IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

QUEST DIAGNOSTICS INCORPORATED,

Petitioner,

v. Case No. 5D20-255

ZACHARY L. HALL AND MANUEL PONCE-DIAZ,

Respondents.

_____/

Opinion filed August 7, 2020

Petition for Writ of Certiorari from the Circuit Court for Orange County, Kevin B. Weiss, Judge.

Hala Sandridge and Chance Lyman, of Buchanan Ingersoll & Rooney PC, Tampa, and Raymond N. Seaford, of Law Office of Raymond N. Seaford, P.A., Tampa, for Petitioner and Respondent, Manuel Ponce-Diaz.

Chad A. Barr, of Law Office of Chad A. Barr, P.A., Altamonte Springs, for Respondent, Zachary L. Hall.

COHEN, J.

The Petitioner, Quest Diagnostics, Inc. ("Quest"), timely seeks certiorari review of the circuit court's order on in-camera inspection, ordering Quest to produce certain documents to Respondent, Zachary L. Hall. Because Quest has not demonstrated irreparable material harm and that the trial court departed from the essential requirements

of law in compelling production of the documents, we deny the petition. See State Farm Fla. Ins. Co. v. Marascuillo, 161 So. 3d 493, 496 (Fla. 5th DCA 2014) (stating that "review on a petition for writ of certiorari is whether the trial court's order constitutes a departure from the essential requirements of law that causes material injury throughout the lawsuit").

The underlying case involves a motor vehicle accident between Manuel Ponce-Diaz, who is employed by Quest as a courier, and Hall; Quest contests liability and damages. In the course of discovery, Hall served on Quest a request to produce, seeking, among other items:

> 5. A copy of any and all testimony/statements of [Hall], sworn or un-sworn [sic], transcribed or hand written [sic], or recordings thereof, maintained by Defendant, or Defendant's attorneys/representative/agents.
>
> . . . .
>
> 9. A copy of any incident/accident report or other documents done in the ordinary course of business containing information about the incident alleged in the Complaint, completed by you or your agents, representatives, or employees surrounding the subject accident.

Quest objected to the production, claiming that the requests called for production of privileged items prepared in anticipation of litigation. Specifically, it listed two documents: an incident report filed by Ponce-Diaz and an investigation report filed by Doug Chiodini, Ponce-Diaz's supervisor (collectively, "incident reports"). Quest claimed that the incident reports were protected by the work product privilege. See Huet v. Tromp, 912 So. 2d 336, 338 (Fla. 5th DCA 2005) (providing that information gathered in anticipation of litigation is protected by work product privilege).

Subsequently, Hall deposed Karen Vandoren, one of Quest's designated corporate representatives; Vandoren is the logistics manager for Quest. When questioned

by Hall as to what her understanding of the accident was, she replied that Chiodini had informed her that Ponce-Diaz was turning left in an intersection when he was struck by a motorcycle. She confirmed, in response to multiple questions by Hall, that the incident reports were the only source of her knowledge as to how the collision had occurred. When Hall asked her whether she was aware of the "specifics of what happened as far as what the light sequencing was or what either driver saw or didn't see at the time of the collision," Vandoren, without objection, replied that she "just [had] what was written on the accident form, that [Ponce-Diaz] says he had the right of way when he was making his turn."

Following the deposition, Hall moved to compel the incident reports, claiming that Quest's work product claim had been waived. Following an in-camera inspection, the trial court granted that request. Quest now seeks certiorari review.

There is no real dispute that the incident reports were work product. Rather, the only issue is whether any such privilege was waived during the course of Vandoren's deposition.

Initially, we reject Hall's assertion that the work product privilege was waived because Quest listed Vandoren as a witness as to liability. It is clear that Vandoren has no personal knowledge as to how the accident occurred or who was at fault; however, there is some indication that Hall intends to claim that Ponce-Diaz was on his cell phone at the time of the accident. Vandoren, as Quest's logistics manager, would be able to testify as to Quest's policy and training on the use of cell phones while driving. Thus, Hall's suggestion that merely listing Vandoren as a "liability witness" constituted a waiver is unpersuasive, considering that she may have relevant knowledge to the case that came from sources other than the incident reports. See Nevin v. Palm Beach Cty. Sch. Bd., 958

So. 2d 1003, 1007 (Fla. 1st DCA 2007) (noting that waiver of work product privilege is not favored under Florida law); cf. Huet, 912 So. 2d at 338 ("[A] party may waive the work product privilege with respect to matters covered by an investigator's anticipated testimony when a party elects to present the investigator as a witness." (emphasis added) (citing United States v. Nobles, 422 U.S. 225 (1975))).

However, Quest cannot sit idly by at Vandoren's deposition while the substance of the incident reports was disclosed and then later complain about production of the reports. See Tumelaire v. Naples Estates Homeowners Ass'n, 137 So. 3d 596, 599 (Fla. 2d DCA 2014) ("Voluntary disclosure of alleged work product waives work-product privilege where that disclosure is inconsistent with maintaining secrecy from the disclosing party's adversary"). Quest's purpose in filing a motion for a protective order, and in this certiorari action, was to avoid letting the proverbial "cat out of the bag." The information Quest now seeks to protect was long gone once Vandoren disclosed the contents of the incident reports to Hall, the opposing party. See id.

Although Quest waived the work product privilege connected to the incident reports, we note that the trial court was incorrect in its finding that "[t]he Amended Notice of Taking Videotaped Deposition specifically requested that the corporate representative provide testimony about how the November 21, 2017 incident occurred." In actuality, the Notice of Taking Videotaped Deposition[1] requested testimony from the corporate representative, not about how the incident occurred, but rather "[t]he [corporate

[1] The record on appeal only included a document titled "Notice of Taking Videotaped Deposition." We assume this document contains the same requests as the purported Amended Notice of Taking Videotaped Deposition referred to in the trial court's findings.

representative's] knowledge of the incident" and "how the [corporate representative] was informed of the incident." We have not had the benefit of reviewing the incident reports because they were not included in the record on appeal. Thus, it is unclear whether the trial court's in-camera inspection was impacted by this misunderstanding.

Accordingly, we deny the petition for writ of certiorari, finding that Quest has not demonstrated that the lower court departed from the essential requirements of the law and that it will suffer a material injury for the rest of the case. See Marascuillo, 161 So. 3d at 496. However, because we do not know whether the trial court's misunderstanding regarding the requested testimony impacted its decision, we remand for reconsideration in light of that misunderstanding and this opinion.

PETITION DENIED; REMANDED.

EVANDER, C.J., and LAMBERT, J., concur.