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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

AVATAR PROPERTY & CASUALTY INSURANCE COMPANY, Petitioner, v. LEE JONES and ANETHETTE JONES, Respondents.	)	Case No. 2D19-243

Opinion filed March 13, 2020.

Petition for Writ of Certiorari to the Circuit Court for Pinellas County; Jack R. St. Arnold, Judge.

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

Melissa A. Giasi of Giasi Law, P.A., Tampa, for Respondents.

SMITH, Judge.

Petitioner, Avatar Property & Casualty Insurance Company (Avatar), seeks certiorari review of the lower court's order compelling production of its investigator's photographs, which Avatar objected to on the grounds of work product privilege. Avatar was sued by the Respondents, Lee and Anethette Jones (the

Joneses), for breach of contract after Avatar denied the Joneses' hurricane water damage claim. The subject photographs were taken by Avatar's investigator during a home inspection related to the Joneses' claim. After the Joneses moved to compel better responses to the discovery requests and sought to overrule Avatar's objections to the production of the photographs and to impose sanctions, the trial court ordered the production of the photographs finding Avatar had failed to file a privilege log. This was error, and the trial court departed from the essential requirements of the law. Accordingly, we grant the petition and quash that portion of the order related to the production of the photographs.

On April 28, 2016, the Joneses filed suit for breach of contract against Avatar under their homeowners' insurance policy after Avatar investigated and denied coverage for their hurricane water damage claim. The discovery dispute at issue here arose after the Joneses served Avatar on June 20, 2016, with a request for production of documents, which requested, among other things: any and all photographs taken by Avatar of the property. Avatar timely responded to the discovery request and objected to the request for photographs as follows:

> 6. Any and all photographs taken by the Insurance Company of the Property.
>
> RESPONSE:
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> Objection. Avatar objects to this request because it seeks documents protected by the work product doctrine. The request calls also for Avatar to produce documents from its claim file, underwriting file, and/or documents that relate to its internal claims handling procedures which is improper in a breach of contract action based on a first-party property insurance claim. See, e.g., State Farm Florida Ins. Co. v. Desai, 106 So. 3d 5 (Fla. 3d DCA 2013); Gen. Star Indem. Co. v. Atlantic Hospitality of Florida, LLC, 93 So. 3d 501 (Fla.

> 3d DCA 2012); State Farm Florida Ins. Co. v. Aloni, 101 So. 3d 412 (Fla. 4th DCA 2012); State Farm Florida Ins. Co. v. Ramirez, 86 So. 3d 1198 (Fla. 3d DCA 2012); Nationwide Ins. Co. of Florida v. Demmo, 57 So. 3d 982 (Fla. 2d DCA 2011); State Farm Fire & Cas. Co. v. Valido, 662 So. 2d 1012 (Fla. 3d DCA 1995); State Farm Florida Ins. Co. v. Gallmon, 835 So. 2d 389 (Fla. 2d DCA 2003). See also, State Farm Mut. Auto. Ins. Co. v. O'Hearn, 975 So. 2d 633 (Fla. 2d DCA 2008); U.S. Fire Ins. Co. v. Clearwater Oaks Bank, 421 So. 2d 783 (Fla. 2d DCA 1982); W. Am. Ins. Co. v. Neva Prods., Inc., 490 So. 2d 117 (Fla. 2d DCA 1986); Geico Gen. Ins. Co. v. Hoy, 927 So. 2d 122 (Fla. 2d DCA 2006); State Farm Mut. Ins. Co. v. Cook, 744 So. 2d 567 (Fla. 2d DCA 1999); Am. Bankers Ins. Co. of Florida v. Wheeler, 711 So. 2d 1347 (Fla. 5th DCA 1998); Michigan Millers Mut. Ins. Co. v. Bourke, 581 So. 2d 1368 (Fla. 2d DCA 1991); State Farm Fire & Cas. Co. v. Martin, 673 So. 2d 518 (Fla. 5th DCA 1996); and, Gen. Star Indem. Co. v. Anheuser-Busch Co., Inc., 741 So. 2d 1259 (Fla. 5th DCA 1999). Avatar objects further to this request because it is overly broad.

