IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2435

LEONARD NORTHUP, as Personal
Representative of the Estate of
MARY HELEN NORTHUP,
Deceased,

Petitioner

vs.

HERBERT W. ACKEN, M.D., P.A.

Respondent

______________________________/

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

**BRIEF OF PETITIONER LEONARD NORTHUP**

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## I. **Preliminary Statement**

For purposes of this appeal, the Petitioner, Leonard Northup, as Personal Representative of the Estate of Mary Helen Northup, Deceased, will be referred to as "Petitioner" or "Plaintiff," his capacity in the trial court. The Respondent, Herbert W. Acken, M.D., will be referred to as "Respondent" or "Defendant." All emphasis is supplied unless otherwise noted.

## II. Statement of the Case and Facts

The underlying litigation is an action for medical negligence. There is a claim for wrongful death involving failure to diagnose an ovarian tumor as well as a survival action for improperly failing to prepare the patient's bowel resulting in an unnecessary colostomy. (Tab 1, Third Amended Complaint). Respondent answered this complaint and filed affirmative defenses. (Tab 2, Defense Answer).

On September 28, 2001, the trial court entered an order scheduling the trial of this matter during the two-week period commencing March 18, 2002. (Tab 3, Pretrial Order). This order required the parties to disclose a list of all witnesses and all potential exhibits by October 28, 2001. Petitioner filed its witness and exhibit list (Tab 4, Plaintiff's Witness and Exhibit List) while respondent relied upon the witness and exhibit list it had filed when the case had previously been set for trial (Tab 5, Defendant's Witness and Exhibit List). Respondent's exhibit list did <u>not</u> contain any reference to deposition transcripts of Dr. Dillon, plaintiff's expert witness.

On November 5, 2001, Petitioner filed a Request for Production requesting copies of all deposition transcripts of Dr. Dillon in defendant's possession.
[1] On December 3, 2001, respondent objected to this request on the basis of the work product doctrine (Tab 7). Petitioner's counsel filed a Motion to Compel on January 15, 2002 (Tab 8).

The Motion to Compel was heard on January 23, 2002, less than two months before the case was set for trial. A transcript of the hearing is attached hereto as

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[1] Dr. Dillon had been deposed by Respondent's counsel on June 15, 2001 and November 2, 2001 (Tab 6).

Tab 9. After hearing argument of counsel and considering the written submissions of counsel, the Honorable Randall G. McDonald granted petitioner's Motion to Compel, overruling the claim of attorney work product. This order was entered on February 25, 2002. (Tab 10)

Respondent timely filed a Petition for a Writ of Certiorari reviewing Judge McDonald's order (Tab 11). The Second District granted Petition for Writ of Certiorari finding production of deposition transcripts well immune from discovery pursuant to the work product doctrine. The Court specifically noted it was relying on Smith v. Florida Power and Light Co., 632 So. 2d 696 (Fla. 3rd D.C.A. 1994) ("Smith"). However, the Second District certified conflict between the Smith decision and the Fourth District case of Gardner v. Manor Care of Boca Raton, 27 Fla. L. Weekly D. 837, (Fla. 4th D.C.A. April 10, 2002) ("Gardner"). Thus, the Second Circuit recognized the district court decisions of Smith and Gardner could not be harmonized and certified conflict establishing this Court's jurisdiction. 827 So. 2d 1070, 1072.

## III. **Summary of the Argument**

The trial court's order does not require defense counsel to identify the portions of Dr. Dillon's prior depositions which he intends to use as impeachment at trial. Instead, defense counsel was ordered to produce **all of Dr. Dillon's prior depositions in his possession**. As such, the trial court correctly determined this case did not seek disclosure of defense counsel's selection, compilation, and evaluation of

documents as contemplated by Smith. The trial court's order is the equivalent of a standard pretrial order requiring the identification of all potentially relevant documents to be used at trial.

The trial court correctly determined that Dr. Dillon's prior deposition transcripts were discoverable and not protected by the work product doctrine. It is well-settled in Florida that documents, pictures, statements and diagrams which may be presented as evidence at trial are not work product exempt from discovery. Such materials are discoverable in every instance when they are intended to be presented at trial either for substantive, corroborative, or impeachment purposes. Defense counsel's contention that these depositions are work product until he actually uses them during trial directly and expressly conflicts with this Court's decision in Dodson v. Purcell, 397 So. 2d 704 (Fla. 1980).

