Court in and for Marion County, Florida. See Fla. R. App. P. 9.141(c)(6)(D).

PETITION GRANTED.

COHEN, HARRIS, and WOZNIAK, JJ., concur.

Wendy COWAN and Clay Cowan, Petitioners,

v.

Julie GRAY, Respondent.

Case No. 5D21-1557

District Court of Appeal of Florida, Fifth District.

Opinion filed January 21, 2022

Background: Following car accident, victim brought action against driver and driver's husband. The Circuit Court, 18th Judicial Circuit, Brevard County, Dale Curtis Jacobus, J., granted victim's motions to compel driver and husband to produce handwritten notes they made in preparation for their depositions. Driver and husband filed petition for certiorari.

Holdings: The District Court of Appeal, Traver, J., held that:

(1) District Court of Appeal had jurisdiction to review the petition;

(2) statute that permitted for production of writings used by a witness to refresh memory while testifying did not apply to compel production driver's and husband's handwritten notes; and

(3) driver's and husband's handwritten notes constituted protected "work product," and thus were protected from discovery by victim.

Petition granted and order quashed.

Eisnaugle, J., filed separate opinion concurring specially.

1. Certiorari ⚿5(1), 27

District Court of Appeal will grant certiorari only if petitioners establish: (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial, (3) that cannot be corrected on post-judgment appeal.

2. Certiorari ⚿35

District Court of Appeal had jurisdiction to review petition for certiorari filed by driver of vehicle involved in accident and her husband, which requested review of trial court's order that granted car accident victim's motions to compel driver and husband to produce handwritten notes they made in preparation for their depositions, where driver and husband asserted irreparable harm from disclosure of the notes which allegedly included attorney-client communications and comprised confidential work product.

3. Certiorari ⚿17

Certiorari lies to review a discovery order requiring production of allegedly privileged information.

4. Certiorari ⚿17

Basis for allowing certiorari review of certain discovery orders is that discovery of protected material could result in letting the "cat out of the bag," and injury could result if such information was disclosed.

5. Pretrial Procedure ⚿371

Statute that permitted production of writings used by a witness to refresh memory while testifying did not apply to compel production of handwritten notes that other driver in car accident and her husband made in preparation for their de-

positions, in favor of car accident victim, where driver and husband did not consult their notes during their depositions. Fla. Stat. Ann. § 90.613.

6. Pretrial Procedure ⚿371

Driver's and husband's handwritten notes made in preparation for their depositions constituted protected "work product," and thus were protected from discovery by car accident victim, absent showing that victim had need of the notes and was unable without undue hardship to obtain the substantial equivalent of the materials by other means. Fla. R. Civ. P. 1.280(b)(4).

See publication Words and Phrases for other judicial constructions and definitions.

7. Pretrial Procedure ⚿359

When determining whether requested documents are protected work-product, it is irrelevant that petitioners prepared their notes at their own behest and without counsel's direction. Fla. R. Civ. P. 1.280(b)(4).

Petition for Certiorari Review of Order from the Circuit Court for Brevard County, Curt Jacobus, Judge. LT Case No. 05-2020-CA-019603

Michael M. Brownlee, of Fisher Rushmer, P.A., Orlando, for Petitioners.

Brian J. Lee, of Morgan & Morgan, Jacksonville, and Lawrence Gonzalez, of Morgan & Morgan, Orlando, for Respondent.

TRAVER, J.

Wendy and Clay Cowan ("Petitioners") seek certiorari relief from a trial court order compelling them to produce handwritten notes they made in preparation for their depositions. We grant their petition and quash the order on appeal.

Mrs. Cowan was involved in a car accident, and Mr. Cowan arrived thereafter. The plaintiff below, Julie Gray ("Respondent"), later took their depositions via Zoom. Mrs. Cowan disclosed she had brought ten handwritten pages of notes to the deposition, but she was not reviewing the notes to refresh her recollection. Instead, she said she took the notes to help her recall the crash before her deposition. She said that she did this of her own volition, and not at counsel's direction. She explained, however, that some notes contained, referenced, or summarized communications she had with her attorney.

Some of Mrs. Cowan's testimony changed over time. She initially testified that she did not take the notes with her lawyer or anyone in his office, and that she did not take them for any purpose other than refreshing her recollection before her deposition. She later filed an errata sheet, however, explaining that she took some of the notes during a meeting with her lawyer to help prepare for her deposition and to remember his instructions.

