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1. [*Am. Home Assur. Co. v. Sebo, 324 So. 3d 977*](#)

Client/Matter: -None-

Am. Home Assur. Co. v. Sebo

Court of Appeal of Florida, Second District

June 30, 2021, Decided

No. 2D20-2202

Reporter

324 So. 3d 977 *; 2021 Fla. App. LEXIS 9799 **; 46 Fla. L. Weekly D 1524; 2021 WL 2671926

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.

Prior History: [**1] Petition for Writ of Certiorari to the
Circuit Court for Collier County; Lauren L. Brodie,
Judge.

*Sebo v. Am. Home Assur. Co., 208 So. 3d 694, 2016
Fla. LEXIS 2596 (Fla., Dec. 1, 2016)*

Core Terms

attorney-client, insurer, documents, work product
doctrine, discovery, trial court, coverage,
communications

Case Summary

Overview

HOLDINGS: [1]-In a first-party bad faith action under
Fla. Stat. § 624.155, in which an insurer contended that
the trial court order required it to submit certain
documents in discovery that were protected by the
attorney-client privilege and the work product doctrine,
the general magistrate correctly determined that the
requested documents were not shielded by the work

product doctrine, because the claims materials were
needed to determine whether the insurer acted in bad
faith; [2]-The trial court did not depart from the essential
requirements of law in approving the recommended
order of the general magistrate because the general
magistrate correctly followed the dictates of *Genovese
v. Provident Life & Accident Ins.* and ruled that the
insurer's objection as to attorney-client privilege could
not be resolved without an in-camera inspection.

Outcome

Petition denied.

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Privileged
Communications > Attorney-Client Privilege

Civil Procedure > ... > Privileged
Communications > Work Product Doctrine > Scope
of Protection

HN1  **Privileged Communications, Attorney-Client
Privilege**

To be entitled to certiorari relief from a discovery order,
the trial court's ruling must be a departure from the

essential requirements of law that causes material injury for the remainder of the proceedings that cannot be remedied on postjudgment appeal. Often, the information at issue is generically considered cat out of the bag material which includes items protected by the attorney-client privilege and the work product doctrine.

Civil Procedure > ... > Privileged

Communications > Work Product Doctrine > Scope of Protection

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > Elements of Bad Faith

Insurance Law > ... > Commercial General Liability Insurance > Exclusions > Work Exclusion Clauses

[HN2](#) **Work Product Doctrine, Scope of Protection**

[Fla. Stat. § 624.155](#) (2005), is a statutory remedy that essentially extended the duty of an insurer to act in good faith and deal fairly in those instances where an insured seeks first-party coverage or benefits under a policy of insurance. Therefore, work product protection that may otherwise be afforded to documents prepared in anticipation of litigation of the underlying coverage dispute does not automatically operate to protect such documents from discovery in the ensuing, or accompanying, bad faith action. In connection with evaluating the obligation to process claims in good faith, 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. The Florida Supreme Court held that other documents may be discoverable.

Materials prepared after the resolution of the underlying disputed matter and initiation of the bad faith action may be subject to production upon a showing of good cause or pursuant to an order of the court following an in-camera inspection.

Civil Procedure > ... > Discovery > Privileged Communications > Attorney-Client Privilege

Evidence > Privileges > Attorney-Client Privilege > Scope

Civil Procedure > ... > Privileged Communications > Work Product Doctrine > Scope of Protection

[HN3](#) **Privileged Communications, Attorney-Client Privilege**

The Florida Supreme Court's holding in *Allstate Indemnity Co. v. Ruiz* is limited to the work product doctrine, and it does not address the attorney-client privilege.

Civil Procedure > ... > Discovery > Privileged Communications > Attorney-Client Privilege

[HN4](#) **Privileged Communications, Attorney-Client Privilege**

Attorney-client privileged communications are not discoverable in a first-party bad faith action.

Civil Procedure > ... > Discovery > Privileged Communications > Attorney-Client Privilege

Evidence > Privileges > Attorney-Client Privilege > Scope

Civil Procedure > ... > Privileged
Communications > Work Product Doctrine > Scope
of Protection

[HN5](#)  **Privileged Communications, Attorney-Client
Privilege**

The attorney-client privilege differs from the work product doctrine. It is a privilege of confidentiality and is statutorily protected. [Fla. Stat. § 90.502](#) (2005). The attorney-client privilege, unlike the work-product doctrine, is not concerned with the litigation needs of the opposing party. Instead, the purpose of the privilege is to encourage full and frank communication between the attorney and the client. This significant goal of the privilege would be severely hampered if an insurer were aware that its communications with its attorney, which were not intended to be disclosed, could be revealed upon request by the insured. Moreover, there is no exception provided under [§ 90.502](#) that allows the discovery of attorney-client privileged communications where the requesting party has demonstrated need and undue hardship.

