

2024 WL 1894872

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District Court of Appeal of Florida, Third District.

Ann HAMILTON, Petitioner,
v.
CITIZENS PROPERTY INSURANCE CORPORATION, Respondent.

No. 3D23-1934

I

Opinion Filed May 1, 2024

A Writ of Certiorari to the County Court for Miami-Dade County, [Luis Perez-Medina](#), Judge. Lower Tribunal No. 23-04397 CC

Attorneys and Law Firms

Higgs Law, P.A., and [Earl I. Higgs, Jr.](#) (Orlando), for petitioner.

Paul R. Percy, P.A., and [Maureen G. Percy](#), for respondent.

Before [EMAS](#), [SCALES](#), and [MILLER](#), JJ.

Opinion

[SCALES](#), J.

*1 In this first-party insurance case, petitioner Ann Hamilton, the plaintiff below, seeks certiorari review of a September 29, 2023 discovery order granting the motion for protective order filed by the defendant below, respondent Citizens Property Insurance Corporation (“Citizens”). The challenged order: (i) authorizes petitioner to depose Citizens’s corporate representative; (ii) requires the corporate representative to bring the entire claims file to the deposition “for the purpose of refreshing his recollection and to allow for competent testimony at deposition;” but also (iii) allows Citizens to designate as privileged any portion of the file’s contents, even those portions of the file relied upon by the witness during his testimony.¹

That portion of the discovery order purporting to preserve the privilege of file materials reviewed by the corporate representative during his deposition, and preventing cross-examination thereon, constitutes a departure from the essential requirements of law because it violates [section 90.613 of the Florida Statutes \(2023\)](#). That statute, which applies to material reviewed by the deponent “while testifying” at discovery depositions,² reads, in relevant part, as follows:

When a witness uses a writing or other item to refresh memory while testifying, an adverse party is entitled to have such writing or other item produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce it, or, in the case of a writing, to introduce those portions which relate to the testimony of the witness, in evidence.

§ 90.613, Fla. Stat. (2023).

The statute is clear and unambiguous: if a witness, during his or her deposition testimony, relies on a written document to refresh his or her recollection, those portions of the document that relate to the witness’s testimony must be produced to the opposing party, resulting in a waiver of an otherwise applicable privilege. See [Soler v. Kukula](#), 297 So. 2d 600, 601-02 (Fla. 3d DCA 1974) (“It is fundamental that the opposite party in both criminal and civil cases has a right to see and examine the memoranda used by a witness so as to be in a position to cross-examine the witness in regard to the testimony given on direct examination.”).

*2 Certiorari jurisdiction lies because, under the circumstances presented here, the harm caused by such error is irreparable. First, there is no practical way to determine on plenary appeal after judgment whether a withheld document – relied upon by the witness during his or her deposition – supported or contradicted the witness’s testimony; nor is there a practical way to determine, on plenary appeal, whether, or to what extent, the error impeded the effectiveness of the aggrieved party’s cross-examination of the witness. See [Ruiz v. Steiner](#), 599 So. 2d 196, 198 (Fla. 3d DCA 1992) (“Especially in circumstances involving the denial of the right to take testimony of an alleged material witness, it has been recognized that such a denial cannot be remedied on appeal since ‘there would be no practical way to determine after judgment what the testimony would be or how it would affect the result.’” (quoting [Travelers Indem. Co. v. Hill](#), 388 So. 2d 648, 650 (Fla. 5th DCA 1980), receded from by Bill Kasper

[Constr. Co. v. Morrison](#), 93 So. 3d 1061, 1062 (Fla. 5th DCA 2012) (en banc)).

Second, while [section 90.613](#) provides an express process for trial court review, and for appeal, of objections based on *relevance*,³ this statutory process appears inapplicable to objections based upon privilege. In any event, by virtue of the statute, a party's privilege objections are deemed waived when a party uses documents to refresh the recollection of that

party's witness. [§ 90.613, Fla. Stat. \(2023\)](#). The subject order effectively authorizes Citizens's witness to thwart the statute without providing any mechanism for post-judgment review.

Petition granted; order quashed.

All Citations

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Footnotes

1 The relevant provision of the challenged order provides:

4. Information to which Citizens claims privilege will not need to be produced to Plaintiffs during the deposition. In this regard, Citizens' [sic] may reference and review its privileged materials while testifying during the deposition, doing so will not constitute a waiver of any privilege. Review of privileged materials by the [corporate representative] while testifying will not constitute a waiver of any privilege and Plaintiff may not cross examine or question the [corporate representative] on the materials reviewed while testifying; the Plaintiff is precluded from seeing or accessing any materials reviewed by the [corporate representative] while testifying during the deposition that the defendant claims privilege to.

2 See [Fla. R. Civ. P. 1.310\(c\)](#) ("Examination and cross-examination of witnesses may proceed as permitted at the trial."); [Proskauer Rose LLP v. Boca Airport, Inc.](#), 987 So. 2d 116, 117 (Fla. 4th DCA 2008).

3 The statute provides, in relevant part, as follows:

If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of an appeal. If a writing or other item is not produced or delivered pursuant to order under this section, the testimony of the witness concerning those matters shall be stricken.

[§ 90.613, Fla. Stat. \(2023\)](#).