NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

AVATAR PROPERTY & CASUALTY INSURANCE COMPANY, Petitioner, v. NIULSURY S. FLORES AND ERNESTO VALDES, Respondents.	)	Case No. 2D20-2458

Opinion filed April 16, 2021.

Petition for Writ of Certiorari to the Circuit Court for Collier County; Lauren L. Brodie, Judge.

Carol M. Rooney and Adam Topel of Butler Weihmuller Katz Craig, LLP, Tampa, for Petitioner.

Manuel Alvarez-Jacinto of Law Offices of Marcote & Marcote De Moya, PLLC, Miami, for Respondents.

KHOUZAM, Chief Judge.

Avatar Property & Casualty Insurance Company seeks a writ of certiorari quashing an order granting a motion by its Insureds, Niulsury S. Flores and Ernesto Valdes, to compel production of documents in the Insureds' breach of contract action for

insurance coverage. Because the documents ordered to be produced are protected by the work product privilege and coverage remains in dispute, we grant the petition and quash the order directing production.

BACKGROUND

After their home was damaged in Hurricane Irma in September 2017, the Insureds submitted a claim under their home insurance policy with Avatar. Avatar determined that "there is coverage under [the] policy" and paid the Insureds over $24,000 in January 2018. In July 2018, the Insureds filed a single-count breach of contract action against Avatar alleging that it owed them additional payments under the same policy.

The Insureds sought discovery from Avatar, which produced some documents but withheld others on the basis of work product privilege and other objections. The Insureds moved to overrule Avatar's objections. Their motion was referred to and heard by a magistrate, who entered a recommended order granting the Insureds' motion. The only finding of fact or conclusion of law in the recommended order states: "This is a dispute over scope and pricing of damages where coverage is not at issue. Therefore, anticipation of litigation is the standard by which to determine protection by the work product doctrine."

Avatar filed exceptions to the recommended order, and the Insureds filed a response. The trial court entered an order generally denying Avatar's exceptions and approving the magistrate's recommended order but directing Avatar to submit copies of all objected-to documents for in camera inspection. Following its review of the documents, the trial court entered an order requiring production of four discrete

documents (referred to as Documents #3, #5, #6, and #10) but ruling that five other requested items "are privileged and shall not be disclosed." The trial court noted that one other disputed item had not been provided to the court for review, but the court did not order its production or otherwise address the omission. Avatar then filed its petition for writ of certiorari, contending that the trial court impermissibly ordered it to produce protected documents from its claims file.

Avatar filed the disputed documents under seal with this court. All four documents concern the same Insureds, although they are split between the hurricane loss claim at issue in the Insureds' lawsuit and another prior claim for a water leak. Documents #5 and #6 predate the loss at issue and address Avatar's investigation of a different claim for a prehurricane leak in the same home. By contrast, Documents #3 and #10 postdate the loss and address the Hurricane Irma claim now at issue. Document #3 is a composite of investigative photographs taken by Avatar's adjuster. Document #10 is a printout of a Claim Payment Screen from Avatar's Claims Management System addressing the Insureds' claim.

ANALYSIS

Avatar contends that the order must be quashed because the documents are protected by the work product privilege. Specifically, it asserts that these four documents from its claims file are investigative and claims handling material that are protected from disclosure because coverage remains in dispute. We agree. Despite the fact that Avatar has admitted that some coverage exists under the policy, the amount and nature of that coverage remains in dispute, and thus the trial court departed from the essential requirements of the law by overruling the work product objection and

directing production of these privileged documents on the express basis that "coverage is not at issue."

In order to obtain certiorari relief, the petitioner must establish (1) a departure from the essential requirements of the law (2) resulting in material injury for the remainder of the case (3) which cannot be corrected on postjudgment appeal. See, e.g., Shindorf v. Bell, 207 So. 3d 371, 372 (Fla. 2d DCA 2016). "Of these three elements, the latter two—material injury and a lack of an adequate appellate remedy—constitute the jurisdictional threshold for our certiorari review; the first element concerns the merits of the petition." Id. Discovery of "cat out of the bag" material, like documents protected by the work product privilege, satisfies the jurisdictional prongs of this test because disclosure of such information may cause irreparable harm. Progressive Am. Ins. Co. v. Herzoff, 290 So. 3d 153, 156 (Fla. 2d DCA 2020). Accordingly, prongs (2) and (3) have been satisfied here, and we turn our attention to the first prong—departure from the essential requirements of the law.

As this court has recently observed, "Second District case law is replete with opinions holding that '[a] trial court departs from the essential requirements of the law in compelling disclosure of the contents of an insurer's claim file when the issue of coverage is in dispute and has not been resolved.' " Owners Ins. Co. v. Armour, 303 So. 3d 263, 267 (Fla. 2d DCA 2020) (alteration in original) (quoting Seminole Cas. Ins. Co. v. Mastrominas, 6 So. 3d 1256, 1258 (Fla. 2d DCA 2009)).

