SUPREME COURT OF FLORIDA

LEONARD NORTHUP, as Personal Representative of the Estate of MARY HELEN NORTHUP, Deceased, Petitioner, vs. HERBERT W. ACKEN, M.D., P.A., Respondent. _____/	CASE NO. SC02-2435

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

ANSWER BRIEF ON THE MERITS
OF THE RESPONDENT, HERBERT W. ACKEN, M.D., P.A.

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STATEMENT OF THE CASE AND OF THE FACTS

The Petitioner's Initial Brief contains a Statement of the Case and of the Facts which accurately sets forth the factual background of this appeal. As a result, the Respondent will not reiterate the factual background here. However, nothing in this statement should be deemed to be a waiver of the right to contest any facts in this case at the trial court level.

SUMMARY OF THE ARGUMENT

In the course of preparation of this case for trial, counsel for Dr. Acken conducted an extensive investigation into the testimonial history of the Plaintiff's retained expert, Michael Dillon, M.D. This investigation revealed that Dr. Dillon had testified as a retained expert on a number of occasions in the past. Based upon a review of these depositions, Dr. Acken's counsel selected a limited number which counsel believed would be useful at the trial of this cause in the form of impeachment evidence should Dr. Dillon testify inconsistently with his former testimony while on direct examination.

Mr. Northup has requested a court order compelling Dr. Acken to reveal the identity of the deposition transcripts his counsel has acquired through this investigation process. The Circuit Court in and for Polk County granted this request, while the Second District Court of Appeal rejected it. This Court should not disturb the decision of the District Court, because that court correctly found that Dr. Acken's counsel's mental impressions about this litigation would be revealed if he were forced to divulge the identity of the deposition transcripts he had chosen. Although the deposition transcripts themselves are not protected work product, the unique assembly of these transcripts into a new subset of documents represents what Dr. Acken's counsel believes is important. As such, the compilation of these documents is entitled to protection from disclosure.

The rule of completeness, which allows a party to introduce an entire document when another party chooses to introduce only a portion, does not compel a different result. The vital right of a party to be able to effectively cross examine an adversarial witness cannot be lightly discarded in the name of judicial economy. Likewise, the fact that the depositions may be used at trial does not compel their disclosure now. There is no way to know what depositions will be used until Dr. Dillon's direct examination is completed at trial. Finally, the provisions of Florida's Rules of Civil Procedure which allow a non-party to obtain copies of statements made concerning the "action or its subject matter" do not help Mr. Northup, a party to this litigation, to obtain the transcripts in question. These transcripts, which Mr. Northup could rather easily obtain on his own, do not concern this action or its subject matter. Instead, they concern those other actions, and the subject matters of those other actions, in which Dr. Dillon has been retained as an expert. In the absence of any showing that Dr. Dillon is unable to obtain the substantial equivalent of these transcripts without undue hardship, the District Court's opinion must be upheld.

LEGAL ARGUMENT

The Second District Court of Appeal correctly determined that the compilation of Dr. Dillon's deposition by Dr. Acken's counsel constituted mental impression work product, and that Mr. Northup's arguments were insufficient to overcome this highly protected privilege.

The instant appeal is an effort by Mr. Northup to have this court reinstate the order of the trial court in and for Polk County, Florida, which had the effect to compelling counsel for the Respondent to disclose the identity of those deposition transcripts that Respondent's counsel had obtained through research, review, analysis, and judgment. Reduced to its most basic element, this appeal is directed toward the issue of whether Respondent's counsel's compilation of deposition transcripts of depositions the Plaintiff's retained expert, Michael Dillon, M.D., has given over time, is discoverable. However, the decision this Court makes in resolving this issue will have far reaching effects on the manner in which civil lawsuits are prepared for trial in the state of Florida, as the position the Petitioner is advocating in this appeal is nothing short of the abrogation of a privilege which protects the thought processes of counsel from disclosure, and which thereby preserves the vitality of the adversarial system. The dismantling of this privilege would have a chilling effect on all counsel, both those representing plaintiffs and defendants, in the manner in which they gather information in support of their clients' interests.

