DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

AMERICAN HOME ASSURANCE COMPANY, INC.,

Petitioner,

v.

JOHN ROBERT SEBO, individually and as trustee under Revocable Trust Agreement of John Robert Sebo, dated November 4, 2004,

Respondent.

No. 2D21-3270

December 5, 2022

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

Laura Besvinick and Julie Nevins of Stroock & Stroock & Lavan, LLP; and Jason Hunter Korn and Joshua A. Hajek of Dentons Cohen & Grigsby P.C., Naples, for Petitioner.

Mark A. Boyle and Molly C. Brockmeyer of Boyle, Leonard & Anderson, P.A., Fort Myers; and Christopher T. Kuleba, R. Hugh Lumpkin, and Matthew B. Weaver of Reed Smith LLP, Miami, for Respondent.

CASANUEVA, Judge.

American Home Assurance Company, Inc. (AHAC), seeks certiorari review of a pretrial discovery order entered in an action alleging bad faith filed by John Robert Sebo. AHAC asserted to the trial court and to this court that the documents at issue are protected by the attorney-client privilege and that the special magistrate applied the wrong legal standard in her recommended order. We deny the petition.

I. BACKGROUND

In an opinion addressing AHAC's previous petition for writ of certiorari, this court set forth the facts as follows:

> Respondent, John Robert Sebo, purchased a home in April 2005, and AHAC provided homeowners insurance for the home. In December 2005, Mr. Sebo filed a claim with AHAC for water intrusion and other damages to the home, and AHAC denied coverage for most of the claimed losses. Mr. Sebo filed suit against a number of defendants, and in November 2009, he amended his complaint to add AHAC as a defendant, seeking a declaration that the policy provided coverage for his damages. Mr. Sebo settled his claims against a majority of the other defendants and proceeded to trial on his declaratory action against AHAC. The jurors found in favor of Mr. Sebo, and the trial court entered judgment against AHAC.
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> Appeals followed. Ultimately, the Florida Supreme Court affirmed the jury verdict finding that the

> "concurrent cause" doctrine applied. *Sebo v. Am. Home Assurance Co.*, 208 So. 3d 694, 700 (Fla. 2016). It is the alleged failure of AHAC to evaluate this doctrine that underpins this discovery dispute. Specifically, AHAC has admitted that it did not consider Florida law on causation prior to its retention of counsel and did not consider the concurrent cause doctrine until the issue was presented in a motion for summary judgment filed by Mr. Sebo.
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> Mr. Sebo commenced a first-party bad faith action against AHAC for damages arising from AHAC's wrongful denial of benefits owed under the homeowners insurance policy. For our purposes, Mr. Sebo served a request for production on AHAC which sought an extensive list of documents relating to the denial of the claim. At issue are documents created before the final judgment was entered on November 9, 2018. AHAC objected to specific categories of documents based on the work product doctrine and the attorney-client privilege. The matter was referred to a general magistrate. Mr. Sebo asserted, and the magistrate agreed, that the documents at issue constitute direct evidence on the issues framed by Mr. Sebo's pleadings. Particularly, the magistrate concluded that the requested discovery items are not protected by the work product doctrine, because they are needed to determine if AHAC acted in bad faith. The magistrate found that AHAC's objection on the basis of attorney-client privilege could not be resolved without an in-camera inspection.

Am. Home Assurance Co. v. Sebo, 324 So. 3d 977, 979 (Fla. 2d DCA 2021).

This court denied AHAC's first petition because the general magistrate properly followed the dictates of *Genovese v. Provident Life & Accident Insurance Co.*, 74 So. 3d 1064 (Fla. 2011), when it

ruled that the objection as to attorney-client privilege could not be resolved without an in camera inspection. *Am. Home Assurance Co.*, 324 So. 3d at 982. The arguments raised in the current petition arise from that in camera inspection.

Each party submitted 100 documents, representing a sample of the documents at issue, to the general magistrate for her in camera review. In a recommended order, the general magistrate ruled on 39 of the documents, identifying 24 items as "Discoverable" and indicating that her ruling was intended as a guide for AHAC's counsel to determine whether the remaining documents were discoverable.

