

{¶ 2} In July 2009, the Nithiananthans filed a complaint against their neighbors, the Toiracs, alleging a private nuisance. The Toiracs filed several counterclaims, including their own nuisance claim against the Nithiananthans. In April 2011, the Nithiananthans filed a motion for inspection of the Toiracs' property, including their home security system and security cameras, because they claim that the Toiracs' cameras are pointed into the Nithiananthans' home. The Nithiananthans also requested forensic imaging² of the Toiracs' home computer because they claim that the computer contains downloaded images from the Toiracs' cameras, which are subject to discovery and helpful to their defense of the allegations lodged against them.

{¶ 3} The magistrate granted the Nithiananthans' motion, and the Toiracs filed a motion to set aside the magistrate's order. The trial court conducted a hearing, and overruled the Toiracs' motion. The Toiracs filed a motion to reconsider, and the trial court denied it. However, through the trial court's judgment entry denying the motion to reconsider, the trial court modified the magistrate's decision in several ways in order to provide safeguards for the discovery of the Toiracs' computer and cameras. The Toiracs now appeal, raising the following assignment of error.

{¶ 4} THE TRIAL COURT ERRED IN ORDERING APPELLANTS TO PROVIDE APPELLEES WITH A FORENSIC IMAGE OF THE HARD DRIVES FROM THEIR PERSONAL COMPUTERS, CONTAINING PRIVATE, PRIVILEGED AND IRRELEVANT MATTER, WITHOUT APPELLANTS COMMITTING ANY DISCOVERY VIOLATIONS.

{¶ 5} The Toiracs argue that the trial court erred in ordering forensic imaging without first finding that they had committed discovery violations.

2. Forensic imaging creates a 'mirror image' of stored information and data. "A mirror image copy represents a snapshot of the computer's records. * * * It contains all the information in the computer, including embedded, residual, and deleted data." *Ferron v. Search Cactus, L.L.C.*, S.D. Ohio No. 2:06-CV-327, 2008 WL 1902499,*3, fn. 5, (Apr. 28, 2008).

{¶ 6} This court reviews a trial court's discovery order for an abuse of discretion. *Nakoff v. Fairview General Hospital*, 75 Ohio St.3d 254 (1996). An "'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 7} The Toiracs rely on *Bennett v. Martin*, 186 Ohio App.3d 412, 2009-Ohio-6195 (10th Dist.), for the proposition that a party must have committed discovery violations before a trial court can order forensic imaging. In *Bennett*, the Tenth District Court of Appeals discussed the circumstances in which a court may order forensic imaging, and set forth a comprehensive protocol parties must follow in order to protect privileged information. We now adopt the Tenth District's reasoning and analysis, and hold that the requesting party must demonstrate that the other party has committed a history of discovery violations to the extent that the court finds it necessary to order the invasion of privacy attendant to forensic imaging.

{¶ 8} As discussed in *Bennett*, courts are reluctant to compel forensic imaging due to the risk of exposing privileged and personal information that may be stored on a hard drive. Therefore, courts must guard against "undue intrusiveness" in order to protect the party's privacy in their electronic information systems. *Id.* at ¶ 40. Weighed against the party's privacy interest, a court must "consider whether the responding party has withheld requested information, whether the responding party is unable or unwilling to search for the requested information, and the extent to which the responding party has complied with discovery requests." *Id.* at ¶ 41. The balancing factors begin to weigh more heavily in favor of forensic imaging "when a requesting party demonstrates either discrepancies in a response to a discovery request or the responding party's failure to produce requested information." *Id.*

{¶ 9} Our decision today does not set forth the proposition that parties requesting

forensic imaging are entitled to such if they are able to demonstrate a single discovery violation, or periodic discrepancies in discovery responses because complex litigation can often entail discovery issues that need to be resolved. Furthermore, it is not our intent to issue a ruling that encourages litigants to create discovery difficulties just so they can seek an order to tromp through the opposing parties' electronically stored garden. Instead, the party must demonstrate the "background of noncompliance," set forth in *Bennett*. *Id.* at ¶ 42.

{¶ 10} In *Bennett*, the court noted that the discovery period was wrought with violations by the defendants. Bennett was forced to file numerous motions to compel, and the trial court's orders to comply with discovery requests went unheeded time and again. The defendants were also untruthful regarding what had and had not been produced, and when they did produce documents, defendants adopted a "lackadaisical and dilatory approach." *Id.* at ¶ 42.

{¶ 11} For example, the defendants often interpreted document requests too narrowly, disregarded portions of Bennett's discovery requests, and produced voluminous email records out of sequential order, and in "disarray." *Id.* at ¶ 6. Defendants also posed generic objections to discovery requests that lacked any basis, and also failed to provide a privilege log. Due to the numerous and blatant violations, the court found that "defendants proved themselves untrustworthy to produce documents in compliance with the court orders." *Id.* at ¶ 45.