Mr. Cowan brought half of a page of notes to his deposition, also to refresh his recollection about the accident's aftermath. He did not consult his notes during his deposition. He testified that he had not sent the notes to his and his wife's attorney, but that he had sent him a question about the notes. He claimed not to have written anything on his notes about attorney-client communications.

Petitioners timely objected to Respondent's efforts to elicit the notes' contents at deposition, invoking the attorney-client privilege and the work product doctrine. Respondent filed motions to compel Petitioners' notes because they used them to refresh their recollection while testifying. Petitioners objected, again contending their notes included attorney-client com-

munications and comprised confidential work product. At a hearing on Respondent's motions to compel, Petitioners argued the record did not reflect any refreshment of recollection, and that the attorney-client privilege and the work product doctrine protected the notes.

The trial court noted the differences in Mrs. Cowan's testimony, and stated Mrs. Cowan used the notes "for her to remember the events in her testimony." It granted Respondent's motions to compel Petitioners' notes via an unelaborated order, declining Petitioners' request for an in-camera inspection before production.

[1] We will grant certiorari only if Petitioners establish: (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial, (3) that cannot be corrected on post-judgment appeal. *State Farm Mut. Auto. Ins. v. Knapp*, 234 So. 3d 843, 848 (Fla. 5th DCA 2018). We first examine the second and third elements to determine our jurisdiction. *See Holden Cove, Inc. v. 4 Mac Holdings Inc.*, 948 So. 2d 1041, 1041 (Fla. 5th DCA 2007).

[2–4] Certiorari lies to review a discovery order requiring production of allegedly privileged information. *See Knapp*, 234 So. 3d at 848. "The basis for allowing certiorari review of certain discovery orders is that discovery of protected material could result in letting the 'cat out of the bag,' and injury could result if such information was disclosed." *Cape Canaveral Hosp., Inc. v. Leal*, 917 So. 2d 336, 339 (Fla. 5th DCA 2005). Based on the nature of the information Respondent seeks, Petitioners have asserted irreparable harm, and we therefore have jurisdiction.

[5] The trial court departed from the law's essential requirements in three ways. First, it did not apply the correct law when it ordered production of Petitioners' notes pursuant to section 90.613, Florida Statutes. Section 90.613 allows for the production of writings used by a witness "to refresh memory while testifying ...." § 90.613, Fla. Stat. (2021). Our record does not show that Petitioners consulted their notes during their depositions. Therefore, section 90.613 is inapplicable.[1]

Second, the trial court did not apply the correct law when it ordered the production of alleged attorney-client communications embedded in the notes without an in-camera inspection. *See Hett v. Barron-Lunde*, 290 So. 3d 565, 574 (Fla. 2d DCA 2020) (granting writ of certiorari where trial court ordered production of attorney-client privileged documents without conducting in-camera inspection). Mrs. Cowan testified that her notes included or referenced conversations she had with her lawyer. In her errata sheet, she swore she took some of the notes during an attorney-client conference in order to remember counsel's instructions. If these attestations are accurate, at least portions of her notes would comprise attorney-client privileged communications "beyond the reach of discov-

1. Respondent contends section 90.613 gives trial courts discretionary authority to order the production of notes used to refresh an adverse party's recollection even when they are not testifying. *See Merlin v. Boca Raton Cmty. Hosp.*, 479 So. 2d 236, 239 (Fla. 4th DCA 1985). There is no way to reconcile this contention, however, with section 90.613's plain text. Indeed, the Fourth District later clarified that "section 90.613, Florida Statutes, applies only to documents a witness refers to 'when testifying.'" *See Proskauer Rose LLP v. Boca Airport, Inc.*, 987 So. 2d 116, 118 (Fla. 4th DCA 2008) (quashing order compelling production of documents comprising work product and containing attorney-client communications). *Merlin* stands solely for the unremarkable proposition that trial courts may order inspection of relevant documents unless they are otherwise privileged. *Id.* at 117.

ery." *See Knapp*, 234 So. 3d at 850 ("[T]here are no 'relevance' or 'need' exceptions to the attorney-client privilege."); *see also* § 90.502(2), Fla. Stat. (2021) ("A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client."). Therefore, the trial court should have acceded to Petitioners' request for an in-camera inspection.

