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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

UNITED STATES AUTOMOBILE ASSOCIATION, USAA CASUALTY INSURANCE COMPANY, and GARRISON PROPERTY & CASUALTY INSURANCE COMPANY,	)	
Petitioners,	)	
v.	)	Case No. 2D19-3340
BAY AREA INJURY REHAB SPECIALISTS HOLDINGS, INC.,	)	
Respondent.	)	

Opinion filed July 17, 2020.

Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Paul L. Huey, Judge.

Jason L. Margolin and Leslie Joughin, III, of Akerman, LLP, Tampa; Antonio Morin of Akerman, LLP, Miami; and Kristin M. Fiore of Akerman, LLP, Tallahassee, for Petitioners.

David M. Caldevilla of de la Parte & Gilbert, P.A., Tampa; J. Daniel Clark of Clark & Martino, P.A., Tampa; Matthew A. Crist of Crist Legal PA, Tampa; and Christopher P. Calkin and Mike N. Koulianos of The Law offices of Christopher P. Calkin, P.A., Tampa, for Respondent.

LaROSE, Judge.

United States Automobile Association, USAA Casualty Insurance Company, and Garrison Property & Casualty Insurance Company (collectively "USAA") seek certiorari review of the trial court's order requiring USAA to produce sixty documents to Bay Area Injury Rehab Specialists Holdings, Inc. ("BAIRS"), in a bad faith action after in camera inspections by a special master and the trial court. USAA claims the sixty documents are privileged attorney-client communications and/or opinion work product. Because USAA failed to preserve the sixty documents for appellate review, we deny the petition.

I. Background

BAIRS sued USAA, alleging that USAA improperly rejected valid personal injury protection (PIP) claims. Bay Area Injury Rehab Specialists Holdings, Inc. v. United Servs. Auto. Ass'n, 173 So. 3d 1004, 1005 (Fla. 2d DCA 2015). USAA agreed to pay the PIP claims in September 2016 (the "2016 Settlement"). This underlying action remains pending on the issue of attorneys' fees.

In 2010, BAIRS filed civil remedy notices under section 624.155, Florida Statutes (2010), claiming that USAA engaged in unfair and bad faith practices in denying the PIP claims at issue in the underlying action described above. Following the 2016 Settlement, BAIRS sued USAA, again, in December 2016, for statutory bad faith and unjust enrichment for denying the PIP claims and litigating the underlying action.

Almost a year later, in October 2017, BAIRS moved to compel discovery because "USAA objected to every single request and . . . produced zero records." USAA then served its first privilege log, identifying four documents withheld based on the attorney-client privilege. The trial court held two hearings on the matter; the

transcripts are not in the appendices filed with this court. The trial court found that "the work product privilege and the litigation privilege do not apply in the context of this bad faith case, although the attorney-client privilege applies." (Citing Allstate Indem. Co. v. Ruiz, 899 So. 2d 1121 (Fla. 2005)). It granted BAIRS' motion to compel, overruled USAA's objections, and directed USAA to file a privilege log to identify any materials for which it claimed the attorney-client privilege.

USAA and its counsel filed certiorari petitions. USAA filed a supplemental privilege log in the trial court, identifying 262 documents purportedly protected by the attorney-client privilege and/or work product doctrine. The parties stipulated to and the trial court entered an "Agreed Amended Order Concerning Discovery" that directed USAA and its counsel to identify all the documents withheld based on the work product doctrine or the attorney-client privilege. USAA and its counsel voluntarily dismissed their certiorari petitions.

The parties then agreed to an in camera inspection of the identified documents by a special master. The trial court entered an order, noting its previous ruling that the work product doctrine "does not apply in this bad faith case." The order also provided detailed instructions for the conduct of the in camera inspection. The trial court explained that both parties had the right to present evidence and arguments and that the preponderance of the evidence standard applies to determine whether a privilege exists, citing American Tobacco Co. v. State, 697 So. 2d 1249 (Fla. 4th DCA 1997).

The special master required USAA to amend its privilege log to provide legally sufficient descriptions for thirty-one of the withheld documents. USAA obliged, filing an amended supplemental privilege log identifying 247 documents. The special

master met with the attorneys and conducted an in camera inspection over the course of some five months. The appendices do not include any transcripts of these proceedings or the documents inspected.

The special master recommended that USAA produce ninety-eight of the withheld documents. USAA filed its exceptions regarding ninety-two of those documents, arguing that (a) forty-five were "clearly communications between Defendant, USAA, and the attorneys representing USAA, regarding this specific litigation"; (b) forty-four were "drafts for use in the defense of this specific litigation (i.e., draft pleadings, draft discovery responses, draft correspondence, and draft settlement agreements) all exchanged between USAA and its attorneys"; and (c) three were "USAA internal case assessments prepared by and for USAA's in-house attorneys regarding this specific litigation."

