DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ROBERT WALLACE,

Petitioner,

v.

CITIZENS PROPERTY INSURANCE CORPORATION,

Respondent.

No. 2D22-441

November 18, 2022

Petition for Writ of Certiorari to the Circuit Court for Lee County; James R. Shenko, Judge.

Gabriela Ibanez-Alers of Kovar Law Group, St. Petersburg, for Petitioner.

Edgardo Ferreyra, Jr., and Joseph Piomelli, of Luks, Santaniello, Petrillo, Cohen & Peterfriend, Fort Myers, for Respondent.

ROTHSTEIN-YOUAKIM, Judge.

Robert Wallace petitions for a writ of certiorari asking this court to quash the trial court's order permitting Citizens Property Insurance Corporation (Citizens) to depose Leo Garcia. We conclude that the order departed from the essential requirements of

law and grant the petition to the extent that the order permits Citizens to depose Garcia on matters beyond the scope of his previously disclosed expert report.

Wallace alleges that his roof was damaged by a storm on June 28, 2019, that a new roof is needed, and that Citizens has breached Wallace's wind-damage policy by not paying for that new roof. In answers to interrogatories, Wallace initially disclosed Garcia as someone who had inspected the roof. Garcia wrote a report documenting his expert opinions and confirming the June 28, 2019, date of loss. Wallace produced that report to Citizens.

But when the time came for Wallace to file his witness list for trial, Wallace omitted Garcia and listed Derek Cronin as his testifying expert. Wallace concurrently informed Citizens that Garcia was now just a nontestifying consulting expert. Cronin prepared a report, which Wallace duly served on Citizens. Cronin's report identified October 19, 2019, as the date of loss—a date different from that reported by Garcia but still within the policy period.[1]

[1] Wallace also moved to amend his complaint so that his pleadings would correspond with the new date of loss provided by

Citizens responded to Wallace's reclassification of Garcia by listing Garcia on Citizens' own witness list and by noticing Garcia for deposition. Wallace moved for a protective order, contending that the work product privilege and Florida Rule of Civil Procedure 1.280(b)(5)(B) precluded the deposition. Citizens then moved for an order compelling Garcia to sit for deposition.

After a short, nonevidentiary telephonic hearing, the trial court denied Wallace's motion for protective order and ordered that Wallace produce Garcia for deposition. We have no transcript of the hearing, and the court's written order lacks findings or analysis. At another hearing a few days later, however, the court recounted that it had denied the protective order because Wallace had provided Garcia's report to Citizens, "taking it outside of it being a consulting expert."

Wallace now asks this court to quash Garcia's deposition.

Analysis

Cronin. That was Wallace's first motion to amend. Shortly before Wallace filed this certiorari petition, the trial court denied Wallace's motion to amend. We do not opine on the propriety of this ruling.

A party is generally free to choose its testifying experts and may redesignate an expert as a nontestifying consultant. *See Huet v. Tromp*, 912 So. 2d 336, 339, 341 (Fla. 5th DCA 2005) (granting certiorari relief and explaining that a party may cure any waiver of the work product privilege stemming from listing that expert as a witness by removing that person from the witness list).

Moreover, Florida law provides procedural safeguards before a party may depose a consulting expert. Rule 1.280(b)(5)(B) states, in pertinent part:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, *only* . . . upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(Emphasis added.)

In its motion to compel, Citizens did not argue that exceptional circumstances supported its taking of Garcia's deposition. Nor did Citizens submit any affidavits or other evidence demonstrating exceptional circumstances. Thus, it appears the trial court denied Wallace a protective order and

granted Citizen's motion without any consideration of whether such circumstances exist, let alone a showing that they do.[2]

On the flip side, however, given Wallace's voluntary disclosure of Garcia's report to Citizens, we are hard pressed to understand how Wallace could suffer irreparable harm—a jurisdictional requirement for certiorari relief—if Garcia is now deposed on the contents of his report. *See Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214, 215 (Fla. 1998) (recognizing that irreparable harm is a "condition precedent to invoking a district court's certiorari jurisdiction"); *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94-95 (Fla. 1995) (emphasizing that certiorari jurisdiction over discovery matters should only be exercised if the petitioner may otherwise suffer irreparable harm); *Lewis Tree Serv., Inc. v. Asplundh Tree Expert, LLC*, 311 So. 3d 206, 210 (Fla. 2d DCA 2020) (holding that

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[2] Indeed, it is hard to understand how Citizens could ever establish exceptional circumstances given that it has hired its own expert who has inspected the property and has prepared a detailed report of his opinion concerning the alleged damage. *See Gilmor Trading Corp. v. Lind Elec., Inc.*, 555 So. 2d 1258, 1260 (Fla. 3d DCA 1989) (rejecting an "exceptional circumstances" argument by a party because its expert had "already formed his opinion" and it could not be said that the "only meaningful source of data is a not-to-be-called expert engaged by one of the parties").

"[c]ertiorari is particularly appropriate" for review of " 'cat out of the bag' discovery orders"). Accordingly, we conclude that we lack certiorari jurisdiction to preclude Citizens from deposing Garcia on his report, but we quash the trial court's order to the extent it permits Citizens to inquire of Garcia as to "facts known and opinions held by [him] that were not previously disclosed." *Cf. Morgan v. Tracy*, 604 So. 2d 15, 15 (Fla. 4th DCA 1992) ("reject[ing] . . . [the] contention that petitioner's prior disclosure of the expert's written report constituted a waiver of the work product privilege as to the facts known and opinions held by the expert that were not previously disclosed" and "conclud[ing] that petitioners' initial listing of the expert on their trial witness list did not constitute a waiver of the work product privilege"); *E. Air Lines, Inc. v. Gellert*, 431 So. 2d 329, 332 (Fla. 3d DCA 1983) (explaining that "waiver does not occur until there has been an actual disclosure of the confidential communication").[3]

[3] We recognize that in interpreting the federal counterpart of rule 1.280(b)(5)(B), some courts have concluded that even if a party voluntarily discloses an expert's report in the preliminary stages of a case, any waiver of its privilege can be reversed if that party subsequently withdraws the expert from its witness list. *See, e.g.*, *Wreal LLC v. Amazon.com, Inc.*, No. 14–21385–CIV, 2015 WL

Petition granted and order quashed to the extent that it permits Citizens to inquire of Garcia beyond his report.

CASANUEVA and ATKINSON, JJ., Concur.

Opinion subject to revision prior to official publication.

1281042, at *3 (S.D. Fla. March 20, 2015) (quashing a subpoena to a reclassified expert because that expert's previously disclosed opinion had only been used for a preliminary injunction motion). Although Florida may well follow suit, *see, e.g., Morgan*, 604 So. 2d at 15, we do not resolve this matter in terms of "waiver" per se; rather, applying the certiorari framework, we simply conclude that Wallace has not demonstrated irreparable harm if Citizens is allowed to depose Garcia on his previously disclosed report.