NOT FINAL UNTIL TIME EXPIRES
TO FILE MOTION FOR REHEARING,
AND IF FILED, DISPOSED OF.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR MIAMI-DADE COUNTY,
FLORIDA

APPELLATE DIVISION

CASE NO. 12-031 AP

LOWER COURT CASE NO.
09-5571 CC 25 (04)

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
Petitioner,

vs.

SOUTH MIAMI HEALTH CENTER, INC.,
Respondent.
_____/

Opinion filed October 15, 2013.

An appeal from a decision of the County Court, Civil Division, Miami-Dade County.

Nancy W. Gregoire, Esq., Kirschbaum, Birnbaum, Lippman & Gregoire, PLLC, and Matthew D. Hellman, Esq., Matt Hellman, P.A., for the Petitioner.

George A. David, Esq., for the Respondent.

Before RODNEY SMITH, MILTON HIRSCH, and THOMAS REBULL, JJ.

REBULL, J.

The issue presented by this petition for writ of certiorari is whether five sheets of paper which contain notes of State Farm's insurance adjuster are protected from discovery under the work product privilege. Because we determine that the order requiring that these documents be produced departs from the essential requirements of law and will cause irreparable harm which

cannot be remedied on appeal following a final judgment, we grant the petition and quash the order dated December 16, 2011. *See State Farm Florida Ins. Co. v. Desai*, 106 So. 3d 5 (Fla. 3d DCA 2013); *State Farm Florida Ins. Co. v. Ramirez*, 86 So. 3d 1198 (Fla. 3d DCA 2012).[1]

The record reflects that Vanessa Castillo was involved in a car accident on July 7, 2008. She began treatment with South Miami Health Center on July 23, 2008 for injuries she alleges she sustained in the accident. On July 29, 2008, Ms. Castillo or South Miami Health Center, or both, first notified State Farm of the accident and the claim for PIP benefits. The documents at issue are the State Farm adjuster's notes from July 29, 2008 up to and including September 17, 2008.

These notes were part of State Farm's claims file. In its response brief in this appellate proceeding, South Miami Health Center notes that "State Farm produced all documents out of its claims file, except for the ones it deemed work product privilege. State Farm produced close to 526 pages from its claims file in response to SMHC'S Request for Productions." According to South Miami Health Center, "State Farm only withheld 17 pages from its claims file . . . ." This petition, however, only concerns the five sheets of paper to which we referred at the outset.

The trial court reviewed in camera the adjuster's notes at issue. In response to our order, State Farm filed those same documents under seal with this Court so that we may properly evaluate the claim of work product privilege. The trial court did not make any findings of fact. We are presented with the same materials which the trial court had before it when it made its decision. Consequently, since we are in the same position as the trial court, our review of the applicability of the work product privilege to the documents at issue is de novo.

Twice recently the Third District Court of Appeal has granted petitions for writs of certiorari and applied Florida law which prohibits discovery of claims file documents and claims handling materials where a breach of contract or coverage issue is still pending and the case does not involve a bad faith claim. *See State Farm Florida Ins. Co. v. Desai*, 106 So. 3d 5 (Fla. 3d

[1] We reject without further comment South Miami Health Center's remaining arguments, including its arguments that this petition is untimely, that State Farm failed to present a sufficient record of the proceedings before the trial court, that State Farm admitted that coverage is not an issue, and that State Farm obtained from the trial court the relief it requested.

DCA 2013); *State Farm Florida Ins. Co. v. Ramirez*, 86 So. 3d 1198 (Fla. 3d DCA 2012). This is in keeping with the law as set forth by the Florida Supreme Court in *Allstate Indemnity Company v. Ruiz*, 899 So. 2d 1121 (Fla. 2005). Indeed, in an appellate proceeding involving a bad faith action, the Third District Court of Appeal characterized the law as follows: "In *Ruiz*, the Florida Supreme Court held that in the bad-faith context, the **normally automatic work product protection afforded to certain claim file documents will not bar their production**. *State Farm Florida Ins. Co. v. Puig*, 62 So. 3d 23, 26 (Fla. 3d DCA 2011)(emphasis added); *see generally State Farm Florida Ins. Co. v. Gallmon*, 835 So. 2d 389 (Fla. 2d DCA 2003)(adjuster notes included in claims file materials protected by work product privilege); *Federal Ins. Co. v. Hall*, 708 So. 2d 976 (Fla. 3d DCA 1998)(granting cert. petition for adjuster notes as work product).

This case is not in the bad-faith context. Breach of contract or coverage, or both, are still in dispute. So, the "normally automatic work product protection" applies. This is plainly not a case where an insurer has simply asserted a blanket work product privilege for all documents which may be contained within a claims file. Nor is it a case where it is alleged that an insurer has placed a document which is otherwise not privileged in a claims file in an attempt to inappropriately cloak the document with a privilege. We have reviewed the specific documents at issue in light of the record as a whole, and hold that they are entitled to work product protection. In so doing, we are persuaded by the following observations by Professor Ehrhardt with regard to the law on the work product privilege:

> The work product privilege only applies to materials obtained or developed in anticipation of litigation or for trial. However, there is no clear indication in the appellate decisions of when litigation is "anticipated" so that the work product privilege is applicable. For example, when an investigation follows a serious accident, there is disagreement whether the materials were assembled in anticipation if litigation has not been threatened.
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> The Supreme Court of the United States has implied that the "anticipation of litigation" requirement should be broadly construed. In Upjohn Co. v. United States, the court, in discussing work product as it applies to materials based upon oral statements of witnesses, indicated its belief that the work product doctrine applied to materials gathered during a corporation's internal investigation of possible wrongdoing. Thus, although there was no immediate threat of litigation, the possibility of governmental or private action was sufficient to invoke the privilege. **In today's litigious society, a broad definition of "anticipation of**

litigation," which appears to be the view adopted by a majority of the Florida decisions, is appropriate.

1 Fla. Prac., Evidence § 502.9 (2013 ed.)(emphasis added)(internal footnotes omitted).

For all of these reasons, we grant the petition for writ of certiorari and quash the December 16, 2011 order mandating that the documents at issue be produced. In addition, the Petitioner's Motion for Appellate Attorney's Fees is granted, and the Respondent's Motion for Appellate Attorney's Fees is denied. We remand to the trial court for proceedings consistent with this opinion.

SMITH and HIRSCH, JJ., concur.