. Denali Water Sols., LLC, 470 N.J. Super. 218, 228 n.6 (App. Div. 2022); Pressler & Verniero, Current N.J. Court Rules, cmt. 4 on R. 4:18-1 (2023).

As set forth in Rule 4:14-7(a), however, the use of subpoenas is "subject to the protective provisions of R. 1:9-2 and R. 4:10-3." That is, the court may quash or modify a subpoena "if compliance would be unreasonable or oppressive," Rule 1:9-2, and "[w]here the subject of the subpoena is electronically stored material, reasonableness should be determined by discoverability pursuant to the terms, conditions and limitations of R. 4:10-2." Pressler & Verniero, Current N.J. Court Rules, cmt. 2 to R. 1:9-1 (2023). Alternatively, the court may issue a protective order under Rule 4:10-3, upon a finding "that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."

Specifically, Rule 1:9-2 provides, in pertinent part:

> A subpoena or, in a civil action, a notice in lieu of subpoena as authorized by R. 1:9-1 may require production of books, papers, documents, electronically stored information, or other objects designated therein. The court on motion made promptly may quash or modify the subpoena or notice if compliance would be unreasonable or oppressive and, in a civil action, may condition denial of the motion upon the advancement by the person in whose behalf the subpoena or notice is issued of the reasonable cost of producing the

> objects subpoenaed. . . . Except for pretrial production directed by the court pursuant to this rule, subpoenas for pretrial production shall comply with the requirements of R. 4:14-7(c).

And Rule 4:10-3 provides, in pertinent part:

> On motion by a party or by the person from whom discovery is sought, the court, for good cause shown . . . may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:
>
> (a) That the discovery not be had;
>
> (b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> (c) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> (d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
>
> (e) That discovery be conducted with no one present except persons designated by the court;
>
> . . . .
>
> If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. . . .
>
> When a protective order has been entered pursuant to this rule . . . a non-party may, on a proper showing

> pursuant to R. 4:33-1 or R. 4:33-2, intervene for the purpose of challenging the protective order on the ground that there is no good cause for the continuation of the order or portions thereof. Neither vacation nor modification of the protective order, however, establishes a public right of access to unfiled discovery materials.

Recently, this court considered a subpoena served on a non-party, seeking electronic discovery. Trenton Renewable Power, 470 N.J. Super. at 227-32. The court emphasized the need to closely scrutinize such demands, including consideration of the burden, expense, and inconvenience imposed on the non-party, whether the information sought from the non-party was truly needed, and whether the information could be obtained from a party to the litigation, or could be obtained through less burdensome means. Ibid.

Stated differently, by the Chancery Division in Berrie v. Berrie, 188 N.J. Super. 274, 284 (Ch. Div. 1983):

> [T]he factors to be weighed in the consideration of an application by a nonparty to limit discovery are the interest of the proposed deponent in the outcome of the litigation, the necessity or importance of the information sought in relation to the main case, the ease of supplying the information requested, the significance of the rights or interests which the nonparty seeks to protect by limiting disclosure, and the availability of a less burdensome means of accomplishing the objective of the discovery sought.

Applying these principles in the context of the present case, it is clear that the trial court mistakenly applied its discretion in entering the November

19, 2021 order, enforcing litigant's rights and ordering discovery above and beyond what is supported by the Court Rules under the circumstances presented.

First and foremost, ordering a forensic examination of electronic devices by an opposing party is contrary to the way our civil discovery rules are intended to work. That is, Rule 4:18-1(a) permits requests to "inspect, copy, test, or sample any designated documents (including . . . electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, by the respondent into reasonable usable form) . . . ." (emphasis added). Furthermore, Rule 4:18-1(b)(1) provides: "The request may specify the form or forms in which electronically stored information is to be produced." And Rule 4:18-1(c) requires the responding party to produce a certification or affidavit of completeness.