The trial court acted within its discretion by requiring production of Dr. Dillon's depositions prior to trial. Florida Statute § 90.108 provides that when any portion of a writing, document, or recorded statement is introduced, the adverse party has the right to require any other portion of the writing or statement to be introduced if fairness requires, however, this must be done **at the time the writing is introduced**, not during cross-examination or during the party's own case. The trial court correctly determined it would be a waste of judicial resources to require a protracted recess of trial each time defense counsel attempted to impeach Dr. Dillon in order to provide plaintiff's counsel an opportunity to review deposition transcripts for the first time.

Dr. Dillon is entitled to copies of all depositions in defense counsel's possession pursuant to Fla. R. Civ. P. 1.280 (b) (3). This rule provides that a person not a party

may obtain a copy of a "statement" concerning the "action or its subject matter" previously made by that party. A "statement previously made" is defined in the rule and includes a stenographic statement such as a deposition. Since the "subject matter of this litigation" is medical malpractice, any prior depositions of Dr. Dillon given in a medical malpractice case "concerns the subject matter of this litigation" and is therefore discoverable.

## IV. Argument

### A. The Trial Court Correctly Determined that Prior Depositions of Dr. Dillon were not Work Product

#### 1. The Trial Court's Order did not seek Disclosure of Respondent's Counsel's Selection, Compilation, or Evaluation of Documents as Contemplated by Smith

Respondent's counsel concedes Dr. Dillon's prior depositions themselves do not constitute work product. However, he attempts to place himself within the rule announced in Smith by arguing that producing all of Dr. Dillon's depositions would constitute work product, since it would allegedly involve disclosure of the selection and evaluation of documents. However, a careful reading of Smith and the federal authorities cited therein refutes this contention and supports the trial court's determination that producing **all** of Dr. Dillon's depositions does not involve disclosure of defense counsel's selection, compilation and evaluation of documents (A. 361)

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Smith involved a request for production by Florida Power and Light ("FPL") to plaintiff requiring production of "all other documents of Florida Power and Light in their possession and not produced by the Defendant, Florida Power and Light in this cause." FPL had become aware that plaintiff had some of its documents but did not know which specific documents had been obtained. Plaintiff's attorney asserted that the documents were not discoverable **at this point in the litigation** [3] **because the grouping of these documents collected outside the discovery process would reveal his mental impressions. Significantly, and in direct contrast to this case, FPL advanced no other argument in either the trial court or in the appellate court to force production of the documents that were once in its possession but could not be specifically identified. The Third District granted the Petition for Writ of Certiorari.**

**The Smith court determined that it was faced with an issue of first impression in Florida – whether an attorney's selection of documents which by themselves would not be cloaked with the work product privilege renders that group of documents, as a discrete unit, immune from discovery. The Smith court held that it did. In arriving at this conclusion, the Third District relied upon three federal decisions, Sporck v. Peil, 759 F. 2d 312 (3rd Cir.).** ***cert. denied*****, 474 U.S. 903, 106 S. Ct. 232, 88 L. Ed. 2d 230 (1985)** [4]**; Shelton v.**

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[2] The trial court's order did not require respondent's counsel to identify which prior depositions or which portions of a particular deposition he intended to use as impeachment. This would be a legitimate example of an order which required disclosure of counsel's selection and evaluation of documents prohibited by Smith.

[3] **Plaintiff's counsel in Smith was not** claiming that these documents did not have to be revealed on his pretrial exhibit list.

[4] **The reasoning set forth in Sporck has not been followed in a number of federal decisions. In fact, Pepsi-Cola Bottling Co. of Pittsburg, Inc. v. Pepisco, Inc., 2002 WL 113879 (D. Kan**

**American Motors Corp., 805 F. 2d 1323 (8th Cir. 1986) and In re: Grand Jury Subpoenas, 959 F. 2d 1158 (2nd Cir. 1992) to support its conclusion.**

**Sporck involved a discovery dispute between the parties in a securities fraud class action suit. Peil alleged that National Semiconductor Corporation (NSC) and its President, Charles Sporck, conspired to artificially inflate the value of NSC stock in order to enable Sporck to sell shares at an inflated level. During discovery, attorneys for Peil served numerous sets of interrogatories and document requests on defendants. In response, defendants produced hundreds of thousands of documents from which Peil's attorneys selected more than 100,000 for copying. Prior to the deposition of Mr. Sporck, plaintiff's counsel requested that Sporck identify all documents examined, reviewed, or referred to by him in preparation for his deposition. Defense counsel refused to identify the documents arguing that all of the documents had previously been produced**, and that the select grouping of the documents was attorney work product and thus protected from discovery by the Federal Rules of Civil Procedure. The Third Circuit agreed.

