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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

SLOSSBERG FAMILY CHIROPRACTIC CENTER, INC., a/a/o KATIE BARNETTE,
Respondent.
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APPELLATE DIVISION (CIVIL): AY
CASE NO.: 2014CA003304
L.T. NO.: 2012SC015538

Opinion filed: AUG 6 2015

Petition for Writ of Certiorari from the County Court in and for Palm Beach County, Judge Reginald R. Corlew

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PER CURIAM.

The instant case involves a petition for writ of certiorari seeking relief from a trial court order compelling discovery. Petitioner, State Farm Mutual Automobile Insurance Co. ("State Farm"), argues the discovery ordered is overly burdensome and otherwise requires discovery of privileged materials. For the reasons set forth below, we grant the petition.

Background

Respondent, Slossberg Family Chiropractic Center, Inc. ("Slossberg"), served as chiropractor for Katie Barnette ("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 Slossberg. State Farm paid Slossberg for services rendered, but Slossberg alleges it has not been

paid the full value of the benefit it conferred. Slossberg instituted a claim against State Farm seeking recovery of the difference between the amount paid and the amount it argues it is owed.

As part of discovery regarding this claim, Slossberg filed Plaintiff's Integrated Discovery with Request for Admissions, Interrogatories, and Request to Produce ("Request"). This Request sought, *inter alia*, certain forms received by State Farm during the six months before and after Insured's procedure. State Farm objected to production of these forms on the grounds of undue burden and privilege. The trial court heard argument on the Request, overruled State Farm's objections, and required disclosure of the above materials by order dated February 18, 2014.

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 where 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 Trustees of Internal Improvement Trust Fund v. Am. Educ. Enters.*, 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 essential requirements of the law cause "irreparable harm." *Id.* at 455.

Analysis and Legal Conclusions

State Farm argues the trial court has failed to observe the essential requirements of the law for two reasons: (1) the order requires State Farm to produce materials it would be unduly burdensome for State Farm to produce and (2) the order requires disclosure of privileged materials.

A. Whether the Trial Court Departed from the Essential Requirements of Law by Ordering Unduly Burdensome Discovery.

State Farm argues first that production of the requested materials would cause it an undue burden. In support of this argument, State Farm presented the trial court with the affidavit of Joy Montoya. Montoya's affidavit states it would take thousands of employee-hours to produce the information requested based on, *inter alia*, a "random sample" of ten such documents. Slossberg did not present any evidence challenging this affidavit, but instead stated it needs only a sampling of fifteen of the requested forms and not each and every form as laid out in the Request. The trial court rejected State Farm's argument "even in light of the affidavit" and noted "if it's a cost issue than [sic] we can discuss costs at a later date if these numbers turn out to be substantiated." State Farm argues the burden caused by the request is unfair and requires the trial court's order be quashed.

When reviewing a trial court's discovery order for its resultant burden, the key concern is "whether there is any showing of irreparable harm and thus a lack of appellate remedies . . . ." *Topp Telecom, Inc. v. Atkins*, 763 So. 2d 1197, 1199 (Fla. 4th DCA 2000). When evidence of the burden caused by a discovery order is uncontroverted, "it is difficult to understand how, even if the order is erroneous, it would rise to the level of irreparable harm." *Id.* To support such a finding, a petitioner would need to show the discovery order "would effectually ruin the objector's business" as opposed to "simply require unwarranted effort and expense." *Id.* at 1200. This is because "[a]n erroneous order compelling discovery when the cost and effort to do so is burdensome but not destructive is simply not 'sufficiently egregious or fundamental to merit the extra review and safeguard provided by certiorari.'" *Id.* at 1201 (quoting *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995)).