The basis for Dr. Acken's objection to the production of Dr. Dillon's depositions in defense counsel's possession is the work product doctrine. This doctrine provides for immunity from discovery for certain materials which are prepared or organized in preparation for litigation. In interpreting the Federal Rule after which the Florida Rule was patterned, the United States Supreme Court has explained that this immunity from discovery is necessary in order to preserve the privacy of an attorney's preparation, and to ensure the proper functioning of the adversarial system. ***Hickman v. Taylor***, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed.451 (1947). Proper preparation of a client's case demands that the attorney assemble information, sift what the attorney considers to be the relevant from the irrelevant facts, and prepare his legal theories and plan of strategy without undue and needless interference. ***Id.***, 329 U.S. at 510, 67 S.Ct. at 393. Although what constitutes work product which is immune from discovery is incapable of a concise definition adequate for all occasions, an attorney's evaluation of the relative importance of evidence falls squarely within the parameters of the privilege. ***Surf Drugs, Inc. v. Vermette***, 236 So.2d 108, 112 (Fla. 1970). What Mr. Northup proposes in his Initial Brief would in effect eviscerate the theoretical underpinnings of the work product doctrine as enunciated by the United States Supreme Court.

Materials which fall within the protection of the work product doctrine are immune from discovery with very limited exceptions which are provided in the Florida Rules of Civil Procedure. Rule 1.280(b)(3) provides in relevant part:

> Subject to the provisions of Subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including that party's attorney,

> consultant, surety, indemnitor, insurer, or agent, ***only upon a showing that the party seeking discovery has need of the materials in preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.*** In ordering discovery of the materials when the required showing has been made, ***the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney*** or other representative of a party concerning the litigation.

(Emphasis added).

Thus, once it is established that the compilation of materials, such as the assembly of the depositions of Dr. Dillon given in other lawsuits, constitutes work product, it becomes incumbent upon Mr. Northup to make a demonstration that he has a need for these materials, and cannot obtain their substantial equivalent without undue hardship. As will be set forth below, the assembly and compilation of these depositions does fall within the ambit of the most highly protected version of the work product doctrine, and Mr. Northup never made any showing to the trial court, the District Court, or to this Court, of an inability to obtain the substantial equivalent of these depositions without undue hardship.

Dr. Acken does not take the position that the depositions of Dr. Dillon, in and of themselves, constitute protected work product. It is not the depositions themselves that are protected, but rather Dr. Acken's counsel's acquisition of certain limited deposition transcripts of Dr. Dillon which constitutes the protected materials. Starting with the entire universe of every deposition which Dr. Dillon has given throughout the course of his career, counsel for Dr. Acken has made a reasoned judgment in obtaining copies of certain deposition transcripts of Dr. Dillon, while rejecting others. It is the thought process of Dr. Acken's counsel in acquiring certain deposition transcripts while rejecting others which mandates that this Court find that the particular assembly of these deposition transcripts constitutes protected work product.

Mr. Northup ignores the obvious in his Initial Brief, and takes the untenable position that

compelling the disclosure of all of Dr. Dillon's deposition transcripts in Dr. Acken's counsel's possession would not reveal the thought processes of counsel. Mr. Northup's argument might make sense if Dr. Acken's counsel had indiscriminately obtained every deposition Dr. Dillon had ever given. In that hypothetical situation, there would be no selection process by counsel to be revealed, because no critical analysis would have been performed. That is not the case here, as Dr. Acken's counsel emphatically informed the trial court that the basis for the application of the work product doctrine to the facts of this case is the thought process that led to the decision to select certain depositions, while rejecting others.

Mr. Northup attempts to confuse the issue in the Initial Brief before this Court by arguing that Dr. Acken "admitted" that no selection of Dr. Dillon's depositions had been made because the depositions are to be used to impeach Dr. Dillon. By definition, any impeachment material will be selected in response to Dr. Dillon's direct testimony, which, of course, will not take place until trial. This contention is specious, at best. The selection which is pertinent to the issues raised in this appeal is the selection of certain of Dr. Dillon's depositions, and the rejection of others, from the overall universe of his depositions he has ever given. It is the identity of these documents that Mr. Northup wants to obtain. From this subset, Dr. Acken will make a second determination, at trial, of which of these depositions, if any, provide material suitable for impeachment. Mr. Northup's attempt to compress these two distinct determinations into one is a transparent effort to avoid the impact of the work product doctrine, and reveals the weakness of his position.

The Third District Court of Appeal has considered a factual scenario which is strikingly similar to the facts of the instant case, and has come to the conclusion that the assembly of these documents by counsel is protected work product. In ***Smith v. Florida Power & Light Company***, 632 So.2d 696 (Fla. 3rd DCA 1994), counsel for the plaintiff had accumulated certain internal FPL generated business documents. Counsel for FPL propounded a request for

production that asked for the plaintiff to produce: "all other documents of defendant, Florida Power & Light Company in your possession and not produced by defendant, Florida Power & Light in this case." The plaintiff objected to the request on the basis of the work product doctrine. The plaintiff argued that the documents were not discoverable because the very grouping of those documents which had been collected outside of the discovery process would reveal his mental impressions. The trial court overruled the plaintiff's objections and ordered the plaintiff to produce these documents. The Third District Court of Appeal ruled that the trial court departed from the essential requirements of law in compelling the disclosure of these documents.

