

IN THE SUPREME COURT OF FLORIDA

Case No.: SC2023-0664

PEOPLES GAS SYSTEM,

Petitioner,

vs.

UNIVERSAL PROPERTY & CASUALTY
INSURANCE COMPANY, *et al.*,

Respondents

On review from the Fourth District Court of Appeal
West Palm Beach, Florida

**RESPONDENTS' RESPONSE TO PETITIONER'S MOTION TO
REVIEW ORDER DENYING REQUEST TO STAY ISSUANCE OF
MANDATE AND FOR ENTRY OF STAY PENDING APPEAL**

Respondents¹ file this response to Petitioner Peoples Gas System's Motion to Review Order Denying Request to Stay Issuance of Mandate and for Entry of Stay Pending Appeal.

¹ The Respondents filing this response are Abby Bryan, Dominic Dattilio, Terri Dattilio, Jassodra Dhanpat, Fernando Feijoo, Amanda Farrar, Blake Jackson, Carolina Luna, Genevieve Manzoni, Sheldin Peterson, Carolina Sassi, Kara Schroeder, Robert Shanley, Jill Solich, Michael Stewart, Inez Slijngard, Toan Luong, Tomeika Johnson, Jean Bellot, Anjelica Salazar, Ryan Sewell, Penny Green, Ana Perez, Hemali Patel, and Tania Lance.

SUMMARY OF RESPONDENTS' OPPOSITION

The Fourth District acted within its discretion in denying Peoples Gas's motion to stay mandate. The Fourth District denied the petition for writ of certiorari in a per curiam denial, then issued a short order denying Peoples Gas's motion for rehearing, rehearing en banc, certification, or in the alternative, a written opinion.

There is not even an arguable basis for this Court's jurisdiction, there is no likelihood that this Court will reverse long-standing law governing the work product doctrine, and there is no harm to Petitioner in complying with a discovery order requiring ordinary deposition testimony from a non-lawyer corporate employee.

ARGUMENT

This Court should deny Peoples Gas's motion for review. The district courts of appeal are vested "with all power and authority necessary for carrying into complete execution all of its judgments, decrees, orders, and determinations in the matters before it agreeable to the usage and principles of law." § 35.08, Fla. Stat. The district court of appeal's power to expedite or delay issuance of its mandate is made express by Rule 9.340. Fla. R. App. P. 9.340, Comm. Notes, 1977 Amend. Thus, the decision to grant or deny a motion to stay

issuance of a mandate is within the district court's discretion, and this Court should overrule that decision only if it determines that the panel abused its discretion. *See generally Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) ("Discretion . . . is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the [lower] court."). The Fourth District did not abuse its discretion in denying Peoples Gas's motion to stay issuance of the mandate.

A district court of appeal's decisions are presumptively final, and it should stay issuance of its mandate only when doing so is "essential." *State ex rel. Price v. McCord*, 380 So. 2d 1037, 1039 (Fla. 1980). The factors to be considered by the district court are the likelihood that this Court will accept jurisdiction, the ultimate likelihood of success on the merits, and the likelihood of harm if the mandate is not stayed. *Id.* Peoples Gas did not establish any of these factors in its motion to stay before the Fourth District, and it has not done so in its motion for review here.

There is no reasonable likelihood that this Court will accept jurisdiction, and the likelihood of Peoples Gas prevailing on the

merits is even lower. The decision in this case is an unelaborated per curiam denial of Peoples Gas's petition, which cites *Grinnell Corp. v. Palms 2100 Ocean Blvd., Ltd.*, 924 So. 2d 887 (Fla. 4th DCA 2006), a decision which this Court has never disturbed. This Court has held that it "does not have jurisdiction to review per curiam decisions of the district courts of appeal that merely affirm with citations to cases not pending review in this Court." *Gandy v. State*, 846 So. 2d 1141, 1144 (Fla. 2003).

Peoples Gas cannot base its jurisdictional argument on the decision denying its petition, so it instead claims there is potential conflict jurisdiction based on the order denying the motion for rehearing, rehearing *en banc*, certification or, in the alternative, written opinion. Unpublished decisions can, rarely, serve as the basis for discretionary conflict jurisdiction. See *Sutton v. State*, 975 So. 2d 1073, 1074 n.1 (Fla. 2008). But a short order denying a motion for written opinion (among the other relief Peoples Gas requested) does not satisfy any definition of "decision" under article V, section 3(b)(3). The Fourth District's order is not like the one in *Sutton*, in which the district court decided that the denial of a writ of prohibition was reviewable only by certiorari. In that case, because of how the

unpublished order treated the denial of a writ, it conflicted with decisions of other district courts that reviewed such denials through final appeals. Here, the Fourth District's order was a discretionary act that did not conflict with any other court's decisions.