AHAC filed exceptions to the magistrate's recommended order, and Mr. Sebo filed a motion seeking clarification of the order. In its exceptions, AHAC argued that "the Magistrate's legal rulings both generally and as applied to the documents reviewed in camera are clearly erroneous" and "[t]he legal rulings show that the Magistrate improperly conflated the work-product standard and the attorney-client privilege." However, regarding the twenty-four documents that the magistrate ordered AHAC to produce, it simply stated:

> A review of the Magistrate's recommendations regarding specific documents confirms the scope of the Magistrate's error. In direct contravention of *Genovese*'s clear and binding mandate that "the insured may not discover those privileged communications that occurred between the insurer and its counsel during the underlying action," the Magistrate recommended that the Court hold communications between American Home and the law firms defending American Home in the coverage litigation "discoverable," notwithstanding the fact that the communications plainly involved the "rendering of legal advice." *Genovese*, 74 So. 3d at 1068.
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> A review of the Magistrate's recommendations regarding specific documents confirms the scope of the Magistrate's error. For example, the Magistrate recommended the production of emails between American Home's representative (Kathleen Spinella) and American Home's lead trial counsel (Scott Frank) and lead appellate counsel [(]Anthony Russo) concerning the coverage litigation with Sebo and related strategy. Such communications are at the core of the attorney-client privilege and they should be protected.

The magistrate issued a recommended order granting Mr. Sebo's request for clarification. AHAC filed exceptions to this second order of the magistrate, arguing that the magistrate erred in failing to conduct an in camera review of all 200 documents submitted by both parties.

The trial court conducted a hearing on AHAC's exceptions. At the hearing, the attorney for AHAC asked the trial court not to affirm the magistrate's ruling and further argued

> that there be an in camera review required of all the documents, as we believe is required by law. And perhaps, you know, we may discuss appointment of a special master to accomplish that, subject to the appropriate legal guidance, obviously, from the Court on what the sort of rules of the road are in terms of the application of the attorney-client privilege.
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> And so I want to end by talking about that in camera review, because I think that's the practical question that confronts us. I recognize we have an advantage that Mr. Kuleba does not, which is we have seen the documents and put them next to the Magistrate's rulings on them. And I would invite Your Honor to do the same, if you have not done so yet, which is, there is no discernible rule that would tell you whether one was discoverable or one was privileged, because, as I mentioned before, there are communications between counsel and the company concerning the defense of the case, some of which are identified as being privileged, some of which are identified as being discoverable, which -- and I'll just conclude on this -- really elevates the importance of document-by-document in camera review. If you are making grand order decisions about whether something is business advice or legal advice or a draft that underlies a communication, that is a document-by-document inquiry.

After the hearing, the trial court overruled AHAC's exceptions and approved and adopted the recommended orders of the

magistrate. The trial court gave AHAC twenty days to produce the twenty-four documents previously ordered to be produced, and it gave AHAC sixty days to produce other documents withheld on the bases of attorney-client privilege that were required to be produced in accordance with the order. However, the trial court also directed AHAC to "provide an updated privilege log for any documents withheld on attorney-client privilege grounds [in] accordance with this Order."

II. STANDARD OF REVIEW

When deciding whether to grant the petition for writ of certiorari, we must determine whether AHAC, as the petitioner, has established that the trial court order constitutes "(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." *Hett v. Barron-Lunde*, 290 So. 3d 565, 569 (Fla. 2d DCA 2020) (alteration in original) (quoting *Bd. of Trs. of Internal Improvement Tr. Fund v. Am. Educ. Enters.*, 99 So. 3d 450, 454 (Fla. 2012)). "An order that compels discovery of privileged information departs from the essential requirements of law because once such 'information is disclosed, there is no remedy for the

destruction of the privilege available on direct appeal.' " *E. Bay NC, LLC v. Est. of Djadjich ex rel. Reddish*, 273 So. 3d 1141, 1144 (Fla. 2d DCA 2019) (quoting *Est. of Stephens v. Galen Health Care, Inc.*, 911 So. 2d 277, 279 (Fla. 2d DCA 2005)).

III. DISCUSSION

Because a discovery order departs from the essential requirements of law when it compels the discovery of privileged information, we first must determine what materials AHAC was compelled to produce. The trial court's discovery order compels the production of twenty-four documents which the magistrate reviewed in camera and found to be discoverable. The order leaves it to AHAC to determine what other documents in its possession are required to be produced in accordance with the order and to provide an updated privilege log for the documents it decides to withhold based on attorney-client privilege grounds. Because the trial court may never decide to require the disclosure of other documents, the petition is premature as to the documents that AHAC was not compelled to produce. *See Bennett v. Berges*, 84 So. 3d 373, 375 (Fla. 4th DCA 2012) ("[B]ecause the order requires a party to submit allegedly protected materials only for an *in camera* inspection, and

the trial court may never require disclosure of the documents to the opposing party, we hold that the petition is premature."); *see also Gross v. Am. Federated Title Corp.*, 314 So. 3d 575, 576–77 (Fla. 3d DCA 2020) ("Certiorari review of such orders is premature because no irreparable harm can be demonstrated until the court enters a subsequent order actually requiring the production of the privileged documents." (citing *Cooper Tire & Rubber Co. v. Rodriguez*, 2 So. 3d 1027, 1031 (Fla. 3d DCA 2009))).

