Filing # 173903708 E-Filed 05/24/2023 03:05:32 PM

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

AMENDED JURISDICTIONAL BRIEF OF PETITIONER PEOPLES GAS SYSTEM

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STATEMENT OF THE ISSUES[1]

The issue presented to the Court is whether Florida law permits discovery of fact work product that the witness learned solely through an attorney-directed investigation, undertaken in anticipation of litigation, without a showing of need and undue hardship by the party seeking the discovery.

Pursuant to the Florida Rules of Appellate Procedure, the petitioner does not seek to raise any issue for review independent of the issue on which jurisdiction is based. *See* Fla. R. App. P. 9.120(f), 9.210(f).

[1] Pursuant to this Court's Order, Peoples Gas's Jurisdictional Brief has been amended solely to include the Statement of the Issues.

INTRODUCTION

Petitioner Peoples Gas System ("Peoples Gas") seeks discretionary review of an aberrant decision of the Florida Fourth District Court of Appeal. In an astonishing turn, the Fourth District has ruled that fact work product no longer exists in Florida. According to the Fourth District, "the work product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's attorney has learned." (App. 4). The Fourth District's decision expressly and directly conflicts with decisions of this Court and other Florida District Courts of Appeal on the same question of law.

The decision summarily eviscerates the fundamental and well-established protection against discovery of investigations undertaken by counsel in anticipation of litigation. Further, it paves the way for depositions of opposing counsel designed with the singular purpose of mining counsel's work product – a result expressly prohibited by this Court. *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1384 (Fla. 1994) (holding that "one party is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary

investigative techniques and discovery procedures") (*quoting Dodson v. Persell*, 390 So. 2d 704, 708 (Fla. 1980)). Indeed, the Fourth District's decision stands alone against a wealth of contrary Florida authority. This Court should exercise its discretionary jurisdiction to review and reverse the Fourth District's decision.

STATEMENT OF THE CASE AND FACTS

This case arises out of numerous lawsuits filed against Peoples Gas and other defendants following a July 2019 gas explosion in Plantation, Florida. At the time of the explosion, Jacquie Salamone worked as the Manager of Business Operations Support Services for Peoples Gas. In that role, Ms. Salamone conducted her own preliminary investigation on the day of the explosion. She did not visit the scene of the explosion but, instead, ran some searches on the company's computer system.

Early in the week following the explosion, legal counsel for Peoples Gas directed Ms. Salamone to conduct a second investigation on their behalf in anticipation of litigation. The information gathered by Ms. Salamone in this second investigation, undertaken at the direction of counsel, was not previously known to her and was not part of her original investigation. Ms. Salamone obtained this

information only through the investigation conducted at the direction and under the supervision of counsel.

Respondents deposed Ms. Salamone on March 17, 2022, in her individual capacity only. Ms. Salamone was designated as a future corporate representative for Peoples Gas. In that capacity, she undertook an investigation of the topics on which she was expected to testify. The trial court entered a protective order on March 9, 2022, prohibiting respondents from questioning Ms. Salamone at her March 17, 2022 deposition about any facts she obtained while preparing to testify as a Peoples Gas corporate representative. As respondents' counsel explained at her deposition: “[T]here’s three different investigations that we’ve uncovered here today: Ms. Salamone’s individual investigation, an investigation done at the direction of Counsel, and then there’s a 30(b)(6) investigation.” This discovery dispute does not include any information learned by Ms. Salamone in preparation for her testimony as a Peoples Gas corporate representative.

During her individual deposition, she was asked questions about how the explosion occurred, why gas service to the premises

was not turned off, and what TECO Energy, Inc.[2] ("TECO") knew about a software processing error that cancelled a turn-off order. Ms. Salamone answered all questions seeking information within her personal knowledge derived independently from counsel's investigation, including what she did and observed as part of her normal business functions. This testimony included the facts and conclusions gathered through her original investigation on the day of the explosion, which had not been undertaken at the direction of counsel. Indeed, Ms. Salamone testified fully as to her personal knowledge, regardless of whether that personal knowledge had been shared with counsel or was learned after she spoke with counsel, so long as she had gained that knowledge from any source other than the investigation she undertook at the direction of counsel.

