

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

AVATAR PROPERTY & CASUALTY INSURANCE COMPANY,

Petitioner,

v.

Case No. 5D20-304

JAMES SIMMONS,

Respondent.

_____ /

Opinion filed June 12, 2020

Petition for Certiorari Review
of Order from the Circuit Court
for Orange County,
Lisa T. Munyon, Judge.

Curt L. Allen and Brian Hohman, of Butler
Weihmuller Katz Craig LLP, Tampa, for
Petitioner.

Mark A. Nation, of The Nation Law Firm,
Longwood, for Respondent.

SASSO, J.

Petitioner, Avatar Property & Casualty Insurance Company (“Avatar”), seeks certiorari relief from an order requiring it to produce photographs within its claim file, and photographs and reports within its underwriting file, pertaining to the condition of the property when the insurance policy was issued. We hold the discovery order does not depart from the essential requirements of the law; therefore, we deny the petition.

Following damages sustained to his home that was insured by Avatar, Respondent James Simmons (“Simmons”) sued Avatar for breach of contract, alleging that Avatar failed to perform under the insurance policy. During discovery, Simmons served on Avatar a request for production, including the two requests giving rise to this Petition:

5. Any and all videos and photographs in [Avatar’s] possession related to [Simmons’s] claim in their native digital format.

9. The complete underwriting file with regard to [Avatar’s] issuance of insurance on the subject risk, and all renewals.

In response to the requests at issue, Avatar objected “to the extent [the request] seeks documents protected by the work product doctrine and attorney client privilege.” Avatar further objected, stating “[t]he request also calls for Avatar to produce documents from its claim file and/or documents that relate to its internal claims handling procedures” Simmons moved to overrule Avatar’s objections and to compel discovery, arguing there is no claim file privilege and that the requested information was prepared in the routine, normal course of claims handling.

At a hearing on Simmons’s motion, the issues were narrowed and discussion turned to limited production of certain photographs. The trial court gave Avatar multiple opportunities to explain why the photographs at issue, and only the photographs, were protected by the work product privilege. Each time Avatar again asserted a categorical privilege, arguing, for example, the photographs were “part of the claims file, and that’s work product.”

Ultimately, the trial court entered an order requiring Avatar to produce photographs in native digital format (in response to request 5) and reports and photographs in native

digital format (in response to request 9).¹ Subsequently, Avatar filed a timely petition for writ of certiorari, arguing that the order departed from the essential requirements of law by compelling disclosure of privileged, irrelevant materials from Avatar's claim and underwriting files, and by failing to make the necessary supporting findings.

Certiorari lies to review a trial court's order compelling production of privileged documents because of the potential for irreparable harm. *Montanez v. Publix Super Mkts., Inc.*, 135 So. 3d 510, 512 (Fla. 5th DCA 2014). Even so, an appellate court may grant certiorari relief only where the petitioner demonstrates that the discovery order at issue constitutes a departure from the essential requirements of the law. *Finn Law Grp., P.A. v. Orange Lake Country Club, Inc.*, 206 So. 3d 169, 170 (Fla. 5th DCA 2016). Departure from the essential requirements of the law is more than mere legal error and instead occurs "when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Combs v. State*, 436 So. 2d 93, 95-96 (Fla. 1983). Under this framework, we consider whether the discovery order at issue so departs.

It is well-settled that "under the work-product doctrine, documents prepared by or on behalf of a party *in anticipation of litigation* are not discoverable." *Liberty Mut. Fire Ins. Co. v. Kaufman*, 885 So. 2d 905, 910 (Fla. 3d DCA 2004) (citing Fla. R. Civ. P. 1.280(b)(3)). However, it is equally established that the party asserting privilege has the burden to prove such a privilege should apply. *See, e.g., Hartford Acc. & Indem. Co. v. McGann*, 402 So. 2d 1361, 1362 (Fla. 4th DCA 1981) ("If objection is made necessitating a court hearing, then in the case of a party objecting on grounds of

¹ The order also required Avatar to file a privilege log in response to Simmons's request for "all non-privileged portions of the claim file." However, Avatar does not challenge that portion of the order in its Petition.

the work product privilege, that party has the burden, first of showing the privilege.”); see also *Kaufman*, 885 So. 2d at 910 (explaining that “the party objecting to the discovery . . . maintains the burden to show that the materials were compiled in response to some event which foreseeably could be made the basis of a claim against the insurer”) (citation omitted). And a party generally cannot carry this burden with a bare assertion that a specific document is held within its claim file. *Homeowners Choice Prop. & Cas. Ins. Co. v. Avila*, 248 So. 3d 180, 184 (Fla. 3d DCA 2018) (finding there is no “claims file privilege”).

As this Court has observed:

Even if . . . a “claims file” is work product, it is not necessarily true that every document in a claim file is work product. Putting a document in a claim file doesn’t make it immune; it is only immune if it *is* work product.

Bankers Sec. Ins. Co. v. Symons, 889 So. 2d 93, 96 (Fla. 5th DCA 2004); see also *Avila*, 248 So. 3d at 184-85 (“[A] specifically-articulated document request for ‘photographs of the alleged property damage’ may require either (a) production of such photographs, or (b) disclosure on a privilege log with a specifically-articulated basis for protection from discovery, even if those photographs have been filed with other non-discoverable, claim-related documents in the insurer’s ‘claims file’ and coverage remains in dispute.”).

Here, the basis for Avatar’s objection to the request at issue was work product privilege. But despite prodding from the trial court, and after multiple opportunities to do so, Avatar never attempted to demonstrate that the photographs at issue were prepared in anticipation of litigation. Furthermore, Avatar did not attempt to establish the basis for its objection with documentary evidence, such as a supporting affidavit. Instead, Avatar only asserted a categorical “claims file” or “underwriting file” privilege.

As this Court explained in *Symons*, there is no claims file privilege. And with that categorical objection serving as the only basis for its work product objection, Avatar has failed to demonstrate a departure from the essential requirements of the law resulting in a miscarriage of justice. Consequently, and based on the narrow issues presented,² we cannot conclude that the trial court's order compelling discovery of certain photographs warrants the extraordinary relief requested.

Finally, we similarly reject Avatar's argument that any perceived deficiencies in the trial court's order warrant certiorari relief. The basis for the trial court's ruling is clear from the hearing transcript, and our review is not impeded. As such, this case is distinguishable from *State Farm Mutual Automobile Insurance Co. v. Knapp*, 234 So. 3d 843, 850 (Fla. 5th DCA 2018).

PETITION DENIED.

COHEN and HARRIS, JJ., concur.

² This is not a case in which a trial court ordered production of the entire claims file.