The order denying Peoples Gas's post-opinion motion cannot serve as a basis for conflict jurisdiction because it does not expressly address any question of law by discussing the underlying facts of this case and applying legal principles to those facts. "[I]n those cases where the district court has not explicitly identified a conflicting decision, it is necessary for the district court *to have included some facts in its decision* so that the question of law addressed by the district court in its decision can be discerned by the Court." *Gandy*, 846 So. 2d at 1144 (emphasis in original). There are no facts in the order from which this Court could discern any conflict.

The only fact discussed in the Fourth District's order was that the trial court's order required production of factual information but prohibited inquiry into protected fact work product:

In this case, the trial court properly bifurcated the issues permitting [Respondents] to inquire into the facts but prohibiting inquiry into the refining, synthesizing, or use of the information gathered at the request of counsel.

That is the entire recitation of facts in the Fourth District's order, and it gives no indication that the court addressed a question of law in a way that conflicted with any decision of this Court or other district courts. To the contrary, that description of the order shows that it was entirely correct and in harmony with all courts' treatment of the work product doctrine.

The order continues with one statement of a legal principle, with citations:

“[T]he work product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts.” *Grinnell Corp. v. Palms 2100 Ocean Blvd., Ltd.*, 924 So. 2d 887, 894 (Fla. 4th DCA 2006) (quoting *Ford v. Philips Elecs. Instruments Co.*, 82 F.R.D. 359, 360 (E.D. Pa.1979)).

People Gas claims this is a holding that conflicts with other decisions. But it is merely a quotation from *Grinnell*, which also would not support discretionary conflict jurisdiction. That quotation recites an existing rule of law which is entirely consistent with decisions of all Florida courts.

Peoples Gas cites multiple cases for the proposition that the work product doctrine protects from discovery the fact work product developed by counsel's investigations. (Motion, pp. 4-5.) That is

certainly true, but the statement of law in the Fourth District’s order does not contradict the work product doctrine in any way. The quotation in *Grinnell*, repeated in the order, notes that facts themselves do not become privileged from discovery merely because a party’s attorney has learned those facts. The decisions that Peoples Gas cites in its Motion are not to the contrary.

The Fourth District’s order and the cases cited by Peoples Gas all apply the same rule of law: facts are not protected from discovery, but attorney work product is. That courts have applied this rule differently to different facts is no surprise—that is the nature of the law. Conflict jurisdiction cannot be invoked simply because a court reaches a different conclusion based on different facts. *See Trinidad v. Fla. Penn Ins. Co.*, 121 So.3d 433, 443 (Fla. 2013) (Polston, J., dissenting) (dissenting based on a lack of jurisdiction because the alleged conflict case “involves different facts and answers a different legal question than the decision on review.”)

Because there is no conflict between the Fourth District’s order and decisions of other Florida appellate courts, there is no likelihood that this Court will exercise discretionary conflict jurisdiction.

Furthermore, there is also little chance Peoples Gas would

ultimately succeed on the merits, even if this Court accepted jurisdiction. For Peoples Gas to succeed, this Court would have to depart from the plain text of Rule 1.280(b), Florida Rules of Civil Procedure, and consistent decisional law from all Florida courts, as well as federal courts applying the substantially identical Federal Rule of Civil Procedure 26(b)(3). This is unlikely. *See Strand v. Escambia Cnty.*, 992 So. 2d 150, 159 (Fla. 2008) (“[T]he presumption in favor of precedent is strong.”); *State v. Poole*, 297 So.3d 487, 506 (Fla. 2020) (“It is no small matter for one Court to conclude that a predecessor Court has clearly erred.”).

This Court has been appropriately reluctant to use certiorari review as a vehicle to make changes in procedural law. *See Suzuki Motor Corp. v. Winckler*, No. SC19-1998, 2021 WL 3778726, at *1 (Fla. Aug. 26, 2021) (discharging jurisdiction over certified question in certiorari proceeding on whether to extend the apex doctrine to non-governmental corporate officers); *In re Amendment to Florida Rule of Civil Procedure 1.280*, 324 So.3d 459, 460 (Fla. 2021) (addressing extension of the apex doctrine by rule change, noting discharge of jurisdiction in *Suzuki Motor Corp. v. Winckler*). If there is to be a sea change in how Florida courts apply the work product

doctrine, that should happen through rule change rather than by reviewing an unpublished order denying rehearing in a certiorari proceeding.