But counsel for Peoples Gas objected to deposition questions seeking the disclosure of facts and conclusions gleaned solely through Ms. Salamone's second investigation, which was undertaken at the direction and under the supervision of counsel and in

[2] At the time of the explosion, Peoples Gas was a division of TECO.

anticipation of litigation. Counsel for Peoples Gas explained as follows:

> As I instructed her, simply because she reported facts to Counsel that she knew by virtue of outside of the investigation, she is not withholding those. But what I did say to her is, the line is, if you are asked to divulge information that you know only because a lawyer inside or out asked you to go figure that out or find it out, then you're not to reveal that information.

If Ms. Salamone possessed knowledge of facts solely as a result of conducting the investigation directed by counsel, then that category of information was withheld as protected work product.

Following the deposition, respondents filed a motion to compel Ms. Salamone to respond to deposition questions and to overrule objections asserted by Peoples Gas. The single issue presented in the motion to compel was whether Ms. Salamone must testify about the facts she learned solely through the investigation she conducted at the direction of legal counsel in anticipation of litigation. Respondents admitted that they sought testimony about the facts and information learned by the investigator solely through the counsel-directed investigation. According to respondents, "facts" are never subject to work product protection. In the trial court,

respondents asserted unequivocally, “[f]acts are never protected. I said that at the last hearing and I’m saying it again now.”

Respondents offered no evidence demonstrating their need for the fact work product they sought, or any undue hardship they faced in gathering the information from other available sources.

The trial court granted respondents’ motion to compel and to overrule objections, ordering “Ms. Salamone shall answer questions regarding any facts and information known to Ms. Salamone regardless of whether counsel for Ms. Salamone and/or TECO asked her to gather those facts and information.” The trial court made no findings regarding respondents’ need, undue hardship, or inability to secure the information they sought from other sources.

Peoples Gas then filed a Petition for Writ of Certiorari in the Fourth District seeking review of the trial court’s order compelling production of its fact work product. Respondents repeated their argument that facts are never subject to work product protection. Ignoring controlling authority from this Court, the Fourth District agreed and, on February 15, 2023, denied the certiorari petition without an opinion, including a single citation to *Grinnell Corp. v.*

Palms 2100 Ocean Blvd., Ltd., 924 So. 2d 887 (Fla. 4th DCA 2006). (App. 3).

Peoples Gas filed a timely Motion for Rehearing, Rehearing En Banc, Certification, or, In the Alternative, for a Written Opinion. On April 13, 2023, the Fourth District purported to deny the motions, but in doing so issued the written opinion Peoples Gas sought. (App. 4–5). In its written order, the Fourth District explained the basis for its denial of the certiorari petition. (App. 4). It concluded that the trial court properly bifurcated the information sought in discovery and correctly ordered the disclosure of facts gleaned through counsel's investigation. (*Id.*). The Fourth District further held that the fact work product doctrine in Florida "furnishes no shield against discovery, by interrogatories or by deposition, of the facts that an adverse party's lawyer has learned." (*Id.*). Judge Warner dissented from the decision on rehearing, explaining that she would grant the Petition for Writ of Certiorari because the information sought through discovery is protected work product. (App. 4–5). As Judge Warner observed, the order "compel[s] a witness to disclose fact work product obtained as a result of attorney-directed investigation in anticipation of litigation." (App. 4).

ARGUMENT

This Court has long recognized the existence of fact work product, explaining "one party is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures." *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1384 (Fla. 1994) (quoting *Dodson v. Persell*, 390 So. 2d 704, 708 (Fla. 1980)). Facts gathered by an investigator in anticipation of litigation qualify as work product under Florida law. This is true even when the investigator is a non-attorney employee. *See Heartland Express, Inc. of Iowa v. Torres,* 90 So. 3d 365, 367 (Fla. 1st DCA 2012). Fact work product necessarily includes an investigator's observations and testimony. *See Heartland Express,* 90 So. 3d at 367 (applying work product doctrine to protect against disclosure of protected information through deposition questions); *Huet v. Tromp*, 912 So. 2d 336, 339–40 (Fla. 5th DCA 2005) (work product doctrine applies to deposition questions); *Alachua Gen. Hosp. v. Zimmer USA, Inc.*, 403 So. 2d 1087, 1088 (Fla. 1st DCA 1981) (investigator cannot be questioned about investigation in discovery deposition). Here, the requested

information -- the facts gleaned from an investigation conducted under the direction and supervision of counsel in anticipation of litigation -- is textbook fact work product.