As is the case here, the documents FPL sought were not in and of themselves protected work product of the opposing counsel, because the party seeking the production of those documents had actually created them. However, the ***Smith*** court reasoned that even if the individual documents sought to be produced were not protected under the work product doctrine, "the selection process itself represents defense counsel's mental impressions and legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation." ***Id.*** at 698, *quoting* ***Sporck v. Peil***, 759 F.2d 312, 315 (3rd Cir.) *cert denied*. 474 U.S. 903, 106 S.Ct. 232, 88 L.Ed.2d 230 (1985). The ***Smith*** court cited to the decision of the ***Sporck*** panel in support of the following proposition: "The selection and compilation of documents by counsel in preparation for pretrial discovery fell within the ***highly protected category of opinion work product*** because identification of documents as a group would reveal counsel's selection process." ***Id***. (Emphasis added).

The ***Smith*** court went on to quote from another Federal Circuit Court in continuing its analysis, for the following proposition: "In cases that involve reams of documents and extensive document discovery, the selection and compilation of documents is often more critical than legal research." ***Id.***, *citing* ***Shelton v. American Motors Corporation***, 805 F.2d 1323 (8th Cir. 1986). The ***Shelton*** court had actually prohibited the plaintiffs from compelling defense counsel from even acknowledging the existence of a collection of AMC generated documents that she had assembled.

Based upon these federal decisions, the ***Smith*** court came to the conclusion that the particular grouping of FPL documents assembled by the plaintiff constituted the protected mental impressions of plaintiff's counsel, thus falling under the highly protected mental impression work product, which enjoys even stronger protection from disclosure than ordinary work product materials. The ***Smith*** court concluded:

> The documents sought comprise a grouping that is the end result of counsel's selection process; identification of the group would reveal counsel's mental impressions. FPL did not, nor could it allege a need for the documents or undue hardship in obtaining them so as to overcome the privilege under Florida Rule of Civil Procedure 1.280(b)(3); all the documents sought are in FPL's possession. Where a request is made for documents already in the possession of the requesting party, with the precise goal of alerting what the opposing attorney's thinking or strategy may be, even third party documents may be protected.

Id. at 698-699.

The opinion in ***Smith*** compels a similar result in the instant action. Like the FPL documents assembled by the plaintiff's attorney in ***Smith***, here, counsel for Dr. Acken has assembled a certain number of depositions which Dr. Dillon has given. Mr. Northup is seeking to obtain these depositions in order to minimize the impact of any impeachment material these depositions may have at the trial of this case. Compelling the disclosure of these depositions would reveal the mental impressions of Dr. Acken's counsel to Mr. Northup.

Mr. Northup takes the position that the court's conclusion in ***Smith***, because it was based on the federal cases cited above, should not prevail on this Court because the federal cases on which the ***Smith*** court relied are factually distinguishable. The distinction Mr. Northup attempts to draw is that in these federal cases, the request to identify those documents deemed to be significant concerned documents the requesting party had produced earlier in discovery, whereas here Dr. Acken went out on his own and found documents he deemed to be important based on his own research. This is a distinction without a difference. Whether the documents came from opposing counsel or from some other source, the mental impressions of an attorney deciding what is important and what is not important must remain protected.

As part of this same argument, Mr. Northup complains that he does not

have any of Dr. Dillon's prior deposition transcripts. If that is true, it is because he has not taken the time to go find them. One of the reasons the work product doctrine was created was to protect the work attorneys perform in preparing their case for trial from disclosure because of an opponent's discovery request which is designed to circumvent having to do the leg work himself. If Mr. Northup's true goal is obtaining Dr. Dillon's prior deposition transcripts, and not compelling the disclosure of Dr. Acken's counsel's mental impressions, then those transcripts are available from alternative sources.