{¶ 12} The discovery process described in *Bennett* resulted in the trial court ordering forensic imaging to ensure that Bennett's valid discovery requests would be met. The Tenth District, after setting forth the balancing factors discussed above, determined that the trial court properly ordered forensic imaging because the defendants' history of continuous and blatant discovery violations outweighed the intrusiveness of forensic imaging. However, no such determination was made by the magistrate or trial court in the case at bar.

{¶ 13} After the Nithiananthans moved for forensic imaging, the parties held a discussion in chambers that was not transcribed. The magistrate then issued an order granting the Nithiananthans' motion. The magistrate, however, did not state its reasoning for granting the order, nor did it consider or balance the factors discussed above. Instead, the magistrate's order states, "this Magistrate has considered the legal arguments and concerns of the parties, and concludes that Plaintiffs are entitled to discover electronically stored material on Defendants' property * * *." The trial court then considered the Toiracs' motion to set aside the magistrate's order, and denied such without any mention of the factors listed above.

{¶ 14} Within the trial court's entry denying the Toiracs' motion for reconsideration, the trial court stated, "throughout the history of this case, the Defendants have demonstrated an indifference to or lack of compliance with discovery, including failing to respond timely and failing to respond completely." However, there is nothing in the record to support the trial court's finding, and nowhere in any previous entry had the trial court found that the Toiracs demonstrated an indifference to the discovery process. While the Nithiananthans filed a few motions to compel discovery, these motions were usually withdrawn soon after filing, or were disposed of when the Toiracs provided additional discovery.

{¶ 15} The record contains the following reference to alleged discovery issues: (1) the Nithiananthans filed a motion to compel on November 12, 2010, but later withdrew it "based upon the response now made"; (2) a magistrate's order dated May 31, 2011 makes reference to two motions to compel discovery,³ and stated that the parties had stipulated "that they would supplement their discovery responses *to one another* by August 23, 2011"; (emphasis added) and (3) the Nithiananthans filed a motion to compel discovery on August 22, 2011,

3. The magistrate's decision does not specify which motions were pending at the time, or on whose behalf the motions were brought, and the record does not make clear which motions were being disposed of.

and later partially withdrew the motion on August 25, 2011, stating that the Toiracs had since responded to their discovery requests adequately. Upon partial withdrawal, the Nithiananthans did not make any further complaints that discovery was not completed.

{¶ 16} The Nithiananthans also moved the court to find witnesses in contempt for failing to appear for depositions. On one occasion, the Nithiananthans moved the court to find Dr. Dong Moon, Deborah Toirac's psychiatrist, in contempt for failing to appear. Dr. Moon's failure to appear was evidently because there was no medical release authorization form executed. The Nithiananthans also moved the court to find Gary Thomas and William Hennegan in contempt for failing to appear for depositions. However, the record does not contain any evidence that their absence had anything to do with the Toiracs.

{¶ 17} The Nithiananthans filed their original complaint on July 31, 2009. Over the course of the litigation, which we note has been ongoing for two and one-half years, the instances of possible discovery infringements we can find in the record are limited. Moreover, the majority of the Nithiananthans' motions to compel appear to have obtained a response and were subsequently dismissed.

{¶ 18} The trial court did not consider or balance the history of this case in direct relation to the factors set forth in *Bennett*, which this court now adopts as the standard for determining whether forensic imaging is warranted. Therefore, we vacate the order to provide forensic imaging, and remand the case for the trial court to balance the Toiracs' privacy interests against any documented discovery violations.

{¶ 19} If after balancing the factors, the trial court finds that forensic imaging is necessary, we direct the trial court to set forth a protective protocol in order to ensure that the forensic imaging is not unduly intrusive. We adopt the well-reasoned protocol set forth in *Bennett*, and hold that *at a minimum*, several protective measures must be enforced when ordering forensic imaging.

{¶ 20} As discussed in *Bennett*, the purpose of issuing a protective protocol is to "protect the defendant's confidential information, as well as preserve any private and privileged information." *Bennett*, 186 Ohio App.3d 412, 2009-Ohio-6195, ¶ 47. Even in the face of a defendant's misconduct during discovery, failure to abide by discovery "will rarely warrant unfettered access to a party's computer system." *Id.* While a requesting party may deserve a remedy for the responding party's misconduct, "that remedy should not require defendants to sacrifice highly sensitive, confidential information that has no bearing" on the cause of action. *Id.* at ¶ 48. As set forth by the court in *Bennett*, an appropriate protocol, at a minimum, would be one wherein:

[A]n independent computer expert, subject to a confidentiality order, creates a forensic image of the computer system. The expert then retrieves any responsive files (including deleted files) from the forensic image, normally using search terms submitted by the plaintiff. The defendant's counsel reviews the responsive files for privilege, creates a privilege log, and turns over the nonprivileged files and privilege log to the plaintiff. *Id.* at ¶ 47.

{¶ 21} Having found that the trial court abused its discretion by not balancing the factors as set forth in *Bennett*, we sustain the Toiracs' single assignment of error and remand the cause for further proceedings consistent with this opinion.

{¶ 22} Judgment reversed and remanded.

HENDRICKSON, P.J., and RINGLAND, J., concur.