The trial court conducted a hearing on USAA's exceptions. The parties did not introduce anything into evidence at the hearing, and the documents were not before the trial court for review at the time. Afterwards, the trial court conducted an in camera inspection of the ninety-two documents in dispute. It concluded that thirty-two were not subject to production under the attorney-client privilege. The trial court ordered USAA to produce the remaining sixty documents.

The next day, after USAA filed a motion to stay in the trial court and noted its imminent filing of the instant certiorari petition, it retrieved all the documents from the trial court. In its certiorari petition, USAA states: "Although USAA believes the detail and law set forth in this Petition is sufficient to quash the Discovery Order, should this Court direct, USAA is willing to file the documents at issue under seal, for an in[-]camera review by this Court." BAIRS, on the other hand, contends that

supplementation is not permissible where "USAA never filed [the sixty] documents under seal with the clerk of the [trial] court." USAA "retrieved those documents from the trial judge's office before filing the petition," and thus, the documents are not part of the original record that could be transmitted to this court.

II. Analysis

Typically, we have certiorari jurisdiction to review orders compelling discovery of privileged information, as "there is no remedy for the destruction of the privilege available on direct appeal." Coates v. Akerman, Senterfitt & Eidson, P.A., 940 So. 2d 504, 506 (Fla. 2d DCA 2006) (quoting Estate of Stephens v. Galen Health Care, Inc., 911 So. 2d 277, 279 (Fla. 2d DCA 2005)). Because USAA asserts the order requires production of privileged and/or work product documents, we have certiorari jurisdiction. See Estate of Stephens, 911 So. 2d at 279 ("The Estate argues that the trial court's order compels discovery of statutorily privileged medical information. Therefore, we properly have certiorari jurisdiction to review the order."); Columbia Hosp. Corp. of S. Broward v. Fain, 16 So. 3d 236, 239 (Fla. 4th DCA 2009) ("To the extent the petition argues that the trial court's order requires production of materials that are privileged or protected, a threshold showing of irreparable harm necessary to invoke this court's certiorari jurisdiction is established." (citation omitted)).

"[T]he next question is whether the order departs from the essential requirements of law." Coates, 940 So. 2d at 506 (quoting Estate of Stephens, 911 So. 2d at 279).

> [T]he departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error. A district court should exercise its discretion to grant certiorari review only when

> there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.

Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 889 (Fla. 2003) (citing Ivey v. Allstate Ins. Co., 774 So. 2d 679, 682 (Fla. 2000)).

USAA argues that the order departs from the essential requirements of the law because all sixty documents are immune from discovery. USAA tells us that BAIRS' alleged need for the documents "cannot, as a matter of law, overcome the attorney-client privilege." See Genovese v. Provident Life & Accident Ins. Co., 74 So. 3d 1064, 1067-68 (Fla. 2011) (recognizing that the attorney-client privilege applies in first-party bad faith actions, even where there is a need and undue hardship). USAA further maintains that twenty-two documents "are also protected from disclosure because they constitute opinion work product." USAA contends that Ruiz, 899 So. 2d 1121, did not hold opinion work product discoverable in bad faith cases.

But as we have oft said, the appellant or petitioner has the vital obligation of "demonstrat[ing] error on the part of the trial court." Times Publ'g Co. v. City of St. Petersburg, 558 So. 2d 487, 491 (Fla. 2d DCA 1990); see also Dragomirecky v. Town of Ponce Inlet, Bd. of Adjustments, 917 So. 2d 410, 412 (Fla. 5th DCA 2006) ("It is the petitioner who has the right to select the issues for review and who has the burden of providing a record adequate to demonstrate error. If petitioner's record is incomplete, he will not be able to demonstrate error and he will fail on the merits."). This obligation necessarily includes the burden of making, preserving, and presenting an adequate record for appellate review. See generally Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979) ("Without a record of the trial proceedings, the appellate court cannot properly resolve the underlying factual issues so as to conclude

that the trial court's judgment is not supported by the evidence or by an alternative theory. Without knowing the factual context, neither can an appellate court reasonably conclude that the trial judge so misconceived the law as to require reversal. The trial court should have been affirmed because the record brought forward by the appellant is inadequate to demonstrate reversible error."); see, e.g., Times Pub. Co., 558 So. 2d at 491-92 (affirming a final judgment where this court was unable to review the trial court's factual finding that the notes were public records subject to production "[i]n the absence of a record reflecting the material reviewed by the trial judge"); Walters v. Manpower Irrigation & Servs., Inc., No. 3D19-2507, 2020 WL 1692273, at *1 (Fla. 3d DCA Jan. 31, 2020) ("We deny the Petition for Writ of Certiorari. Without a transcript of the hearing on the respondent's motion to compel, we are unable to conclude that the trial court departed from the essential requirements of law.").