Peoples Gas has also not shown that it will suffer any harm by the denial of the stay. It argues that the Fourth District has now eviscerated the work product doctrine when in fact, the court exercised its discretion to deny a writ of certiorari where the trial court required disclosure of mere facts, not of attorney work product. As the majority recognized, the order properly separated facts from fact work product, and prohibited inquiry into the latter. There is no harm in disclosing facts that are ordinarily discoverable in civil litigation.

Accordingly, the Fourth District did not abuse its discretion in denying Peoples Gas's motion to stay the mandate, and Peoples Gas's motion for review here should be denied.

Finally, this Court should not be swayed by Peoples Gas's argument that, absent a stay, parties will be invited to set depositions of opposing counsel. No reasonable person would read the Fourth District's unpublished order, or the *Grinnell* decision that it cites, and conclude that it is appropriate to set depositions of opposing counsel.

That quotation in the order comes from federal case law, and the *Grinnell* opinion itself noted that federal courts had “consistently held” so since *Hickman v. Taylor*, 329 U.S. 495 (1947). The concurrence noted that this Court has “invariably rel[ied] on federal law, specifically *Hickman*” and its progeny. *Grinnell*, 924 So. 2d at 896 (Klein, J., concurring specially). In the decades since courts throughout the country have cited this rule, it has not been read to authorize the depositions of counsel in ordinary civil litigation. See 8 Federal Practice and Procedure (Wright & Miller) § 2023 (3d ed.) (after *Hickman* “the courts [have] consistently held that the work product concept furnished no shield against discovery ... of the facts that the adverse party’s lawyer has learned ... although courts have looked with mounting suspicion on efforts to depose opposing counsel.”) Respondents wish to assure this Court that Peoples Gas’s fear is unfounded, and there is no danger that its counsel will be asked to give deposition testimony absent some entirely unforeseeable turn of events.

WHEREFORE, Respondents respectfully request that this Court deny Peoples Gas System’s Motion to Review Order Denying Request to Stay Issuance of Mandate and for Entry of Stay Pending Appeal.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list by email on June 15, 2023.

BURLINGTON & ROCKENBACH, P.A.
Courthouse Commons/Suite 350
444 West Railroad Avenue
West Palm Beach, FL 33401
(561) 721-0400
Attorneys for listed Respondents
pmb@FLAppellateLaw.com
jvm@FLAppellateLaw.com
kbt@FLAppellateLaw.com

By: /s/ Jeffrey V. Mansell
JEFFREY V. MANSELL
Florida Bar No. 112072

/kbt

SERVICE LIST

In Re: Plantation Explosion Cases (Pertains to all cases)

Case No. SC2023-0664

Samuel A. Coffey, Esq.
Sean C. Goldstein, Esq.
COFFEY TRIAL LAW
500 N.E. Fourth Street, #100
Ft. Lauderdale, Florida 33301
pleadings@ct-law.com
sam@ct-law.com
sean@ct-law.com
marissa@ct-law.com

Bradley Winston, Esq.
Beth Feder, Esq.
WINSTON LAW FIRM
2924 Davie Road, #201
Davie, FL 33314
bwinston@winstonlaw.com
bfeder@winstonlaw.com
lwheaton@winstonlaw.com

Wayne S. Koppel
KOPPEL & ASSOCIATES, P.A.
817 South University Drive, #100
Plantation, Florida 33324
service@koppellaw.net
wayne@koppellaw.net
cheree@koppellaw.net

Zachary Landes, Esq.
Zachary J. Brewer, Esq.
BARTLETT LLP
800 E. Cypress Creek Road, #400
Fort Lauderdale, FL 33334
Zach.landes@bartlettllp.com
Zachary.brewer@bartlettllp.com
Pauline.ianno@bartlettllp.com

Thomas H. Leeder, Esq.
Andrew R. Smith, Esq.
LEEDER LAW
8551 W. Sunrise Blvd., #202
Plantation, Florida 33322
pleadings@leederlaw.com
thomas@leederlaw.com
andrew@leederlaw.com

