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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

PROGRESSIVE AMERICAN INSURANCE COMPANY,

Petitioner,

v.

JAMES HERZOFF,

Respondent.

Case No. 2D19-2342

Opinion filed February 7, 2020.

Petition for Writ of Certiorari to the Circuit Court for Sarasota County; Andrea McHugh, Judge.

Michelle N. Post of Freeman, Goldis, & Cash, P.A., Saint Petersburg, for Petitioner.

Chioma H. Michel and Raymond A. Haas of HD Law Partners, Tampa for Respondent.

LUCAS, Judge.

Progressive American Insurance Company (Progressive) seeks a writ of certiorari to quash a discovery order of the circuit court that requires Progressive to produce a claim file in a coverage dispute with its insured, James Herzoff. Because the

circuit court did not properly consider Progressive's work product assertion, we grant Progressive's petition and quash the order below.

Mr. Herzoff has a boat that, at all times relevant, was covered under a Progressive property insurance policy. In 2015, he made a claim under the policy in effect at that time for water damage that had occurred within the boat's interior. Apparently, Progressive paid that claim to his satisfaction. In 2018, Mr. Herzoff made a subsequent claim on the same boat under his 2018 policy, stating that the boat had once again sustained interior water damage. Progressive denied that claim. Mr. Herzoff filed a complaint in the circuit court alleging that Progressive breached the 2018 policy.

During discovery, Mr. Herzoff sought to obtain Progressive's 2015 claim file for Mr. Herzoff's prior policy claim. Progressive objected to producing the 2015 claim file and served a privilege log that asserted the entire claim file was subject to "work product privilege."[1] Mr. Herzoff sought to compel production of the claim file, and the matter was brought before a general magistrate.

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[1]The sufficiency of Progressive's generic notation that all 171 pages of documents within the claim file (whatever they were) were attorney work product was not challenged below or in this petition. Cf. Fla. R. Civ. P. 1.280(b)(6) ("When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."); TIG Ins. Corp. of Am. v. Johnson, 799 So. 2d 339, 340 (Fla. 4th DCA 2001) (denying certiorari petition where insurer asserted that its claims files were protected by attorney-client or work product privilege, but "did not identify in any way the documents which it claimed were privileged, as is required by [rule] 1.280(b)(5)").

At the hearing, Progressive argued that Florida law generally shields an insurer's claims handling documents unless a claim of bad faith has been asserted. Since Mr. Herzoff's action is a coverage dispute, Progressive maintained, he could only obtain its work product privileged documents if he established good cause and, even then, only after the court conducted an in camera inspection. See generally Fla. R. Civ. P. 1.280(b)(4); see also Marshalls of M.A., Inc. v. Witter, 186 So. 3d 570, 572 (Fla. 3d DCA 2016) ("When a party asserts the work-product privilege, Florida law requires that the trial court 'hold an in-camera inspection of the discovery material at issue in order to rule on the applicability of the privilege.' The failure to conduct an in-camera inspection of the discovery materials a party asserts are protected by the work-product privilege constitutes a departure from the essential requirements of law subject to certiorari relief." (quoting Snyder v. Value Rent–A–Car, 736 So. 2d 780, 782 (Fla. 4th DCA 1999))). Mr. Herzoff countered that the documents in the 2015 claim file might be relevant to his lawsuit because the 2015 and 2018 water damage claims had similarities, and, in any event, his 2015 claim never resulted in litigation. Since his 2015 claim did not give rise to litigation, Mr. Herzoff concluded, there could be no work product privilege over the file's contents.

It appears the general magistrate found Mr. Herzoff's argument convincing. In her recommended order, the magistrate concluded:

> Each case holding that the work product privilege protects an insurer's claim file was decided in the context of active ongoing first-party coverage litigation. None of the cases addresses whether a prior non-litigated, settled claim file is protected. Given the reported similarity in the type of claim, the Magistrate finds that the prior claim file is relevant for the purposes of discovery. Accordingly, the Magistrate recommends the Court direct Progressive to turn over the

> earlier claim file within 20 days of the date the Court adopts this Recommended Order as final. Progressive may withhold from production only material that may be protected by the attorney-client privilege.

After hearing and considering exceptions to the magistrate's recommended order, the circuit court entered its Second Amended Order on Exceptions to Recommended Order of General Magistrate on May 28, 2019. The Second Amended Order adopted the findings of the Recommended Order and ordered the parties to "abide by all of the findings and recommendations contained in the Recommended Order." Progressive filed this timely certiorari petition to quash the Second Amended Order.

In Shindorf v. Bell, 207 So. 3d 371, 372 (Fla. 2d DCA 2016), we explained that

> a writ of certiorari may be available to review a pretrial discovery order when the following three elements have been established: "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal." Plantz v. John, 170 So. 3d 822, 824 (Fla. 2d DCA 2015) (quoting Williams v. Oken, 62 So. 3d 1129, 1132 (Fla. 2011)). 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.; Ryan v. Landsource Holding Co., LLC, 127 So. 3d 764, 767 (Fla. 2d DCA 2013) (citing State Farm Mut. Auto. Ins. Co. v. O'Hearn, 975 So. 2d 633, 635 (Fla. 2d DCA 2008)).

"Discovery of 'cat out of the bag' material such as information that is protected by privilege, work product, or trade secrets [that] may cause irreparable harm if disclosed" satisfies the jurisdictional requirements for certiorari relief. See Allen v. State Farm Fla.

Ins. Co., 198 So. 3d 871, 873 (Fla. 2d DCA 2016) (citing Allstate Ins. Co. v. Langston, 655 So. 2d 91, 94 (Fla. 1995)).