This Court exercised its discretionary jurisdiction over this appeal based upon an express and direct conflict which the Second District Court of Appeal identified between ***Smith*** and ***Gardner v. Manor Care at Boca Raton, Inc.***, 831 So.2d 676 (Fla. 4th DCA 2002). To the extent that there is a conflict between these two opinions, the resolution of the conflict must be made with the approval of the ***Smith*** opinion, and the rejection of the majority opinion in ***Gardner***. ***Gardner*** was a nursing home lawsuit in which the defendant facility produced documents in response to the plaintiff's Request to Produce, including surveys conducted by the Agency for Health Care Administration, as well as personnel files of the facility's employees. The facility then served interrogatories which asked the plaintiff to identify which surveys and personnel files were relevant, and why. The Fourth District Court of Appeal found that the trial court had not departed from the essential requirements of law in reaching the conclusion that this

request did not violate the work product doctrine.

The majority's rationale in ***Gardner*** appears to be that the documents from which the selection process would be made were finite in number, had actually been produced by the facility, and ultimately constituted nothing more than the identification of documents to be used at trial whose identity had to be disclosed pursuant to the terms of the court's pre-trial order. The ***Gardner*** majority opinion studiously avoids any discussion of the fact that the interrogatories at issue demanded the disclosure of plaintiff's counsel's mental impressions. This approach is inconsistent with the theoretical basis of the work product doctrine as established by the United States Supreme Court, and is contrary to the adversarial system of jurisprudence. The absence of any legal foundation for the majority's conclusion was succinctly established by Judge Stevenson's dissent in the ***Gardner*** opinion, in which he sets forth the precise rationale which mandates this Court's approval of the ***Smith*** opinion, and the rejection of the ***Gardner*** majority.

As noted above, the trial court's order compelling the production of Dr. Dillon's depositions in the possession of Dr. Acken's counsel departs from the essential requirements of law because it does not acknowledge that the assembly and particular grouping of these documents constitutes the highly protected form of mental impression work product. Another reason to reject the trial court's conclusion is that it did not require Mr. Northup to establish that he

could not obtain the substantial equivalent of the material he was seeking to have produced without undue hardship. ***National Security Fire & Casualty Company v. Dunn***, 751 So.2d 777 (Fla. 5th DCA 2000). Of course, if required to do so, Mr. Northup would fail in this endeavor, as the documents which Mr. Northup is seeking to have Dr. Acken produce are either already in the possession of Mr. Northup's retained expert, Dr. Dillon, or are readily obtainable by Mr. Northup's retained expert. Thus, in the absence of a showing of an inability to obtain the substantial equivalent of these documents without undue hardship, the trial court departed from the essential requirements of law in compelling the production of these materials. Mr. Northup has not produced any affidavits or other sworn evidence to overcome the application of the work product doctrine in this case.

As a secondary argument in support of his position that Dr. Acken should be compelled to reveal his counsel's mental impressions in the form of identifying those deposition transcripts which he has obtained through his research, Mr. Northup has argued that it would not be fair to require Mr. Northup's counsel to have to review hundreds of pages of deposition transcripts in order to verify that their use during the trial of this cause was not done improperly by quoting Dr. Dillon's former deposition testimony out of context. This is in response to Dr. Acken's argument that the compilation of Dr. Dillon's previous deposition testimony was accomplished for the purpose of being able to impeach Dr. Dillon during cross-examination at the trial of this cause. In response, Mr. Northup argued that the Rules of Civil Procedure allow a party to introduce the remainder of a statement when only a part of a given statement is published to the jury. The purpose of this rule, as argued by counsel for Mr. Northup, is to ensure that a party has an opportunity to clear up any misconceptions which can be raised in the minds of the jurors when only a small portion of a statement is provided for their consideration, because that small portion may be taken out of context.

Mr. Northup's argument in this regard is not well taken. It is the nature of the adversary system of litigation which we have adopted in this country that allows for parties to cross-examine witnesses called for the opposing side. One of the methods which attorneys have used throughout the history of American jurisprudence is calling into question the credibility of a given witness by confronting the witness with prior inconsistent statements. Obtaining this form of impeachment evidence is of vital importance in allowing the members of the jury to reach a reasoned conclusion as to the credibility of individual witnesses.

Mr. Northup's argument is essentially that securing impeachment material for his expert witness is not fair. However, this flies in the face of hundreds of years of Anglo-American legal history. Impeachment is a vital part of the adversary process, and the trial court's order in this case departs from the essential requirements of law in part because it would deprive Dr. Acken of the opportunity to pursue this most basic form of advocacy.

Mr. Northup has also argued that if Dr. Acken intends to use these deposition transcripts at the trial of this cause, then any work product protection which may have attached to these materials would therefore disappear. Mr. Northup has essentially analogized the case law which provides that reports prepared by experts who are not going to testify at trial constitute protected work product; however that work product protection disappears when the attorney decides to call that expert to testify at the trial of the cause. The same holds true for the introduction of evidence of video surveillance tapes, which remain protected work product provided they are not going to be introduced at trial, but which lose that work product distinction once the determination is made that the jury will see the surveillance video. ***Dodson v. Purcell***, 390 So.2d 704 (Fla. 1980).