[6, 7] An in-camera inspection is, however, unnecessary because, third, the trial court applied the incorrect law in rejecting Petitioners' work product claim. *See Ashemimry v. Ba Nafa*, 847 So. 2d 603, 605 (Fla. 5th DCA 2003). Petitioners prepared their notes in preparation for their depositions and for no other reason.[2] Florida Rule of Civil Procedure 1.280(b)(4) governs discovery requests for work product, which includes documents prepared in anticipation of litigation. It is irrelevant for work product purposes that Petitioners prepared their notes at their own behest and without counsel's direction. *See Snyder v. Value Rent-A-Car*, 736 So. 2d 780, 781 (Fla. 4th DCA 1999) ("There is no requirement in this rule that for something to be protected as work product, it must be an item ordered to be prepared by an attorney."); *see also Knapp*, 234 So. 3d at 849 ("Fact work product traditionally protects that information which relates to the case and is gathered in anticipation of litigation."). Work product is only discoverable based on a showing that Respondent "has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *See* Fla. R. Civ. P. 1.280(b)(4). Respondent made no effort to meet this burden; instead, she erroneously relied on section 90.613. Accordingly, the trial court departed from the law's essential requirements when it granted Respondent's motion to compel. For these reasons, we grant the petition and quash the trial court's order.

PETITION GRANTED; ORDER QUASHED.

HARRIS, J., concurs.

EISNAUGLE, J., concurring specially, with opinion.

EISNAUGLE, J., concurring specially.

I agree with the majority's well-reasoned opinion. However, I do not join the discussion concerning an in-camera inspection because, as the majority recognizes, that issue is not relevant to our decisional path. *See Pedroza v. State*, 291 So. 3d 541, 547 (Fla. 2020) ("A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment." (quoting *State v. Yule*, 905 So. 2d 251, 259 n.10 (Fla. 2d DCA 2005) (Canady, J., specially concurring))).

Here, we grant the petition because the materials are protected by the work product doctrine, not because an in-camera in-

2. Respondent's reliance on *Watkins v. Wilkinson,* 724 So. 2d 717 (Fla. 5th DCA 1999), is understandable but misplaced. In *Watkins,* we directed the production of a notebook prepared by an accident victim to record her medical treatments. 724 So. 2d at 717 ("She compiled these notes just for her own information and not at the direction of her lawyer."). In determining whether the notebook was work product, however, the dispositive element was not counsel's instruction. Rather, *Watkins* made clear the notebook's author had not prepared it in anticipation of litigation, but instead for her own information. Petitioners' undisputed and sworn testimony about their notes illustrates a contrary purpose.

spection is necessary to determine if the materials are protected by the attorney-client privilege. As a result, the majority's analysis concerning an in-camera inspection is dicta. *Yule*, 905 So. 2d at 259 n.10 (Canady, J., specially concurring) ("If not a holding, a proposition stated in a case counts as dicta." (quoting Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 Stan. L. Rev. 953, 1065 (2005))).

1

Louann KOVACS, Petitioner,

v.

STATE of Florida, Respondent.

Case No. 5D21-3098

District Court of Appeal of Florida, Fifth District.

Opinion filed January 28, 2022

LT Case Nos. 2020-301597-CFDB, 2020-301598-CFDB, 2020-301669-CFDB, 2020-303086-CFDB, 2020-303184-CFDB

Petition for Belated Appeal A Case of Original Jurisdiction.

Louann Kovacs, Ocala, pro se.

Ashley Moody, Attorney General, Tallahassee, and Rebecca Rock McGuigan, Assistant Attorney General, Daytona Beach, for Respondent.

PER CURIAM.

The petition for belated appeal is granted. A copy of this opinion shall be filed with the trial court and be treated as the notice of appeal from the March 1, 2021 judgments and sentences rendered in Case Nos. 2020-301597-CFDB, 2020-301598-CFDB, 2020-301669-CFDB, 2020-303086-CFDB, and 2020-303184-CFDB, in the Circuit Court in and for Volusia County, Florida. *See* Fla. R. App. P. 9.141(c)(6)(D).

PETITION GRANTED.

COHEN, EISNAUGLE and NARDELLA, JJ., concur.

2

Shawn Ryan Anthony SHEA, Appellant,

v.

STATE of Florida, Appellee.

Case No. 5D22-60

District Court of Appeal of Florida, Fifth District.

Opinion filed March 18, 2022

3.800 Appeal from the Circuit Court for Orange County, Chad K. Alvaro, Judge. LT Case No. 1995-CF-013539-A-O

Shawn R. Shea, Bristol, pro se.

Ashley Moody, Attorney General, Tallahassee, and Allison L. Moore, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

Because it appears that Appellant's filings are abusive, repetitive, malicious, or frivolous, Appellant is cautioned that any further pro se filings in this Court asserting claims stemming from Orange County Circuit Court Case No. Case No. 1995-CF-013539-A-O may result in sanctions such as a bar on pro se filing in this Court and