After hearing USAA's objections, considering the parties' memoranda and arguments, and conducting an in camera review of the documents, the trial court rejected USAA's objections and concluded that the sixty documents were discoverable.[1]

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[1]USAA's failure to preserve an adequate record below prevents appellate review at this time. Neither party attacks the specificity of the trial court's findings. However, in light of the quarrelsome legal history of this case, we would import upon the trial court and parties the need of including a detailed analysis in the record—preferably written given the use of in camera review—explaining the basis for discovery of each document. See Bartow HMA, LLC v. Kirkland, 126 So. 3d 1247, 1254 (Fla. 2d DCA 2013) (offering a road map to guide the trial court and parties where "the course of the discovery proceedings between the parties . . . developed into a procedural and evidentiary quagmire"); see also Nemours Found. v. Arroyo, 262 So. 3d 208, 211-12 (Fla. 5th DCA 2018) (explaining the importance of a trial court making specific detailed findings addressing any privilege claims before ordering production for meaningful appellate review). The lack of detailed findings may hamper appellate review and require certiorari relief in some instances. See Harborside Healthcare, LLC v. Jacobson, 222 So. 3d 612, 616 (Fla. 2d DCA 2017) ("[I]t may be a departure from the essential requirements of the law when the trial court requires production of documents—without explanation—despite objections that statutory protections apply.

That determination necessarily involved factual findings as to whether the documents were privileged attorney-client communications or opinion work product. See Rogers v. State, 742 So. 2d 827, 829 (Fla. 2d DCA 1999) ("Whether the privilege ever existed and, if so, whether it was waived are questions of fact that can be determined only after an evidentiary hearing."); cf. Times Pub. Co., 558 So. 2d 487, 491-92 ("The trial court's determination [that the notes were subject to production] involved a factual finding as to whether the notes constituted public records."). "In the absence of a record reflecting the material reviewed by the trial judge, we cannot review the trial court's findings." Times Pub. Co., 558 So. 2d at 492.

Florida Rule of Appellate Procedure 9.220(a) does not save USAA. Rule 9.220(a) permits a party to cure an incomplete appendix, but only to the extent that the party is able to transmit portions of the trial court's record. Cf. Times Pub. Co., 558 So. 2d at 492 ("As we pointed out in Bei v. Harper, 475 So. 2d 912 (Fla. 2d DCA 1985), although Florida Rule of Appellate Procedure 9.200(f)(2) provides that the court direct a party to supply omitted parts of an incomplete record, the rule is not intended to cure inadequacies resulting from a party's failure to make a record during the proceedings."); cf., e.g., Patin v. Davis, 289 So. 3d 998, 999 (Fla. 1st DCA 2020) (refusing to consider videos that were not admitted into evidence and were not in the appellate record). As BARIS points out, nothing indicates that USAA ever followed a proper procedure for filing the sixty documents under seal with the trial court. See generally Stone v.

Where the trial court fails to specifically address whether claimed statutory privileges apply, leaving this court 'to guess at the basis for the discovery of each document' and as to whether the trial court even considered the objection, certiorari relief may be warranted." (first citing Bartow HMA, LLC v. Kirkland, 171 So. 3d 783, 785 (Fla. 2d DCA 2015); then quoting id. at 786-87)).

Travelers Ins. Co., 326 So. 2d 241, 243 (Fla. 3d DCA 1976) ("[W]here there has been an in[-]camera inspection, a proper procedure to follow would be to move the trial court for an order transmitting, under seal to the appellate court, the documents which were inspected in camera, for appellate review."). Rather, USAA—knowing it was going to file a petition—retrieved the documents from the trial judge's office. USAA claims that it was just following the trial court's order; the trial court directed USAA to retrieve the documents or the court would discard them. But the trial court's direction did not prevent USAA from submitting the documents under seal. USAA cannot now blame the trial court for its own failure.

The documents are not in the trial court's record, and they cannot be transmitted to this court for review under rule 9.220(a). Consequently, we deny the petition. Cf. Times Pub. Co., 558 So. 2d at 491-92 (affirming a final judgment where this court was unable to review the trial court's determination that the notes were discoverable "[i]n the absence of a record reflecting the material reviewed by the trial judge").

Denied.

NORTHCUTT and ATKINSON, JJ., Concur.