However, the ***Dodson*** line of case law is inapplicable to the facts of the instant case. Under ***Dodson***, work product protected material ceases to carry an immunity from discovery once it is determined by that party's counsel that

the material will be used and introduced as evidence at the trial of that cause. Here, the stated purpose for obtaining these various depositions of Dr. Dillon is to be in a position to impeach Dr. Dillon by confronting him with relevant, prior inconsistent statements, thereby calling into question Dr. Dillon's credibility as a witness. By definition, impeachment of a witness with prior inconsistent statements cannot occur until the witness makes a statement on direct examination which is contradicted by a prior statement. Thus, it is impossible to determine which, if any, of Dr. Dillon's previous depositions will be offered as impeachment evidence until Dr. Dillon's direct examination has been elicited by Mr. Northup's counsel. Thus, Mr. Northup's argument that by indicating an intention to utilize these other depositions for impeachment evidence at trial constitutes a waiver of any work product protection which may otherwise be afforded is simply not supported by a common sense evaluation of the facts of this case. [1]

Mr. Northup has raised another argument which is similarly without merit. He has quoted the following sentence from Fla.R.Civ.P. 1.280(b)(3) in support of the proposition that he should be entitled to obtain copies of Dr. Dillon's depositions: "Upon request without the required showing a person not a party

[1] A diligent search of Florida appellate decisions did not reveal a single published opinion permitting pre-trial discovery of planned expert impeachment of this nature.

may obtain a copy of a statement concerning the action or its subject matter previously made by that person." Mr. Northup has argued that the clause: "concerning the action or its subject matter," means that he can obtain copies of depositions which Dr. Dillon has given in any other case provided the other case concerns the same subject matter, the detection of ovarian cancer. However, Mr. Northup did not cite to any opinion from any jurisdiction which interprets this clause so broadly so as to allow a party to obtain copies of statements made in any context regarding any individual, provided there is some loose connection between the prior statement and some issue in the pending litigation. That is not the purpose of this portion of 1.280(b)(3). Instead, the rule was designed to insure that any individual who makes a statement about the specific facts surrounding that particular lawsuit is entitled to obtain a copy of that statement when it is requested. To construe the language of this rule of procedure in the manner which Mr. Northup suggests would twist its meaning beyond all recognition.

Mr. Northup implies in making this argument that he cannot obtain these deposition transcripts from any other source. This is inaccurate; Dr. Dillon can certainly identify those cases in which he has been retained to serve as an expert witness, and from there it is a simple matter of contacting the attorneys who hired him and securing the transcripts from them. The fact that Mr. Northup is intent on obtaining these deposition transcripts directly from Dr. Acken's

counsel reveals that Mr. Northup is not interested in the transcripts themselves, but in learning what Dr. Acken's counsel believes is important. This is precisely the tactic which the creation of the work product doctrine was designed to avoid.

Thus, Dr. Acken's counsel's assembly of various depositions which Dr. Dillon has given throughout the course of his career constitutes protected work product. The disclosure of these materials would amount to the disclosure of Dr. Acken's counsel's mental impressions, the most protected form of work product under Florida law, and would change the nature of all expert discovery throughout the state. Because these documents do reveal the mental impressions of counsel for Dr. Acken, and because Mr. Northup has made absolutely no showing of an inability to obtain the substantial equivalent of these materials without undue hardship, the decision of the trial court to compel the production of these documents constituted a departure from the essential requirements of law for which Dr. Acken would have no adequate remedy on final appeal. As such, the Second District Court of Appeal properly quashed the trial court's February 25, 2002 order, with instructions to enter an order sustaining Dr. Acken's objection to the production of these materials. To the extent that there is a conflict among the District Courts of Appeal over the issues raised in this case, that conflict must be resolved by approving ***Smith***, rejecting ***Gardner***, and confirming that an attorney's mental impressions will not

be compromised. The Second District Court of Appeals' decision in this case must not be disturbed.

CONCLUSION

For the reasons stated herein, Dr. Acken respectfully requests that this court affirm the opinion of the Second District Court of Appeal in all respects.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this _____ day of February, 2003, to all parties on the attached service list.

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this document complies with the requirements of Fla.R.App.P.9.210(a)(2). This document is being submitted in New Times Roman 14 point font.

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