State Farm's first argument is rejected. State Farm does not allege the trial court's order would effectually ruin its business. Instead, State Farm argues the trial court's order requires an unwarranted amount of hours and expense to produce the requested materials. *Topp Telecom* specifically states that such a claim is insufficient to cause irreparable harm justifying certiorari relief. 763 So. 2d at 1200. This is particularly accurate in the instant case, where Slossberg has agreed to limit its requested discovery to a sampling of fifteen of the requested documents. With the understanding that Slossberg seeks only fifteen of the requested documents, State Farm's arguments in favor of certiorari are rejected. As noted by the trial court, State Farm remains free to revisit this issue below should cost of producing this sample become overly burdensome.

B. Whether the Trial Court Departed from the Essential Requirements of Law by Requiring Disclosure of Purportedly Privileged Materials.

State Farm also argues the ordered discovery requires turning over privileged materials. State Farm specifically identifies the documents as protected as work product[1] and under section 456.057(7)(a)(3),[2] Florida Statutes. The trial court heard argument as to Slossberg's Request, but in the transcript of the hearing the only oral argument presented by State Farm was regarding burden. The trial court's order only stated State Farm's objections were overruled. It is unclear whether the trial court considered and determined the materials were not privileged as work product or as confidential patient medical records.

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[1] State Farm argues the information is privileged under a "claims file privilege" by which any item found within an insured's "claim file" is protected from discovery. State Farm misstates the applicable privilege, as the "claims file" privilege is actually an articulation of the work product doctrine. *See State Farm Fla. Ins. Co. v. Aloni*, 101 So. 3d 412, 414 (noting when faced with discovery of claims file materials, a trial court may conduct an in camera review to determine whether the materials constitute "work product"). Therefore, the operative question is whether the material is protected as work product, not whether the material is merely located in a claims file.

[2] Section 456.057(7)(a)(3) protects against disclosure of confidential patient medical records.

"Discovery orders that require the disclosure of claimed confidential information are reviewed with greater caution than those that are simply burdensome or costly due to overbreadth." *Rousso v. Hannon*, 146 So. 3d 66, 71 (Fla. 3d DCA 2014). Disclosure of so-called "cat out of the bag" material constitutes a departure from the essential requirements of law that cannot be remedied by direct appeal. *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995). This is because "cat out of the bag" material by its very content "could be used to injure another person or party outside the context of litigation." *Cooper Tire & Rubber Co. v. Cabrera*, 112 So. 3d 731, 733 (Fla. 3d DCA 2013). In *Superior Insurance Co. v. Holden*, the Fourth District Court of Appeal determined that discovery of work product was inappropriate where coverage was not at issue. 642 So. 2d 1139, 1140 (Fla. 4th DCA 1994). The Fourth District noted, however, that the petitioner remained free to move for an in camera inspection to determine whether the purportedly privileged materials actually met the definition of work product. *Id.*

Without a more specific finding by the trial court, certiorari is appropriate to avoid disclosure of potentially privileged materials. *See State Farm Mut. Auto. Ins. Co. v. Ortho Fla., LLL*, 22 Fla. L. Weekly Supp. 892a (Fla. 15th Cir. Ct. 2015). The trial court should be given the opportunity to hold an in camera inspection to determine whether the requested materials are indeed work product or protected medical records. If the trial court determines these privileges apply, discovery may be inappropriate and if not, discovery could proceed. Without such a finding, however, there exists a possibility of disclosure of "cat out of the bag" materials. A determination of whether the requested materials actually fall under the definition of work product or confidential medical records should occur before discovery is allowed to proceed. Accordingly, the petition must be granted to afford the trial court an opportunity to conduct an in

camera inspection and specifically determine whether these privileges apply.

The Petition for Writ of Certiorari is **GRANTED** and the case **REMANDED** with instructions to conduct an in camera inspection of the purportedly protected materials. State Farm's Motion for Appellate Attorney's Fees is **GRANTED** conditioned upon the trial court's determination that the requirements of section 768.79, Florida Statutes, are satisfied following entry of final judgment.

G. KEYSER, BARKDULL, and SMALL, JJ., concur.