Robert J. Borrello, Esq.
Herman J. Russomanno, Esq.
Christopher S. Russomanno, Esq.
RUSSOMANNO & BORRELLO, P.A.
150 W. Flagler Street, #2800
Miami, Florida 33130
rborrello@russomanno.com
herman2@russomanno.com
chris@russomanno.com
gpalazzotto@russomanno.com

Michael T. Lewenz, Esq.
Steffani M. Russo, Esq.
ZEBERSKY PAYNE SHAW
LEWENZ, LLP
110 S.E. 6th Street, #2900
Ft. Lauderdale, Florida 33301
mlewenz@zpllp.com
srusso@zpllp.com
iechevarria@zpllp.com

Kevin Mulet, Esq.
Miriam Fresco Agrait, Esq.
Rubenstein Law, P.A.
9130 S. Dadeland Blvd.
Miami, Florida 33156
eservice@rubensteinlaw.com
kevin@rubensteinlaw.com
mfagrait@rubensteinlaw.com
lbanciella@rubensteinlaw.com

Timothy C. Conley, Esq.
Adam D. Griffin, Esq.
Geneva K. Hernandez, Esq.
LAU, LANE, PIEPER,
CONLEY & MCCREADIE, P.A.
100 Ashley Drive, #1700
Tampa, FL 33602
tconley@laulane.com
agriffin@laulane.com
ghernandez@laulane.com
dnh@laulane.com

Karen B. Parker, Esq.
KAREN B. PARKER, P.A.
9100 S. Dadeland Blvd.
Datran One, #514
Miami, Florida 33156
kparker@kbparkerlaw.com
ebacker@kbparkerlaw.com
fmartinez@kbparkerlaw.com

Michael B. Stevens, Esq.
Mary Grecz, Esq.
DERREVERE, STEVENS,
BLACK & COZAD
2050 Vista Parkway, #201
West Palm Beach, Florida 33411
eservice@derreverelaw.com
sjilani@derreverelaw.com

Sean P. Ravenel, Esq.
Matthew W. Peaire, Esq.
Mary Jo Kuusela, Esq.
BUTLER WEIHMULLER
KATZ CRAIG, LLP
400 N. Ashley Drive, # 2300
Tampa, FL 33602
sravenel@butler.legal
mpeaire@butler.legal
tgrajales@butler.legal
mkuusela@butler.legal
dmarquith@butler.legal

Robert C. Solomon, Esq.
Candace Korthals, Esq.
Jaimie Quinn, Esq.
LAW OFFICE OF
SABAN & SOLOMON
150 N. University Drive, #200
Plantation, Florida 33324
solomon@sslegalfirm.com
quinn@sslegalfirm.com
bedoya@sslegalfirm.com
candace@sslegalfirm.com
service@sslegalfirm.com

Jonathan S. Burns, Esq.
JB LAW, P.A.
2300 Glades Rd., #460W
Boca Raton, Florida 33431
jburns@jbinjurylaw.com

Stacy D. Blank, Esq.
Martin E. Burke, Esq.
Brandon Faulkner, Esq.
HOLLAND & KNIGHT LLP
100 N. Tampa Street, #4100
Tampa, FL 33602
Stacy.blank@hklaw.com
Martin.burke@hklaw.com
Brandon.faulkner@hklaw.com

Jonathan M. Midwall, Esq.
Olga Butkevich, Esq.
Sanaz Alempour, Esq.
COLE, SCOTT, KISSANE, P.A.
Esperante Building
222 Lakeview Avenue, #120
West Palm Beach, FL 33401
Jonathan.Midwall@csklegal.com
Olga.Butkevich@csklegal.com
Loren.Ryan@csklegal.com
Sanaz.Alempour@csklegal.com

Alyson Holob, Esq.
Jourdan Weltman, Esq.
Demi Halmoukos Sims, Esq.
Julian Geraci, Esq.
UNIVERSAL PROPERTY &
CASUALTY INSURANCE
1110 W. Commercial Blvd.
Ft. Lauderdale, FL 33309
subrogationservice@universalprop-
erty.com

Daniel L. Monfiston, Esq.
THE MONFISTON FIRM, P.A.
100 S. Biscayne Blvd.
Miami, Florida 33131
daniel.monfiston@monfistonlaw.com
pleadings@monfistonlaw.com

Donald J. Ward, III, Esq.
SEARCY DENNEY SCAROLA BARN-
HART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
_wardteam@searcylaw.com
djw@searcylaw.com