The question, then, is whether the Second Amended Order constitutes a departure from the essential requirements of law. We hold that it does.

"Work product" was broadly defined in Surf Drugs, Inc. v. Vermette, 236 So. 2d 108, 112 (Fla. 1970), wherein the Florida Supreme Court provided several examples of work product that help illustrate the scope of its protection:

> Personal views of the attorneys as to how and when to present evidence, [their] evaluation of its relative importance, [their] knowledge of which witness will give certain testimony, personal notes and records as to witnesses, jurors, legal citations, proposed arguments, jury instructions, diagrams and charts [they] may refer to at trial for [their] convenience, but not to be used as evidence, come within the general category of work product.

Without question, materials within an insurer's claim file will frequently fit within the definition of work product. See generally Zirkelbach Constr., Inc. v. Rajan, 93 So. 3d 1124, 1127 (Fla. 2d DCA 2012) ("An insurer's claim file generally constitutes work product . . . ."); Ill. Nat'l Ins. Co. v. Bolen, 997 So. 2d 1194, 1196 (Fla. 5th DCA 2008) ("It is well-established that an insurer's claim file constitutes work-product . . . ."); Scottsdale Ins. Co. v. Camara De Comercio Latino-Americana De Los Estados Unidos, Inc., 813 So. 2d 250, 252 (Fla. 3d DCA 2002) ("[T]he claims file is the insurer's work product."); Nat'l Sec. Fire & Cas. Co. v. Dunn, 705 So. 2d 605, 607 (Fla. 5th DCA 1997) ("Generally, the contents of insurance claim files are protected by the work product privilege.").[2]

[2]Obviously, that does not mean that every document or material an insurance company elects to place within a file it labels "claim file" constitutes work

Ordinarily, materials that constitute an attorney's work product are not discoverable. However, our court explained how a party may overcome a claim of work product protection to access work product materials:

> The work-product privilege is not absolute, and the Florida Rules of Civil Procedure provide a mechanism for invading it. . . . Florida Rule of Civil Procedure 1.280(b)(3) provides that a party may be ordered to produce documents and tangible things prepared in anticipation of litigation "only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Here, the record does not contain affidavits or testimony in support of this proposition. Assertions of counsel do not fulfill this requirement. See Prudential Ins. Co. of Am. v. Fla. Dept. of Ins., 694 So. 2d 772 (Fla. 2d DCA 1997); Procter & Gamble Co. v. Swilley, 462 So. 2d 1188, 1195 (Fla. 1st DCA 1985).

CSX Transp., Inc. v. Carpenter, 725 So. 2d 434, 435 (Fla. 2d DCA 1999). As in CSX, the proper procedure, described in Florida Rule of Civil Procedure 1.280(b)(4), was not followed here. Instead, the circuit court appears to have adopted the general magistrate's view that materials in an insurer's claim file could not be work product if that claim was settled without litigation. But that is an overly circumscribed view of what constitutes work product. We agree with the Fifth District's conclusion that "most courts addressing the issue have held (either expressly or impliedly) that the work product doctrine protects documents created in anticipation of terminated litigation as

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product. "[A]n insured 'may request that the trial court conduct an *in camera* inspection of the withheld documents to ensure that each properly meets the specific criteria of the work product and/or attorney-client privilege.' " State Farm Fla. Ins. Co. v. Aloni, 101 So. 3d 412, 414 (Fla. 4th DCA 2012) (quoting Superior Ins. Co. v. Holden, 642 So. 2d 1139, 1140 (Fla. 4th DCA 1994)).

well as anticipated litigation that never materializes." State Farm Fla. Ins. Co. v. Marascuillo, 161 So. 3d 493, 497 (Fla. 5th DCA 2014).

> The test of when matters and documents are prepared "in anticipation of litigation or for trial" is, not whether an action has been commenced, but whether "in the light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."

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)); see also F.T.C. v. Grolier Inc., 462 U.S. 19, 28 (1983) (holding that attorney work product was exempt from mandatory disclosure under the Freedom of Information Act "without regard to the status of the litigation for which it was prepared"); Anchor Nat'l Fin. Servs. v. Smeltz, 546 So. 2d 760, 761 (Fla. 2d DCA 1989) ("[M]aterials such as these may qualify as work product even if, as here, no specific litigation was pending at the time the materials were compiled. Even preliminary investigative materials are privileged if compiled in response to some event which foreseeably could be made the basis of a claim."). Indeed, no Florida court has held that materials prepared in anticipation of litigation lose their work product protection simply because a lawsuit never materialized. The protection turns on the "prospect" of possible litigation, not whether actual litigation ensued. Cf. In re Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998) (holding that a "document can fairly be said to have been prepared or obtained because of the prospect of litigation" if "the lawyer . . . at least . . . had a subjective belief that litigation was a real possibility, and

that belief . . . [was] objectively reasonable" (quoting Senate of Puerto Rico v. U.S. Dep't of Justice, 823 F.2d 574, 586 n.42 (D.C.Cir.1987))).

The circuit court's order, which adopted the magistrate's conclusion that the 2015 claim file could not be protected from discovery as attorney work product because the 2015 claim had been settled without litigation, was a departure from the essential requirements of the law. That does not mean the entirety of Progressive's 2015 claim file is protected work product. If Mr. Herzoff makes a proper evidentiary showing, and the court conducts a proper in camera review, it may be that certain materials within the 2015 claim file are discoverable in this action. See CSX, 725 So. 2d at 435; Fla. R. Civ. P. 1.280(b)(4). The order before us, however, did not follow that process, and so we must grant the petition and quash the order.

Petition granted; order quashed.

VILLANTI and SLEET, JJ., Concur.