As this Court explained in *Deason*, the work product doctrine in Florida protects both "fact work product" and "opinion work product." *Deason*, 632 So. 2d at 1384; *see also Heartland Express*, 90 So. 3d at 367; *Horning-Keating v. State*, 777 So. 2d 438, 444 (Fla. 5th DCA 2001). Fact work product includes factual information relating to the case gathered in anticipation of litigation. *Deason*, 632 So. 2d at 1384. Opinion work product, in contrast, includes an attorney's mental impressions, conclusions, opinions, and theories. *Id.* Fact work product may be subject to discovery upon a showing, by the requesting party, of need and undue hardship in obtaining the materials from other sources. *Id.*

This Court and other Florida District Courts of Appeal have uniformly held that fact work product is protected in Florida and may only be discoverable upon a showing of need and undue hardship. *See Deason*, 632 So. 2d at 1384; *Dodson v. Persell*, 390 So. 2d 704, 707 (Fla. 1980) (surveillance films are protected work product unless they are intended to be used at trial); *Heartland Express*, 90 So. 3d

at 367–68; *Huet*, 912 So. 2d at 339–40; *Horning-Keating*, 777 So. 2d at 444; *Alachua Gen.*, 403 So. 2d at 1088. Moreover, Florida appellate courts have expressly held that, absent proof of need and undue hardship, a party cannot depose his adversary's investigator about the facts the investigator learned during an investigation conducted in anticipation of litigation. *See Heartland Express*, 90 So. 3d at 367–68; *Huet*, 912 So. 2d at 339–40; *Alachua Gen.*, 403 So. 2d at 1088.

This Court should accept jurisdiction in this case and reverse the Fourth District's decision because every Florida appellate court to consider the issue (except the Fourth District's majority in this case) has concluded that facts gathered in an investigation undertaken at the direction of counsel in anticipation of litigation are protected by the work product doctrine. *See Heartland Express*, 90 So. 3d at 367–68; *Dodson,* 390 So. 2d at 707; *Huet*, 912 So. 2d at 339–40; *Alachua Gen.*, 403 So. 2d at 1088. Indeed, Judge Warner recognized in her dissenting opinion that the Petition for Writ of Certiorari filed by Peoples Gas should have been granted because the facts targeted for discovery are protected work product.

Respondents will likely argue that this Court cannot exercise jurisdiction over this case because the Fourth District's original opinion was a per curiam denial with a single citation. But respondents cannot avoid the import of the Fourth District's subsequent written order. According to respondents, the Fourth District's subsequent written order is insufficient to permit conflict review. *Contra* Art. V, § 3(b)(3), Fla. Const. ("The supreme court may review ***any decision*** of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." (emphasis added)). To the contrary, the written opinion explains clearly and definitively the points of law and fact upon which the Fourth District's decision rests. *See Tippens v. State*, 897 So. 2d 1278, 1280 (Fla. 2005) ("[T]he district court decision under review 'must contain a statement or citation effectively establishing a point of law upon which the decision rests.'" (quoting *Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988)); *see also Persaud v. State*, 838 So. 2d 529, 532 (Fla. 2003) ("[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 this Court.”). The Fourth District’s statement that the work product doctrine does not apply to facts learned by opposing counsel as part of an investigation in anticipation of litigation expressly and directly conflicts with the numerous cases from this Court and the other District Courts of Appeal holding that the fact work product doctrine does indeed apply to facts.

CONCLUSION

For the foregoing reasons, Peoples Gas respectfully requests that the Court accept jurisdiction over this case and reverse the Fourth District’s decision.

Respectfully submitted,

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I HEREBY CERTIFY that on May 24, 2023, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal system, which will transmit the foregoing document via email to all counsel of record.

I FURTHER CERTIFY that on May 24, 2023, I served the foregoing via email on the following:

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