Thus, Rule 4:18-1 anticipates that in civil discovery the responding party will produce responsive electronic data in such a manner that the data may be inspected, copied, tested, or sampled by the requesting party. The Rule does not anticipate that the requesting party will be permitted to search through their opponents' electronic devices for responsive data, any more than it anticipates that the requesting party would be permitted to search through their

opponent's filing cabinets for responsive documents. At most, the parties are "encouraged to meet and confer about the format in which they will produce electronic documents." Pressler & Verniero, Current N.J. Court Rules, Official Comment to R. 4:18-1 (2023). See also In re Ford Motor Co., 345 F.3d 1315, 1316-17 (11th Cir. 2003) ("Rule 34(a) does not grant unrestricted, direct access to a respondent's database compilations. Instead, Rule 34(a) allows a requesting party to inspect and to copy the product – whether it be a document, disk, or other device – resulting from the respondent's translation of the data into a reasonably usable form."); Menke v. Broward Cnty. Sch. Bd., 916 So.2d 8, 10 (Fla. Ct. App. 2005) ("In civil litigation, we have never heard of a discovery request which would simply ask a party litigant to produce its business or personal filing cabinets for inspection by its adversary to see if they contain any information useful to the litigation. Requests for production ask the party to produce copies of the relevant information in those filing cabinets for the adversary."); Agio Corp. v. Coosawattee River Resort Ass'n, Inc., 760 S.E.2d 691, 695-96 (Ga. Ct. App. 2014) (finding that Georgia civil discovery statute "does not allow a requesting party unrestricted and direct access to a responding party's untranslated data," but instead "provides that any untranslated data is to be extracted by the responding party and then translated by the responding party . . . before the data is given to the requesting

party"); Carlson v. Jerousek, 68 N.E.3d 520, 534 (Ill. Ct. App. 2016) (finding "defendants' request to create and search a forensic image" of the plaintiff's computers "runs counter to the traditional protocol of discovery, in which one party requests specific information and the other party searches its own files (and computers) to identify and produce responsive information").

Accordingly, an order compelling forensic examination of electronic devices by the requesting party's e-discovery expert, over the responding party's objection, must be considered an extraordinary remedy, beyond what should generally be required of a party--let alone a non-party, as in this case--without less invasive methods having been exhausted, and without there having been a showing that the responding entity defaulted on its obligations to search its records and produce the requested data, as opposed to mere skepticism that they have done so. R. 4:10-2(g); R. 4:18-1; Trenton Renewable Power, 470 N.J. Super. at 227-32.[4]

[4] Case law from outside this jurisdiction also supports this conclusion. See John B. v. Goetz, 531 F.3d 448, 457-61 (6th Cir. 2008); In re Ford Motor Co., 345 F.3d at 1316-17; People v. Spykstra, 234 P.3d 662, 671-72 (Colo. 2010); William Hamilton Arthur Architect, Inc. v. Schneider, 342 So.3d 757, 763-64 (Fla Ct. App. 2022); Menke, 916 So.2d at 10-12; Agio Corp., 760 S.E.2d at 695-96; Carlson, 68 N.E.3d at 534-38; Melcher v. Apollo Med. Fund Mgmt. LLC, 859 N.Y.S.2d 160, 162 (App. Div. 2008); Crosmun v. Trs. of Fayetteville Tech. Cmty. Coll., 832 S.E.2d 223, 233-39 (N.C. Ct. App. 2019); Cornwall v. N. Ohio Surgical Ctr., Ltd., 923 N.E.2d 1233, 1238-40 (Ohio Ct. App. 2009); In re Shipman, 540 S.W.3d 562, 566-70 (Tex. 2018).

Here, the record reflects that as of November 2021, the Department had complied with the April 2020 subpoena. That is, as of November 2021: (1) the Department's e-discovery expert had conducted forensic searches of State-issued devices and produced responsive information; and (2) Department employees had conducted their own searches of their personal devices, consistent with the instructions set forth in the subpoena, and produced responsive information. At most, there were disputes regarding the thoroughness of the searches, mere speculation by the trial court that there was "one piece of paper that is the most important" that might not have been turned over, and further speculation by plaintiffs' counsel that the Department employees would have withheld data that painted them in a bad light. However, those are run-of-the-mill concerns that could be raised with respect to any document production. Thus, under the circumstances presented, the trial court's mandate that the Department turn over State-issued and personal phones, "for a period of 8 hours," for additional review by plaintiffs' e-discovery expert "using the methodology of its choice for accomplishing that task," was unduly invasive and burdensome. R. 1:9-2; R. 4:10-2(g).