Insurance Law > Liability & Performance
Standards > Bad Faith & Extracontractual
Liability > Elements of Bad Faith

[HN6](#)  **Bad Faith & Extracontractual Liability,
Elements of Bad Faith**

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.

Civil Procedure > ... > Discovery > Privileged
Communications > Attorney-Client Privilege

Evidence > Privileges > Attorney-Client
Privilege > Exceptions

[HN7](#)  **Privileged Communications, Attorney-Client
Privilege**

Exceptions to the attorney-client privilege may arise in certain cases.

Civil Procedure > ... > Discovery > Privileged
Communications > Attorney-Client Privilege

Evidence > Privileges > Attorney-Client
Privilege > Scope

Civil Procedure > ... > Privileged
Communications > Work Product Doctrine > Scope
of Protection

[HN8](#)  **Privileged Communications, Attorney-Client
Privilege**

Materials requested by the opposing party in an insurance bad faith action may implicate both the work product doctrine and the attorney-client privilege. When a claim of privilege is asserted, the trial court should conduct an in-camera hearing to determine if the materials at issue are truly protected by the attorney-client privilege. 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 Indemnity Co. v. Ruiz* and did not involve the rendering of legal advice, then that material is discoverable.

Counsel: Laura Besvinick and Julie Nevins of Stroock & Stroock & Lavan LLP, Miami, for Petitioner.

Mark A. Boyle and Molly Chafe Brockmeyer of Boyle, Leonard & Anderson, P.A., Fort Myers; and R. Hugh Lumpkin, Matthew B. Weaver, and Christopher T.

Kuleba of Reed Smith LLP, Miami, for Respondent.

Judges: CASANUEVA, Judge. VILLANTI and BLACK, JJ., Concur.

Opinion by: CASANUEVA

Opinion

[*979] CASANUEVA, Judge.

American Home Assurance Company, Inc., (AHAC) seeks certiorari review of a pretrial discovery order entered in an action alleging bad faith. AHAC contends that the trial court order requires it to submit certain documents in discovery that are protected by the attorney-client privilege and the work product doctrine. After consideration, we deny the petition.

I. PROCEDURAL HISTORY

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 [**2] 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.

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.

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 [**3] 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. AHAC filed exceptions to the magistrate's order, which were denied by the trial court. The trial court adopted the recommended order of the general magistrate, [*980] and AHAC thereafter filed the instant petition for writ of certiorari.¹

II. DISCUSSION

¹The recommended order of the general magistrate was approved with the exception of one category of documents to which AHAC had withdrawn its objection.

[HN1](#) [↑] "To be entitled to certiorari relief from a discovery order, the trial court's ruling must be a departure from the essential requirements of law that causes material injury for the remainder of the proceedings that cannot be remedied on postjudgment appeal." *Allen v. State Farm Fla. Ins.*, 198 So. 3d 871, 873 (Fla. 2d DCA 2016) (first citing *Bd. of Trs. of Internal Improvement Tr. Fund v. Am. Educ. Enters., LLC*, 99 So. 3d 450, 457 (Fla. 2012); then citing *Allstate Ins. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995); and [**4] then citing *Ryan v. Landsource Holding Co.*, 127 So. 3d 764, 766 (Fla. 2d DCA 2013)). Often, as here, the information at issue is generically considered "cat out of the bag" material which includes items protected by the attorney-client privilege and the work product doctrine. *Id.*

As this discovery issue arises in the context of a bad faith claim, we begin our discussion with *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005). The battleground that we now tread on was clearly identified by the Florida Supreme Court. There, the insurance company asserted that the work product doctrine extends to and encompasses "the entire claim file and all files, whatever the name, in the underlying coverage or damage matter or dispute, including an extension into any bad faith litigation which may flow from the processing or litigating of the underlying claim." *Id. at 1124*. The insured argued, as Mr. Sebo does here:

[H]ow is one to ever determine whether an insurance company has processed, analyzed, or litigated a claim in a fair, forthright, and good faith manner if access is totally denied to the underlying file materials that reflect how the matter was processed and contain the direct evidence of whether the claim was processed in "good" or "bad" faith?

Id. This evidence, it is asserted, is both logically and legally material [**5] and relevant.

The *Ruiz* court noted that [HN2](#) [↑] *section 624.155, Florida Statutes* (2005), is a "statutory remedy [that] essentially extended the duty of an insurer to act in good faith and deal fairly in those instances where an insured seeks first-party coverage or benefits under a policy of insurance." *Id. at 1126*. Therefore, "work product protection that may otherwise be afforded to documents prepared in anticipation of litigation of the underlying coverage dispute does not automatically operate to protect such documents from discovery in the ensuing, or accompanying, bad faith action." *Id. at 1131*. The supreme court held

that in connection with evaluating the obligation to process claims in good faith . . . , 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.

