

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

APPELLATE DIVISION (CIVIL): AY
CASE NO.: 502017CA003956XXXXMB
L.T. NO.: 502015CC006553XXXXMB

CITIZENS PROPERTY INSURANCE
CORPORATION,
Petitioner,

v.
ONE CALL PROPERTY SERVICES,
INC., a/a/o Robert Anis,
Respondent.

Opinion filed: **JAN 10 2018**

Petition for Writ of Certiorari from the County Court in and for Palm Beach County,
Judge Sherri L. Collins

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PER CURIAM.

Petitioner, Citizens Property Insurance Corporation (“Citizens”), filed a Petition for Writ of Certiorari challenging the trial court’s discovery order compelling an independent insurance adjuster to answer a deposition question concerning communications with Citizens’ counsel.

On June 23, 2015, Respondent, One Call Property Services, Inc. ("One Call"), filed suit against Citizens for breach of contract and breach of contract with implied equitable assignment of benefits. One Call brought the breach of contract claims for payment of remediation and construction work One Call allegedly performed for Robert Anis, whose property was insured by Citizens. One Call brought the action against Citizens as the assignee of Mr. Anis.

During litigation, One Call deposed Fred Breese, an independent insurance adjuster working for CatManDo, the company hired by Citizens to perform insurance adjusting services for Mr. Anis's property. During the deposition, counsel for One Call asked the following:

Q. Okay. And you are sitting here next to Mr. Martin who represents Citizens. Did you have any conversations with him?

A. Yes, I did.

Q. Okay. And what did you guys talk about?

MR. MARTIN: I'm going to instruct him not to answer based on attorney-client privilege.

MS. EL MEKKAOUI: Okay.

MR. MARTIN: If you want to proffer, that's fine, I'll keep instructing him not to answer and we can do one later.

MS. EL MEKKAOUI: I'll explore a little more then.

BY MS. EL MEKKAOUI:

Q. Mr. Breese, are you employed by Citizens?

A. No, I'm not.

Q. Have you retained an attorney in this matter?

A. Repeat the question.

Q. Have you retained or paid for an attorney to represent you?

A. No.

Q. So you have not paid Mr. Martin or his law firm?

A. No.

Q. Okay. I'm going to re-ask the question again. What did you guys talk about prior to the deposition?

MR. MARTIN: I'll instruct him not to answer on the basis of attorney-client privilege.

MS. EL MEKKAOUI: And we'll certify that.

On July 27, 2016, One Call filed its Motion to Compel Answer, Overrule Objection and for Sanctions ("Motion") in an attempt to receive an answer from Breese as to its question concerning Breese's conversations with Citizen's counsel. On October 21, 2016, Citizens filed its Response in Opposition, arguing that attorney-client privilege applies to its conversations held with Breese. On March 9, 2017, a brief hearing was held at Uniform Motion Calendar to resolve the Motion. After hearing arguments from counsel, the trial court judge granted the Motion, reasoning that Breese appeared to be more akin to a witness rather than a client and thus, the attorney-client privilege would not apply.

Case law has defined the role and duties of an insurance adjuster. In *King v. National Sec. Fire and Cas. Co.*, 656 So. 2d 1338 (Fla. 4th DCA 1995), the Fourth District Court of Appeal held that an independent insurance adjuster owes a duty to the insurance company arising out of a contract between the insurance company and the independent adjuster. *King*, 656 So. 2d at 1339. The Second District Court of Appeal has further held that "an insurance adjuster is a special agent for the company and his powers and authority are prima facie coextensive with the business intrusted to his care." *Old Republic Ins. Co. v. Von Onweller Const. Co.*, 239 So. 2d 503, 504 (Fla. 2d DCA 1970).

Although case law is sparse on this issue, *King* and *Old Republic Ins. Co.* are clear in

establishing that a special relationship does exist between an insurance adjuster and insurance company. At the time of the survey inspection of Mr. Anis' property, Breese was working as an insurance adjuster for CatManDo, a company retained by Citizens to perform insurance adjusting services. As the Second District Court of Appeal pointed out in *Old Republic Ins. Co.*, an insurance adjuster constitutes a special agent for the company. Moreover, as indicated in the hearing by Citizens' counsel, Breese signed documents as Citizens and is responsible for communicating with the insured, investigating the insured's claims, determining coverage, and making payment. We therefore find that Breese is an agent of Citizens' corporation for purposes of attorney-client privilege. Accordingly, the trial court departed from the essential requirements of the law when it granted One Call's Motion on the grounds that Breese was more akin to a witness than a client for attorney-client privilege purposes.