Eric M. Ellsley, Esq.
THE ELLSLEY LAW FIRM
MASA Global Building
1250 S. Pine Island Road, #275
Plantation, FL 33324
ellsley@ellsleylaw.com
pleadings@ellsleylaw.com
becky@ellsleylaw.com

Glenn B. Levine, Esq.
Danitza Gozalez, Esq.
LAW OFFICES OF
ANIDJAR & LEVINE, P.A.
300 SE 17th Street
Ft. Lauderdale, Florida 33316
pleadings@anl-law.com
glevine@anl-law.com

Thomas E. Buser, Esq.
Blake Dolman, Esq.
KRUPNICK CAMPBELL MALONE
BUSER SLAMA HANCOCK, PA
12 SE 7th Street, #801
Fort Lauderdale, FL 33301
Pleadings-TEB@krupnicklaw.com
tbuser@krupnicklawgroup.com

Stephen Cameron, Esq.
THE CAMERON LAW GROUP, P.A.
8010 N. University Drive
Tamarac, FL 33321
pleadings@cameronlawgroup.com
stephen@cameronlawgroup.com

James Graver, Esq.
LAW OFFICES OF
JAMES G. GRAVER, P.A.
8041 Lake Worth Road, #212
Lake Worth, FL 33467
service@graverlaw.com
jgraver@graverlaw.com
jallen@graverlaw.com

Reid A. Cocalis, Esq.
TRIPP SCOTT, PA
110 Southeast Sixth Street
Fort Lauderdale, FL 33301
rac@trippscott.com
hbb@trippscott.com
rls@trippscott.com

Jose Aguirre, Esq.
Justin Jaffe, Esq.
Lowercase, PLLC
5582 NE 4th Ct, #6A
Miami, FL 33137

Richard J. Maleski, Esq.
COZEN O'CONNOR
200 South Biscayne Blvd., #300
Miami, FL 33131
rmaleski@cozen.com
mmartinez@cozen.com
lreategui@cozen.com

Andres Baltodano, Esq.
Daniel Santaniello, Esq.
LUKS, SANTANIELLO,
PETRILLO, SOHEN
& PETERFRIEND
110 SE 6TH Street
Fort Lauderdale, FL 33301
Luksfll-pleadings@ls-law.com
abaltodano@insurancedefense.net

Joseph J. Kalbac, Esq.
Denise H. Georges, Esq.
COLSON HICKS EIDSON
255 Alhambra Circle, Penthouse
Coral Gables, FL 33134
denise@colson.com
eservice@colson.com
nicky@colson.com
jkalbac@colson.com

Debi F. Chalik, Esq.
CHALIK AND CHALIK, P.A.
10063 N.W. 1st Court
Plantation, FL 33324
litigation@chaliklaw.com

Andrew W. Horn, Esq.
LAW OFFICE OF
ANDREW W. HORN
Offices at Grand Bay Plaza, #800
2665 S. Bayshore Drive
Miami, FL 33133

Jeffrey A. Adelman, Esq.
Joseph N. Nusbaum, Esq.
BROTMAN NUSBAUM
IBRAHIM & ADELMAN
137 W. Royal Palm Road
Boca Raton, FL 33432
jeff@lawbni.com
cheryl@lawbni.com
joe@lawbni.com

Erin M. Raschke, Esq.
Rhett C. Parker, Esq.
PHELPS DUNBAR LLP
100 South Ashley Drive, #200
Tampa, FL 33602
Erin.raschke@phelps.com
Rhett.parker@phelps.com
Gwen.braman@phelps.com
Christina.lewis@phelps.com
Jill.reevew@phelps.com

Michael T. Gelety, Esq.
FRIEDLAND & ASSOCIATES, P.A.
707 NE 3rd Avenue, Suite 201
Ft. Lauderdale, FL 33304
pleadings@yourfightourbattle.com
michael@yourfightourbatle.com
monica@yourfightourbattle.com

Kenneth W. Waterway, Esq.
Gina Clausen Lozier, Esq.
Madelyn Rodriguez, Esq.
BERGER SINGERMAN LLP
350 Las Olas Blvd., #1000
Fort Lauderdale, FL 33301
drt@bergersingerman.com
kwaterway@bergersingerman.com
gclausen@bergersingerman.com
mjourgensen@bergersingerman.com
dbertola@bergersingerman.com
mrodriguez@bergersingerman.com