It is true that there is no privilege under Florida law that automatically attaches to "claims file" material. See, e.g., Homeowners Choice Prop. & Cas. Ins. Co. v. Avila, 248 So. 3d 180, 184-85 (Fla. 3d DCA 2018) (observing that, although both

parties cited a "claims file privilege," "[t]here is no such privilege by that designation"). Nonetheless, "[w]ithout question, materials within an insurer's claim file will frequently fit within the definition of work product." Herzoff, 290 So. 3d at 157 (collecting cases).

That is because work product is broadly defined to include documents that "can fairly be said to have been prepared or obtained because of the prospect of litigation." Id. at 156, 158 (quoting State ex rel. Day v. Patterson, 773 S.W.2d 224, 228 (Mo. Ct. App. 1989) (quoting 8 Charles Alan Wright, Arthur P. Miller & Edward H. Cooper, Federal Practice and Procedure § 2024 at 198 (2d ed. 1988))). Consequently, "[e]ven preliminary investigative materials are privileged if compiled in response to some event which foreseeably could be made the basis of a claim." Id. at 158 (quoting Anchor Nat'l Fin. Servs. v. Smeltz, 546 So. 2d 760, 761 (Fla. 2d DCA 1989)).

Consistent with these principles, Florida courts routinely hold that materials generated during an insurer's investigation of a claim for coverage constitute protected work product. See, e.g., Avatar Prop. & Cas. Ins. Co. v. Mitchell, 46 Fla. L. Weekly D168a, D169 (Fla. 3d DCA Jan. 13, 2021) (collecting cases, and holding: "The adjuster was tasked with investigating whether the claim was subject to coverage. Consequently, the materials challenged constitute work-product."); see also Zirkelbach Const., Inc. v. Rajan, 93 So. 3d 1124, 1129 (Fla. 2d DCA 2012) (concluding the "claims handling materials" at issue were "clearly [the Insurer]'s protected work product").

Here, the magistrate's express finding, which the trial court adopted, was that the investigative and claims handling materials were not privileged because "coverage is not at issue," presumably because Avatar admitted that some coverage existed under the policy. But that finding is contrary to Florida law, which holds that,

regardless of the binary question of whether any coverage exists, the issue of coverage remains disputed for these purposes where the amount of coverage remains to be determined.

In GEICO General Insurance Co. v. Hoy, 927 So. 2d 122, 126 (Fla. 2d DCA 2006), this court rejected the insured's argument "that because GEICO has already paid the $10,000 in available coverage, it cannot now claim that the question of coverage remains unresolved." Citing to the Fifth District's decision in American Bankers Insurance Co. of Florida v. Wheeler, 711 So. 2d 1347, 1348 (Fla. 5th DCA 1998), we held that where an insurer denies that additional benefits are due after an initial determination of coverage, the issue of coverage remains partially pending and, thus, claims file discovery may depart from the essential requirements of the law. Id.

Expressly following this court's decision in Hoy, the First District has also concluded that "the extent of coverage" remained in dispute despite a "partial payment of the policy limits," thereby precluding the simultaneous litigation of breach of contract and bad faith claims. Vanguard Fire & Cas. Co. v. Golmon, 955 So. 2d 591, 594 (Fla. 1st DCA 2006). It interpreted Hoy as holding that the "insured's breach of contract suit against [her] insurer raised a coverage issue, which was not settled by [the] insurer's payment of only part of what insured was claiming in [the] breach of contract action." Id.

Likewise here, the issue of coverage remains in dispute despite Avatar's payment of some benefits to the Insureds. The payment was made before the lawsuit was filed, and Avatar's answer raises several affirmative defenses to coverage, including alleging that the Insureds breached their postloss obligations under the policy. Under the circumstances, the trial court departed from the essential requirements of law

by ordering production of Avatar's investigative and claims handling materials based on the express contrary conclusion that "coverage is not at issue."

Finally, the mere fact that no litigation arose directly from the Insureds' prior leak claim that caused Avatar to produce some of the materials at issue does not affect the determination of work-product protection. As this court explained in Herzoff, the "view that materials in an insurer's claim file could not be work product if that claim was settled without litigation . . . is an overly circumscribed view of what constitutes work product." 290 So. 3d at 157. Instead, "the work product doctrine protects documents created in anticipation of terminated litigation as well as anticipated litigation that never materializes." Id. (quoting State Farm Fla. Ins. Co. v. Marascuillo, 161 So. 3d 493, 497 (Fla. 5th DCA 2014)). Thus, Documents #5 and #6 retain their protected status even though the prehurricane claim they addressed did not lead to litigation.

Consequently, because the trial court departed from the essential requirements of the law by ordering production of these privileged claims file materials on the mistaken basis that "coverage is not at issue," we grant the petition and quash the order.

Petition granted; order quashed.

CASANUEVA and KELLY, JJ., Concur.