Additionally, there is no justification for the trial court's extraordinary order when considering the fact that the Department is not a party to the litigation. As set forth in the third amended complaint, plaintiffs allege that

defendants persuaded the Department to conduct unnecessary inspections of Columbus Hospital. Accordingly, plaintiffs' primary source of discovery regarding these allegations should be from defendants, and only secondarily from the Department. R. 4:10-2(g); Trenton Renewable Power, 470 N.J. Super. at 232. As stated in Trenton Renewable Power:

> When a party seeks discovery from a non-party, particularly when the [electronically stored information] is voluminous, time-consuming and costly to prepare for production, and may implicate issues of privilege and confidentiality, the court must consider "the relative simplicity in which the information may be supplied by [a party], and the availability of less burdensome means to obtain the same information."
>
> [470 N.J. Super. at 232 (quoting Beckwith v. Bethlehem Steel Corp., 182 N.J. Super. 376, 382 (Law Div. 1981) (citations omitted)).]

Discovery from defendants could have narrowed the scope of any requests made to the Department, by indicating who in the Department the defendants may have contacted. However, the record does not include any references to discovery from defendants that supported the necessity of the subpoena.

Still further, the requirement that electronic devices be turned over to plaintiffs' expert had the potential to violate privilege or confidentiality attaching to responsive documents, contrary to Rule 4:10-2(a). And this is true

notwithstanding that the November 19, 2021 order cross-referenced a letter from plaintiffs' counsel under which plaintiffs agreed that: "Nothing will be turned over to Plaintiff pending review by the [Deputy Attorney General] which will have the opportunity to withhold based upon a proper privilege log with Vaughn Index which shall be turned over to the [c]ourt with all information sought to be withheld upon proper privilege for in camera inspection." The trial court did not enter any protective order under Rule 4:10-3, addressing how electronic data recovered from the devices would be handled. See also Official Comment to Rule 4:18-1 (Aug. 1, 2016) (addressing production of metadata in electronic discovery, and obligation of "receiving lawyer" to "consider his or her obligations" under R.P.C. 4.4(b) before reviewing any metadata produced). See also John B., 531 F.3d at 457 ("[T]he mere imaging of the media, in and of itself, raises privacy and confidentiality concerns. Duplication, by its very nature, increases the risk of improper exposure, whether purposeful or inadvertent.").

Additional reasons also compel a conclusion that the trial court abused its discretion in mandating that Department employees turn over their personal electronic devices for forensic imaging and searching, whether by the Department's e-discovery expert or plaintiffs' e-discovery expert. Fundamentally, this requirement was legally dubious at the time it was first

ordered, in the February 2021 order, given that there was no evidence in the record that the Department employees actually utilized their personal devices for work purposes. At most, the court speculated that they did. Therefore, plaintiffs made no showing that the personal devices might contain relevant information. R. 4:10-2.

As of November 2021, it was clear that some employees did use their personal phones for work-related communications, since those employees submitted certifications indicating the discovery of responsive documents on their devices. However, this does not diminish the trial court's error in failing to consider this issue at the outset.

It is also important to note that plaintiffs served the subpoena on the Department, and not the individual Department employees. The Department cannot be obligated to produce data from employees' personal electronic devices unless it has "possession, custody or control" over that data. R. 4:18-1(a). And it cannot be deemed in possession, custody or control of any data that does not belong to the government. Cf. N.J.S.A. 47:1A-1 to -13 (Open Public Records Act (OPRA) requiring public access to "government records"). That is, when interpreting Rule 4:18-1, the Department cannot be deemed to

have "possession, custody or control," over any electronic data on employees' personal electronic devices unless the data comprises government records.[5]

In this regard, courts in other jurisdictions have concluded that public records contained in personal accounts or on personal electronic devices may be subject to production under those jurisdictions' open public records statutes. However, those cases also have recognized that individuals have privacy rights in the content of their personal accounts and personal electronic devices. Thus, these courts have concluded that employees may be required to search

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[5] OPRA defines a "governmental record" or "record" as:

> any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.
>
> [N.J.S.A. 47:1A-1.1.]

