

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE FARM FIRE AND CASUALTY  
COMPANY,  
Petitioner,

APPELLATE DIVISION (CIVIL): AY  
CASE NO: 2015CA004772  
L.T. NO.: 2014SC009027

v.

PREMIER DIAGNOSTIC IMAGING  
A/A/O SAMANTHA WASSON,  
Respondent.

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Opinion filed: **AUG 2 2016**

Petition for Writ of Certiorari from the County Court in and for Palm Beach County,  
Judge Frank Castor

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PER CURIAM.

This Petition for Writ of Certiorari arises from the trial court's March 30, 2015, order finding Petitioner, State Farm Fire and Casualty Company ("State Farm"), waived any privileges it had in its claim file by failing to file a proper privilege log. Because we hold that State Farm was not required to file a privilege log, we hold that the trial court departed from the essential requirements of the law and grant the petition.

**Background**

Premier Diagnostic Imaging ("Premier Diagnostic") provided medical services to Samantha Wasson ("Insured") after she was injured in an automobile accident. Insured had an

insurance policy with State Farm and assigned the benefits under this policy to Premier Diagnostic. Premier Diagnostic then instituted the underlying claim against State Farm seeking recovery of benefits under the policy.

As part of discovery, Premier Diagnostic requested State Farm produce “[t]he entire PIP claim file maintained by [State Farm] or anyone on [State Farm’s] behalf with regard to [Insured], cover to cover, including original jackets and everything contained in the file.” That request stated that it did not include any documents to which a genuine privilege was applicable. State Farm objected to this request stating it was “vague, overbroad, ambiguous, unduly burdensome, and not likely to lead to the discovery of admissible evidence.” State Farm also objected on the grounds that the request sought “privileged information prepared in anticipation of litigation or confidential communications between [itself and its counsel] constituting work product/attorney client privilege.” State Farm attached a privilege log to that objection that contained only minimal information. In response, Premier Diagnostic filed a Motion to Overrule [State Farm’s] Objections to [Premier Diagnostic’s] First Request for Production, Motion to Compel Better Responses, and Motion to Overrule Privilege Objections and Compel Production of Documents (“Motion to Overrule”). Premier Diagnostic also filed a Motion to Strike [State Farm’s] Privilege Log, Motion to Deem Privileges Waived, and Motion to Compel Documents Requested in [Premier Diagnostic] First Request to Produce to [State Farm] (“Motion to Strike Privilege Log”). In the Motion to Strike Privilege Log, Premier Diagnostic argued that State Farm failed to comply with Florida Rule of Civil Procedure 1.280(b)(6) and thus the trial court should strike the log and deem any privilege waived. It appears the trial court held a hearing on both the Motion to Overrule and the Motion to Strike Privilege Log. However, no transcript of any such hearing has been provided and nothing indicates the disposition of the

Motion to Overrule. The trial court did enter an order granting Premier Diagnostic's Motion to Strike Privilege Log stating "[State Farm's] privileges are waived and [State Farm] shall produce all documents requested in [Premier Diagnostic's] Request to Produce within thirty (30) days." This timely petition followed shortly thereafter.

### **Standard of Review**

A non-final order that is not appealable under Florida Rule of Civil Procedure 9.130 is reviewable as a petition for writ of certiorari when the order is "(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." *Bd. of Trs. of Internal Improvement Trust Fund v. Am. Educ. Enters., LLC*, 99 So. 3d 450, 454 (Fla. 2012) (quoting *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 822 (Fla. 2004)). The final two prongs of this test essentially ask whether the departure from essential requirements of the law cause "irreparable harm." *Id.* at 455.

### **Analysis and Legal Conclusions**

State Farm argues that the trial court departed from the essential requirements of the law in finding that it waived any privilege applicable to its claim file by failing to file a proper privilege log. In response Premier Diagnostic cites to *TIG Insurance Corp. of America v. Johnson*, 799 So. 2d 339 (Fla. 4th DCA 2001) and argues, as it did before the trial court, that the privilege log filed by State Farm fails to include all the information required under Florida Rule of Civil Procedure 1.280(b)(6) and as such State Farm waived any privilege it may have had in its claim file.

Rule 1.280(b)(6) states:

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.

The level of specificity required by this rule is unclear, though the Fourth District Court of Appeal relying on analogous federal case law and local rules appears to require, at a minimum, a proper privilege log include a description of the type of document, the general subject matter of the document, the date of the document, and any other information sufficient to identify the document for possible subpoena. *TIG Ins. Corp. of Am.*, 799 So. 2d at 341. The failure to file a proper privilege log may result in a waiver of any applicable privilege. *Id.*

This, however, is only true when the party claiming the privilege is required to file a privilege log. *Nevin v. Palm Beach Cnty. Sch. Bd.*, 958 So. 2d 1003, 1008 (Fla. 1st DCA 2007). If the party claiming a privilege is not required to file a privilege log, it is a departure from the essential requirements of the law for a trial court to find waiver of applicable privileges for the failure to do so. *Gosman v. Luzinski*, 937 So. 2d 293, 296 (Fla. 4th DCA 2006); *DLJ Mortg. Capital, Inc. v. Fox*, 112 So. 3d 644, 645 (Fla. 4th DCA 2013). For example, when a party objects to production of certain documents on privilege grounds in addition to other grounds, that party is not required to file a privilege log until the trial court resolves the non-privilege objections and it is a departure from the essential requirements of the law to find a waiver of applicable privilege for the failure to do so. *Gosman*, 937 So. 2d at 296. Similarly, when a party is objecting to the production of a category of documents, because for example they are protected as work product or by attorney-client privilege, there is no need to file a privilege log and it is a departure from the essential requirements of the law to find a waiver of these privileges for the failure to do so. *Fox*, 112 So. 3d at 645. It is for these reasons we hold the trial court departed from the essential requirements of the law.