Turning to the arguments in AHAC's petition, it contends that the trial court erred in approving the magistrate's first recommended order because the magistrate used the wrong legal standard in three aspects when applying the attorney-client privilege. First, AHAC argues that the magistrate's order improperly considered Mr. Sebo's "need" for the documents at issue, which is contrary to *Genovese*, 74 So. 3d at 1068, and section 90.502, Florida Statutes (2021).[1] In support of its argument, AHAC points

[1] Section 90.502 provides the evidentiary attorney-client privilege. A client possesses a privilege to refuse disclosure of "confidential communications" when that specific communication was "made in the rendition of legal services to the client." § 90.502(2). A communication is deemed "confidential" in those circumstances where "it is not intended to be disclosed to third

to the following language in paragraph four of the order: "Therefore, the discovery issues involved in the instant motion ([AHAC's] related litigation files) and others this Court has heard may be the only source of information as to the essential issue, [AHAC's] conduct and handling of [Mr. Sebo's] claim."

We do not read this language of the order as applying a need-based analysis to the attorney-client privilege. The paragraph in its entirety states as follows:

> A central issue in this litigation is whether [AHAC] failed to act in good faith. The Court must consider the efforts or measures taken by the insurer to resolve the coverage dispute. *See State Farm Mut. Auto Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995) (holding that factors to be considered include the insurer's diligence and thoroughness in investigating the facts pertinent to coverage and the substance of the coverage dispute or weight of legal authority on the coverage issue). Therefore, the discovery issues involved in the instant motion ([AHAC's] related litigation files) and others this Court has heard may be the only source of information as to the essential issue, [AHAC's] conduct and handling of [Mr. Sebo's] claim.

The language in this paragraph recognizes that the only source of information as to the central issue of the bad faith

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persons." § 90.502(1)(c). This privilege is absolute, not qualified. *Genovese*, 74 So. 3d at 1066-68.

litigation may be AHAC's litigation file. The language does not indicate that the attorney-client privilege does not apply simply where the other party has a need for it. Further, the language specifically references other discovery issues the magistrate has heard in the past, which includes arguments related to the work product doctrine and the doctrine's requirement that the opposing party establish a need for the material. *See Kidder v. State*, 117 So. 3d 1166, 1171 (Fla. 2d DCA 2013) (noting that fact work product may be discovered if the opposing party demonstrates need and undue hardship (citing *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1384 (Fla. 1994))).

Second, AHAC argues that the magistrate's order improperly considered the "relevance" of the documents in determining the attorney-client privilege. The sentence at issue is in paragraph ten of the magistrate's order and it states, "Communications and documents prepared by [AHAC's] outside counsel are relevant because the knowledge of the attorney is imputable to the client ([AHAC]) whether disclosed by the attorney or not, [AHAC] will be bound by such knowledge." As noted in the magistrate's order, this statement was in response to AHAC's argument that documents of

outside counsel are irrelevant. The order did not rule that the attorney-client privilege did not apply to certain documents simply because they were relevant.

Third, AHAC contends that paragraph five of the magistrate's order improperly found that the attorney-client privilege does not apply to communications between an insurer and its counsel regarding the weight of legal authority on coverage issues. AHAC further argues that paragraph five incorrectly states that a document or communication must be prepared in anticipation of litigation for the attorney-client privilege to apply.

A review of paragraph five of the order reveals that its language correctly followed the holding in *Genovese*. Paragraph five states as follows:

> As to the first category of documents, Non-legal advice "attorney-client" documents, [AHAC] has raised objections based upon attorney-client privilege. Simply because a communication is between an attorney and a client (Defendant) does not mean the privilege automatically applies. The Court must consider whether the communication is a rendition of legal advice. The general business duties of an insurer delegated to an attorney include evaluating the weight of legal authority on coverage issues and informing the client of the position on the insured's claim and therefore, the privilege would not apply. *See State Farm Mut. Auto Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995). Likewise, the

> privilege does not apply where an attorney is merely investigating a claim, analyzing a coverage issue, facilitating day to day claims handling activities or any other activity other than rendering of legal advice in anticipation of litigation. *Genovese v. Provident Life & Accident Insurance Company*, 74 So. 3d 1064 (Fla. 2011).