The statute also explicitly excludes certain "confidential" information from the definition of "government record." Ibid.

their own accounts and devices and produce data responsive to the records requests, subject to any assertions of privilege or confidentiality by the public employer. Unlike here, these courts have not mandated that the employees turn over their personal electronic devices for search by a third party (someone other than the employees themselves), nor have they found any requirement that public entities undertake extraordinarily extensive or intrusive searches of their employees' personal accounts and devices. See Ethyl Corp. v. U.S. Env't Prot. Agency, 25 F.3d 1241, 1246-47 (4th Cir. 1994); City of San Jose v. Superior Court, 389 P.3d 848, 858-61 (Cal. 2017); Better Gov't Ass'n v. City of Chicago Office of Mayor, 169 N.E.3d 1066, 1074-78 (Ill. Ct. App. 2020); Toensing v. Atty. Gen. of Vt., 178 A.3d 1000, 1002, 1004, 1009-13 (Vt. 2017); Nissen v. Pierce Cnty., 357 P.3d 45, 49, 56-58 (Wash. 2015).

Because New Jersey case law recognizes privacy interests with respect to State-issued devices,[6] the trial court in this case clearly erred in failing to adequately consider and protect the strong privacy interests associated with the contents' of individuals' personal electronic devices, which often include an extraordinary amount of confidential and even privileged information. N.J.

[6] See, e.g., N. Jersey Newspapers Co. v. Passaic Cnty. Bd. of Chosen Freeholders, 127 N.J. 9, 18 (1992); Livecchia v. Borough of Mt. Arlington, 421 N.J. Super. 24, 38-39 (App. Div. 2011); Gannett N.J. Partners, LP v. Cnty. of Middlesex, 379 N.J. Super. 205, 216-17 (App. Div. 2005).

Const. art. I, ¶ 1; Doe v. Poritz, 142 N.J. 1, 77-78, 89-90 (1995) (recognizing constitutional right to privacy). See also Carlson, 68 N.E.3d at 537 ("A request to search the forensic image of a computer is like asking to search the entire contents of a house merely because some items in the house might be relevant."). The requirement that individual Department employees produce their personal devices for forensic evaluation was unduly invasive and burdensome, and beyond what should generally be required in civil discovery, particularly of non-parties to a litigation. R. 1:9-2; R. 4:10-2(g).

Moreover, consistent with this court's holding in Trenton Renewable Power, 470 N.J. Super. at 227-32, a clear alternative to a third-party forensic evaluation existed, which was less intrusive and protected the employees' privacy rights. Indeed, that alternative was the very demand set forth in the subpoena: that the employees undertake searches of their own devices and produce certifications relating to their searches and their search results. Such certifications are used in the OPRA context, Paff v. New Jersey Department of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007), and they are consistent with the certifications or affidavits of completeness required for document productions under Rule 4:18-1(c). Thus, the employees' searches of their own devices, and their production of certifications attesting to their searches, complied with the explicit terms of the subpoena, as well as the law, and the

trial court clearly erred in ordering more invasive measures without any showing of substantial need.

Of course, on remand, the trial court may consider the completeness of the Department's production, should further discovery in the litigation suggest that the Department or the individual Department employees have withheld responsive documents. On the record presented, however, plaintiffs have made no such showing. At most, there appear to be some outstanding issues regarding whether some Department employees' State-issued devices have not been searched, or not thoroughly searched, including the Department's admission that it has not produced any data from the Commissioner's device. The court may consider those disputes on remand. However, to the extent the court requires additional searches, it should permit the Department and its employees to conduct those searches and produce responsive information to plaintiffs, subject to any privileges or other objections that also may be asserted and resolved by the court.

Finally, there does not appear to be any malfeasance on the part of the Department, nor any attempt to unduly delay the proceedings. Despite the COVID-19 pandemic in New Jersey throughout 2020 and 2021, the Department produced responsive documents from State-issued devices, and arranged for its employees to produce responsive documents from their

personal devices. While the Department's response to the subpoena may have been delayed by the pandemic, and while the Department has attempted to negotiate the terms of its compliance with the subpoena, and disagreed with the trial court's rulings, its positions have been grounded in the law and have not been taken in bad faith. Indeed, the trial court recognized these facts and denied plaintiffs' repeated requests for sanctions. On the record presented, there is nothing suggesting any nefarious behavior on the part of the Department or its employees that might warrant more intrusive methods such as the court's requirement that plaintiffs' IT expert be permitted to forensically evaluate any State-issued or personal electronic devices.

In sum, we reverse the November 19, 2021 order to the extent the trial court mandated that the Department and its employees turn over State-issued and personal electronic devices for forensic review by plaintiffs' IT expert. We remand for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.