The Joneses, for reasons not apparent from the record, did not seek to compel the photographs until two years later, on September 6, 2018. A hearing was held on the Joneses' motion to compel on December 17, 2018. The issues, as recognized by the trial court, were not complex. However, as revealed by the transcript of the hearing on the motion to compel, a simple case soon became muddied as other discovery battles, also set for the same hearing, were hashed out. In addition to the production of the photographs, the Joneses sought the continued deposition of Avatar's corporate representative, which it originally started on October 12, 2017, but was forced to terminate due to what the Joneses' characterize as baseless objections by Avatar's counsel.[1]

[1]The record reveals that counsel for Avatar and counsel for the Joneses have a tumultuous history as adversaries apart from the instant case, and from our

At the hearing below, the trial judge showed frustration with both parties' counsel and their inability to get along and act professionally, identifying the case going forward as one of his "problem" cases worthy of case management conferences, face-to-face hearings, trial counsel appearances only, and appointment of a special master to sit in on future depositions. Moreover, at the time of the hearing—more than two and one-half years since the filing of the Joneses' complaint—Avatar had not yet filed an answer to the complaint, but had, nonetheless, filed not one but two motions for summary judgment, neither of which had been set for hearing. Based upon our review of the record, the trial judge was understandably displeased with the antics displayed by counsel for both parties.

The request for the photographs was the last issue addressed at the hearing. During the hearing, the Joneses agreed to limit the breadth of the requested photographs to those taken by Avatar's investigator during the home inspection, thereby resolving Avatar's overbreadth objection and leaving only Avatar's privilege objections for the trial court's determination. The court inquired whether Avatar planned on using the photographs at trial before it ruled on whether the photographs were discoverable. Coverage counsel appearing for Avatar, who was not familiar with the file, replied that he was not sure if they planned on using the photographs and argued that the photographs were protected by work-product privilege.

In response to the privilege argument of Avatar, the trial court ruled:

> THE COURT: Okay. I don't see any privilege log filed and this has been pending a while. So I'm going to overrule that. If you've got some photographs, I'd like you to share those

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review of the record and deposition transcripts that history has no doubt plagued this case.

> with the other side, and we'll see if we can't move this thing to some sort of resolution before --

The following day, the trial court issued its order, which provides in pertinent part:

> [The Joneses] withdrew their Motion to Compel Better Responses set forth in the first motion and limited their request to a production of photographs in the possession of [Avatar]. [Avatar] has objected to such production claiming privilege, but has filed no privilege log. As proffered to the Court, the photographs are of the alleged damage to [the Joneses'] home. [The Joneses] also [have] photographs, copies of which have been shared with [Avatar]. Considering all factors, the Court orders [Avatar] to produce the subject photographs no later than February 13, 2019.

Thereafter, Avatar filed the instant petition for writ of certiorari arguing the trial court departed from the essential requirements of law when it ordered production of the photographs because Avatar had not filed a privilege log.[2] We agree.

"Certiorari review 'is appropriate when a discovery order departs from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal.' " Harley Shipbuilding Corp. v. Fast Cats Ferry Serv., LLC, 820 So. 2d 445, 448 (Fla. 2d DCA 2002) (quoting Allstate Ins. Co. v. Langston, 655 So. 2d 91, 94 (Fla.

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[2]Avatar also argues the trial court departed from the essential requirements of the law in ordering production before issues of coverage and damages have been decided and that the Joneses failed to establish a need for the requested materials. We do not find merit in these arguments. At the time of the hearing on the motion to compel, no answer was filed. Therefore, whether coverage is at issue in the case cannot be determined by this court, and we cannot say that the trial court departed from the essential requirements of the law. Regarding whether the Joneses established a need for the requested materials, that issue is not yet ripe for review. See Publix Supermarkets, Inc. v. Johnson, 959 So. 2d 1274, 1275 (Fla 4th DCA 2007) (noting *after* materials prepared in anticipation of litigation are deemed not subject to discovery, an exception applies where the party seeking discovery shows a need of the materials and is unable without undue hardship to obtain the substantial equivalent of the material by other means).

1995)). "Orders granting discovery, including discovery of work product materials, are amenable to certiorari review because appeal after a final judgment in a case where discovery was improperly granted seldom provides adequate redress." McGarrah v. Bayfront Med. Ctr., Inc., 889 So. 2d 923, 925 (Fla. 2d DCA 2004) (citing Langston, 655 So. 2d at 94).