Id. at 1129-30.²

Here, the general magistrate correctly determined that the requested documents [**981] were not shielded by the work product doctrine, because the claims materials are needed to determine whether AHAC [**6] acted in bad faith.

However, [HN3](#) [↑] the supreme court holding in *Ruiz* is limited to the work product doctrine, and it does not address the attorney-client privilege. *Genovese v.*

²The Florida Supreme Court held that other documents may be discoverable. "[M]aterials prepared after the resolution of the underlying disputed matter and initiation of the bad faith action may be subject to production upon a showing of good cause or pursuant to an order of the court following an in-camera inspection." *Id. at 1130*.

[Provident Life & Accident Ins., 74 So. 3d 1064, 1066 \(Fla. 2011\)](#); see [State Farm Fla. Ins. v. Puig, 62 So. 3d 23, 26 \(Fla. 3d DCA 2011\)](#); [Liberty Mut. Fire Ins. v. Bennett, 939 So. 2d 1113, 1114 \(Fla. 4th DCA 2006\)](#); [XL Specialty Ins. v. Aircraft Holdings, LLC, 929 So. 2d 578, 582 \(Fla. 1st DCA 2006\)](#); see also [Boozer v. Stalley, 146 So. 3d 139, 145 \(Fla. 5th DCA 2014\)](#). [HN4](#) [↑](#)] In *Genovese*, the court held that attorney-client privileged communications are not discoverable in a first-party bad faith action. *Id.*

[HN5](#) [↑](#)] The attorney-client privilege differs from the work product doctrine. It is a privilege of confidentiality and is statutorily protected. [§ 90.502, Fla. Stat.](#) (2005). As noted by the court in *Genovese*:

[T]he attorney-client privilege, unlike the work-product doctrine, is not concerned with the litigation needs of the opposing party. See [Quarles & Brady, LLP v. Birdsall, 802 So. 2d 1205, 1206 \(Fla. 2d DCA 2002\)](#) ("[U]ndue hardship is not an exception, nor is disclosure permitted because the opposing party claims that the privileged information is necessary to prove their case.") (citation omitted); see also [West Bend Mutual Ins. Co. v. Higgins, 9 So. 3d 655, 658 \(Fla. 5th DCA 2009\)](#). Instead, the purpose of the privilege is to "encourage full and frank communication" between the attorney and the client. *Id. at 657* (quoting *Am. Tobacco v. State, 697 So. 2d 1249, 1252 (Fla. 4th DCA 1997)*). This significant goal of the privilege would be severely hampered if an insurer were aware that its communications with its attorney, which were not intended to be disclosed, could be revealed upon request by the insured. Moreover, [\[*7\]](#) we note that there is no exception provided under [section 90.502](#) that allows the discovery of attorney-client privileged communications where the requesting party has demonstrated need and undue hardship.

[74 So. 3d at 1068](#). Thus, "[HN6](#) [↑](#)]" 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." *Id.*

[HN7](#) [↑](#)] The supreme court noted that exceptions to the attorney-client privilege may arise in certain cases. For example, the court noted that "the discovery of attorney-client privileged communications between an insurer and its counsel is permitted where the insurer raises the advice of its counsel as a defense in the action and the communication is necessary to establish the defense." *Id. at 1069* (citing [Coates v. Akerman, Senterfitt & Eidson, P.A., 940 So. 2d 504, 510 \(Fla. 2d DCA 2006\)](#)). In another example, the supreme court stated that "cases may arise where an insurer has hired an attorney to both investigate the underlying claim and render legal advice. Thus, the [HN8](#) [↑](#)" materials requested by the opposing party may implicate both the work product doctrine and the attorney-client privilege." *Id. at 1068*. The court stated that when a claim of privilege is asserted, the trial court should conduct [\[*8\]](#) an in-camera hearing to determine if the materials at issue are truly protected by the attorney-client privilege. *Id.* "If the trial court determines that the investigation performed by the attorney resulted in the preparation of materials that are required to be disclosed [\[*982\]](#) pursuant to *Ruiz* and did not involve the rendering of legal advice, then that material is discoverable." *Id.*

In the present case, the general magistrate correctly followed the dictates of [Genovese](#) and ruled that AHAC's objection as to attorney-client privilege could not be resolved without an in-camera inspection. During the in-camera inspection, the general magistrate will have to determine whether the documents at issue meet one of the exceptions to the attorney-client privilege as discussed in *Genovese*.

Accordingly, the trial court did not depart from the essential requirements of law in approving the recommended order of the general magistrate, and we deny the petition for writ of certiorari.

Petition denied.

VILLANTI and BLACK, JJ., Concur.

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