In *Genovese*, the court held that "when an insured party brings a bad faith claim against its insurer, the insured may not discover those privileged communications that occurred between the insurer and its counsel during the underlying action." 74 So. 3d at 1068. The attorney-client privilege protects the disclosure of confidential communication that is "necessary to obtain informed legal advice," and when such communication between a lawyer and a client is not made with the lawyer "in his professional capacity as a lawyer, no privilege attaches." *Id.* at 1067 (first quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976); and then quoting *State v. Branham*, 952 So. 2d 618, 621 (Fla. 2d DCA 2007)). The court held that in cases where an attorney was hired by the insurer "to both investigate the underlying claim and render legal advice," both the attorney-client privilege and the work product doctrine may be implicated. *Id.* at 1068. "If the trial court determines that the investigation performed by the attorney resulted in the preparation

of materials that are required to be disclosed pursuant to [*Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005),] and did not involve the rendering of legal advice, then that material is discoverable." *Id.* Here, the magistrate correctly ruled that materials relating to the investigation of the underlying claim are discoverable if those materials do not involve the rendering of legal advice.

AHAC also challenges the magistrate's decision to rule on only thirty-nine of the 200 documents submitted. As noted above, the trial court order leaves the decision to AHAC to determine what other documents in its possession are required to be produced in accordance with the order and to provide an updated privilege log for the documents it decides to withhold based on attorney-client privilege grounds. The magistrate intended that her findings be used as a guide for AHAC to determine which documents should be produced. Because the trial court may never decide to require the disclosure of other documents, AHAC cannot show that the order causes a material injury for the remainder of the case. *See E. Bay NC, LLC*, 273 So. 3d at 1144.

Further, "[o]n certiorari an appellate court can only deny the writ or quash the order under review. It has no authority to take

any action resulting in the entry of a judgment or orders on the merits or to direct that any particular judgment or order be entered." *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 844 n.18 (Fla. 2001) (quoting *Snyder v. Douglas*, 647 So. 2d 275, 279 (Fla. 2d DCA 1994)). The quantity of documents that AHAC may claim, and for which it may be entitled to assert the attorney-client privilege, could be extraordinary and require additional trial court orders pertaining to the review of those documents. Those orders, such as they may come into existence, may allow for review. However, we do not opine on such possible discovery orders.

Finally, we note that although AHAC's petition challenges certain language in the magistrate's order, as noted above, there is no linkage of the law to a specific document. At the hearing on the exceptions to the magistrate's recommended order, AHAC asked the court not to affirm the magistrate's determination and to order an in camera review of all the documents at issue, of which there are thousands. No argument was presented that challenged a specific document with a detailed argument explaining why that document was protected by the absolute privilege afforded by section 90.502. "Generally, a petitioner cannot raise in a petition for writ of

certiorari a ground that was not raised below." *First Call Ventures, LLC v. Nationwide Relocation Servs., Inc.*, 127 So. 3d 691, 693 (Fla. 4th DCA 2013). It was AHAC's burden to establish the existence of the protective privilege. *See Deason*, 632 So. 2d at 1383 ("The burden of establishing the attorney-client privilege rests on the party claiming it." (citing *Fisher*, 425 U.S. 391)).

AHAC's petition before this court similarly focuses on the arguments previously discussed and does not provide a detailed argument explaining why the content of certain documents amounted to legal advice and were not required to be disclosed pursuant to *Ruiz*. *See Allstate Indem. Co.*, 899 So. 2d at 1129–30 ("[W]e hold that in connection with evaluating the obligation to process claims in good faith under section 624.155, all materials, including documents, memoranda, and letters, contained in the underlying claim and related litigation file material that was created up to and including the date of resolution of the underlying disputed matter and pertain in any way to coverage, benefits, liability, or damages, should also be produced in a first-party bad faith action."); *see also Tacher v. Helm Bank*, 50 So. 3d 1239, 1240 (Fla. 4th DCA 2011) ("It is not the responsibility of an appellate

court to make an appellant's arguments for him, 'to sift through the pleadings and affidavits to determine whether there are material issues of fact.' " (quoting *E & I, Inc. v. Excavators, Inc.*, 697 So. 2d 545, 547 (Fla. 4th DCA 1997))).

For the reasons we have explained, the petition for writ of certiorari is denied.[2]

STARGEL and LABRIT, JJ., Concur.

Opinion subject to revision prior to official publication.

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[2] We note that the United States Supreme Court presently has on its docket the case *In re Grand Jury*, in which the issue presented is the scope of attorney-client privilege in the context of alleged dual-purpose communications. *See In re Grand Jury,* 23 F.4th 1088 (9th Cir. 2021), *cert. granted sub nom. In re Jury,* No. 21-1397, 2022 WL 4651237 (U.S. Oct. 3, 2022); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014).