**A. State Farm was not required to file a privilege log until the trial court resolved its non-privilege based objections.**

State Farm not only objected to the production of the claim file on privilege grounds, but also because the operative request was “vague, overbroad, ambiguous, unduly burdensome, and not likely to lead to the discovery of admissible evidence.” Thus, despite the fact that it filed a privilege log, it was under no requirement to do so until the trial court resolved these non-privilege based objections. *See Gosman*, 937 So. 2d at 296. It is unclear whether these non-privilege based objections were ruled upon prior to the trial court finding State Farm waived its privileges by failing to file a privilege log. If they were not addressed prior to that finding, the trial court departed from the essential requirements of the law by finding a waiver in this circumstance. *Gosman*, 937 So. 2d at 296.

**B. State Farm was not required to file a privilege log because its objection was categorical rather than document specific.**

In any event, even if the trial court did rule on the non-privilege based objections prior to finding State Farm waived any privileges it may have in its claim file by failing to file a proper privilege log, the trial court nevertheless departed from the essential requirements of the law because State Farm was not required to file a privilege log for its categorical privilege objection. As discussed above, when a privilege objection is categorical rather than document specific a party is not required to file a privilege log. *See Fox*, 112 So. 3d at 645, *see also Nevin*, 958 So. 2d at 1008. Here, State Farm objected to the production of an entire category of materials—those materials contained in the claim file and thus protected as work product or by the attorney-client privilege. Such a categorical objection does not require a privilege log. *Fox*, 112 So. 3d at 645. Because it was not even required to file a privilege log, the fact that State Farm may have filed one that failed to contain all of the information required under Rule 1.280(b)(6) should not

result in the waiver of any privilege it may hold. Accordingly, irrespective of whether the trial court ruled on the non-privilege based objections prior to finding State Farm waived its privilege by failing to file a proper privilege log, it was nevertheless a departure from the essential requirements of the law for the trial court to find that State Farm waived any privilege applicable to the claim file because it was not required to file a privilege log for its categorical objection.

We note separately that discovery of the entire claim file is prohibited in this type of action. *State Farm Fla. Ins. Co. v. Ramirez*, 86 So. 3d 1198, 1198 (Fla. 3d DCA 2012). Because there is no bad faith claim and coverage is still in dispute, the claim file is broadly protected from discovery. *See Seminole Cas. Ins. Co. v. Mastrominas*, 6 So. 3d 1256, 1258 (Fla. 2d DCA 2009) (noting “[a] trial court departs from the essential requirements of the law in compelling disclosure of the contents of an insurer’s claim file when the issue of coverage is in dispute and has not been resolved”). District Courts of Appeal across Florida agree on this point. *See State Farm Fla. Ins. Co. v. Aloni*, 101 So. 3d 412, 414 (Fla. 4th DCA 2012) (holding a trial court departed from the essential requirements of the law by requiring an insurer to produce its claims file when coverage was in dispute and had not been resolved); *Superior Ins. Co. v. Holden*, 642 So. 2d 1139, 1140 (Fla. 4th DCA 1994) (same); *Nationwide Ins. Co. of Fla. v. Demmo*, 57 So. 3d 982, 984 (Fla. 2d DCA 2011) (same); *Scottsdale Ins. Co. v. Camara De Comercio Latino-Americana de Los Estado Unidos, Inc.*, 813 So. 2d 250, 251 (Fla. 3d DCA 2002) (same). Simply put, generally speaking Premier Diagnostic is not entitled to discovery of the claim file in this action because coverage is still in dispute and there is no allegation of bad faith. *Ramirez*, 86 So. 3d at 1198.

Accordingly, the Petition for Writ of Certiorari is **GRANTED** and the trial court’s March 30, 2015 order is **QUASHED**. Petitioner’s Motion for Appellate Attorney’s Fees is **GRANTED**

and the trial court is to determine a reasonable amount of fees. The award of attorney's fees is conditioned on the trial court's determination that the proposal for settlement was properly made and submitted and that Petitioner is otherwise entitled to fees under section 768.79, Florida Statutes and Florida Rule of Civil Procedure 1.442.

BLANC, CARACUZZO, and OFTEDAL, JJ., concur.

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Respondent.




Petition filed: April 28, 2015

DATE OF PANEL: JUNE 21, 2016

PANEL JUDGES: BLANC, CARACUZZO, OFTEDAL

GRANTED/DENIED/OTHER: PETITION DENIED

PER CURIAM OPINION/DECISION BY: PER CURIAM

DATE CONCURRING:	)	DISSENTING:	)	CONCURRING SPECIALLY:	)
	)	With/Without Opinion	)	With/Without Opinion	)
<u> 7/18/16</u>	)		)		)
J. )	)	J. )	)	J. )	)
<u>Cheryl Caracuzzo</u>	)		)		)
<u> 7/25/16</u>	)	J. )	)	J. )	)
<u> 8/2/16</u>	)		)		)
J. )	)	J. )	)	J. )	)