Florida Rule of Civil Procedure 1.280(b)(6) governs claims of privilege made in response to discovery requests and requires the creation of a privilege log when materials are sought to be shielded from production. The rule provides:

> When a party withholds information *otherwise discoverable* under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Fla. R. Civ. P. 1.280(b)(6) (emphasis added). The Fourth District Court of Appeal has explained the nuance of timing as it relates to the obligation of filing a privilege log:

> Before a written objection to a request for production of documents is ruled upon, the documents are not "otherwise discoverable" and thus the obligation to file a privilege log does not arise. Once the objection is ruled upon and the court determines what information is "otherwise discoverable," then the party must file a privilege log reciting which documents are privileged. If it is not done in that order, then the party faced with an unduly burdensome document request still has to obtain and review all the documents to determine which are privileged, even though the court may later limit the scope of the request if it was unduly burdensome.

Gosman v. Lizinski, 937 So. 2d 293, 296 (Fla. 4th DCA 2006); see also Allstate Indem. Co. v. Oser, 893 So. 2d 675, 677 (Fla. 1st DCA 2005) (noting Florida Rule of Civil

Procedure 1.280 "does not provide a time limit for filing the [privilege] log.").

In Morton Plant Hospital Ass'n, this court, relying upon Gosman, recognized that the obligation to file a privilege log does not arise until the information is determined to be "discoverable"—which is *after* the trial court has ruled on the party's non-privilege discovery objections. Morton Plant Hosp. Ass'n. v. Shahbas, 960 So. 2d 820, 826 (Fla. 2d DCA 2007); see also State Farm Fla. Ins. Co. v. Coburn, 136 So. 3d 711, 712 (Fla. 2d DCA 2014) (denying State Farm's petition for writ of certiorari related to the circuit court's order denying motion for protective order for failure to establish irreparable harm because State Farm's privilege claim had not matured where it had not yet filed a privilege log); Gosman, 937 So. 2d at 296 n.1 ("Obviously, if the sole objection to discovery were that it sought privileged documents, then compliance with Rule 1.280(b) would be required prior to any hearing on the objection as the information contained in the privilege log would be necessary to 'asses the applicability of the privilege or protection.' ").

In the instant case, the issue of the discoverability of the photographs was before the trial court on Avatar's objections, which included both its overbreadth objection to the request for "any and all" photographs and its privilege objections. Avatar's obligation to file a privilege log did not mature until the asserted non-privilege objection—overbreadth—was resolved. See Morton Plant Hosp. Ass'n, 960 So. 2d 820; Dade Truss Co. v. Beaty, 271 So. 3d 59, 64 (Fla. 3d DCA 2019); Gosman, 937 So. 2d at 296. This resolution did not emerge until during the course of the hearing when the Joneses narrowed the scope of the request, thereby resolving the overbreadth objection and implicating Avatar's privilege objections. In light of these events, the trial court

should have allowed Avatar a reasonable amount of time in which to file its privilege log. See DLJ Mortg. Capital, Inc. v. Fox, 112 So. 3d 644, 646 (Fla. 4th DCA 2013) ("The trial court should allow [p]etitioner to file a privilege log within a reasonable time after it rules on the non-privilege objections, so that an *in camera* inspection may be conducted.").

Accordingly, it follows that the trial court departed from the essential requirements of the law in compelling the production of the photographs based upon Avatar's failure to file a privilege log. For this reason, we grant Avatar's petition as to that portion of the trial court's order compelling production of the photographs taken by Avatar's investigator, with instructions that the trial court shall allow Avatar to file a privilege log within a reasonable time so that the privilege claims may be properly presented and considered by the trial court, and to allow the trial court to conduct an in-camera inspection of the photographs. See DLJ Mortg. Capital, 112 So. 3d at 646. In so granting the petition, we make no comment as to the merits of any of Avatar's privilege claims.

We sympathize with the trial court's frustration with the shenanigans displayed by both trial counsel in this case, and we note that this is not the only case that has come before this court wherein these two specific trial attorneys have displayed unprofessional behavior resulting in a waste of judicial resources and unnecessary expense to the parties.[3] The trial court rightfully earmarked this case as one of its "problem" cases and should not hesitate to exercise its inherent authority to sanction unprofessional behavior should case management efforts fail in the future. See

[3]See Rodriguez v. Avatar Prop. & Cas. Ins. Co., 45 Fla. L. Weekly D128 (Fla. 2d DCA Jan. 15, 2020).

Moakley v. Smallwood, 826 So. 2d 221, 227 (Fla. 2002).

Petition granted, order quashed in part, and the matter is remanded for further proceedings consistent with this opinion.

CASANUEVA and ROTHSTEIN-YOUAKIM, JJ., Concur.