The next relevant inquiry is whether attorney-client privilege attaches to communications held between Breese and Citizens' counsel. The Florida Supreme Court in *Deason* has set forth the following test to determine whether attorney-client privilege applies in a corporate context:

- (1) the communication would not have been made but for the contemplation of legal services;
- (2) the employee making the communication did so at the direction of his or her corporate superior;
- (3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
- (4) the content of the communication relates to the legal services being rendered, and the subject of the communication is within the scope of the employee's duties;
- (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1383 (Fla. 1994). "[T]o minimize the

threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny.” *Id.*

Whether attorney-client privilege attaches to communications held between Breese and Citizens’ counsel is a question that must be resolved by the trial court. *See Las Olas River House Condo. Ass’n, Inc. v. Lorch, LLC*, 181 So. 3d 556, 559 (Fla. 4th DCA 2015). In *Las Olas River House Condo. Ass’n, Inc.*, petitioners sought a writ of certiorari to quash an order compelling them to produce documents they claimed were attorney-client privileged. *Id.* at 556-57. There, the trial court compelled the production of documents because it found that communications with two people who were not “employees” within the meaning of *Deason* were not attorney-client privileged. *Id.* at 557. On appeal, the Fourth District Court of Appeal remanded the case for the trial court to conduct an *in camera* inspection of the documents and apply the test set forth by the Florida Supreme Court in *Deason* to determine whether the attorney-client privilege was waived. *Id.* at 559.

Because the trial court found that Breese was not a “client” within the meaning of attorney-client privilege, it did not apply the test set forth in *Deason* to consider whether communications held between Breese and Citizens’ counsel were attorney-client privileged. As we find that Breese is an agent of Citizens for attorney-client privilege purposes, we remand proceedings to the trial court so that a hearing may be held to determine whether the attorney-client privilege applies in light of the *Deason* test.

Citizens has further moved for conditional appellate attorney’s fees pursuant to section 768.79, Florida Statutes, and pursuant to its proposal for settlement. We find that Citizens is entitled to a provisional award of fees contingent upon the trial court’s determination that the

proposal for settlement was properly made and submitted and that Citizens is otherwise entitled to fees under section 768.79, Florida Statutes. *See Saterbo v. Markuson*, 210 So. 3d 135 (Fla. 2d DCA 2016) (reviewing *de novo* the trial court's determination of eligibility to receive an award of attorney's fees where the Second District Court of Appeal had previously granted the party's motion for appellate attorney's fees *contingent upon* a determination by the trial court that said party was entitled to such fees).

The Petition for Writ of Certiorari is GRANTED, the trial court's Order Granting Plaintiff's Motion to Compel Answer, Overrule Objection and for Sanctions is QUASHED, and the proceedings are REMANDED to the trial court with instructions to conduct a hearing to determine whether the attorney-client privilege applies in light of the *Deason* test. Furthermore, Petitioner's Motion for Conditional Appellate Attorney's Fees is GRANTED, and the matter is REMANDED for the trial court to determine a reasonable amount of fees, with the award being contingent upon the trial court's determination that the proposal for settlement was properly made and submitted.

J. MARX, and GILLEN, JJ. concur.

FRENCH, J., dissenting.

I respectfully dissent. While I agree with the majority in finding that Breese constitutes an agent of Citizens, I disagree in remanding proceedings to the trial court so that a hearing may be held to determine whether the attorney-client privilege applies in light of the *Deason* test. To conduct such a hearing would be a waste of judicial time and cause expense to the parties. The substance of confidential communications between an attorney and client are privileged and not subject to discovery. *See* § 90.502, Fla. Stat.; *Upjohn Co. v. United States*, 449 U.S. 383 (1981). During the deposition of Breese, One Call's counsel posed the following question, "what did you

guys talk about prior to the deposition?” Citizens’ counsel subsequently objected on the basis of attorney-client privilege. *See Feltner v. Internationale Nederlanden Bank, N.V.*, 622 So. 2d 123, 125 (Fla. 4th DCA 1993) (finding that once invoked, attorney-client privilege must be respected and in a deposition, must be affirmatively invoked at the time the objectionable question is asked). The deposition question at issue clearly seeks discovery of confidential communications held between Breese and Citizens’ counsel prior to the deposition. As this question was properly objected to on the basis of attorney-client privilege, we should find that communications held between Breese and Citizens’ counsel prior to the deposition were attorney-client privileged.

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Respondent.

Petition filed: April 7, 2017

_____/_____
DATE OF PANEL: DECEMBER 12, 2017

PANEL JUDGES: J. MARX, GILLEN, FRENCH

GRANTED/DENIED/OTHER: PETITION GRANTED

PER CURIAM OPINION/DECISION BY: PER CURIAM

CONCURRING:

) DISSENTING:

) CONCURRING SPECIALLY:

) With/Without Opinion

) With/Without Opinion

DATE:

J.

J.

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DATE:

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J.

Joseph Marx 1-5-18
Jeffrey D. Gillen 01/09/18

Robert French
1/5/18