In Shelton, the Eight Circuit reversed a default judgment which had been entered against AMC for refusing to allow its attorney to answer deposition questions asking her to identify a subset of documents that she considered to be important out of a larger collection of documents **which had already been produced** by AMC.

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**January 22, 2002) (NO.01-2009-KHV) adopted the dissent of Judge Seitz in Sporck and upheld a magistrate's order which rejected application of the work product privilege under circumstances similar to Sporck. See also, San Juan Dupont Plaza Hotel Fire Litig, 859 F. 2d 1007, 1018 (compelled disclosure of document lists does not implicate work product); Bohannon v. Honda Mfr. Co. Ltd., 127 F.R.D. 536, 539-40 (D. Kan. 1989)**

Likewise, In re: Grand Jury Subpoenas involved a request for documents already in the possession of the opposing party's attorneys.

The facts of this case are clearly distinguishable from those set forth in Sporck, Shelton and In re Grand Jury Subpoenas. In each of those cases, one party produced records to another party and thereafter asked the opposing party to identify which records they considered to be important out of a collection which had already been produced. That is in direct contrast to this case, since respondent's counsel has not produced any of the previous depositions of Dr. Dillon and petitioner's counsel does not possess any other deposition transcripts of this witness. None of those cases involve prior statements of a witness which were intended to be used as impeachment at trial. Finally, those cases do not support respondent's contention that a party need not disclose documents in its pretrial exhibit list which may be used at trial.

Smith did not involve nor discuss the issues of use of a prior statement of a witness at trial. The Second District's statement below in Northup that "possible use of the depositions for impeachment at trial is not before us and we do not address it." Northup at note 1, is simply erroneous. There would be no other use of prior depositions of Dr. Dillon except for impeachment at trial, since his deposition had already been taken by defense counsel!

In Smith, plaintiff claimed work product "at this point in the litigation." Smith, 632 So. 2d at 697. A document or exhibit may be work product at the outset of litigation but loses this protection if it is to be used at trial. An example of this is surveillance film. Surveillance film is initially protected. However, once a defendant determines it may be used at trial, the film is no longer privileged. However, before

plaintiff views the film, the defendant is entitled to depose plaintiff. See Dodson. This rule protects both parties.

It should be stressed that Petitioner's counsel did not request Dr. Dillon's prior deposition transcripts until **after** Dr. Dillon was deposed. Defense counsel was able to examine Dr. Dillon and determine the basis of his opinions for over six hours during his pretrial deposition. Thus, at the time the prior deposition transcripts were sought, Plaintiff's attorney was preparing for trial, not preparing to defend a deposition of his expert. As this Court set forth in Dodson, on the eve of trial, the parties must disclose any potentially relevant evidence which may be used at trial. The prior depositions are completely analogous to a surveillance film and accordingly, whatever work product protection may exist earlier in the litigation, it is lost when the case moves forward to trial.

Here, the defense attorney had the opportunity to take the deposition of Dr. Dillon and fully develop any inconsistencies in his testimony without regard to any depositions. Thus, no work product was disclosed or even sought. However, after Dr. Dillon's deposition was completed and the case proceeded to trial, any protection that was previously afforded was lost. Consistent with the Court's decision in Dodson, such information must be disclosed if it is anticipated it will be used at trial.

The Court in Gardner, rejected a claim of work product similar to that asserted by respondent. There, Manor Care propounded interrogatories requesting plaintiff to identify which documents [5] plaintiff contended were relevant to the issues to be determined at trial. The trial court overruled plaintiff's work product objection.

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[5] **These documents were personnel files of defendant's employees and various surveys conducted at Manor Care.**

Plaintiff filed a petition for a writ of certiorari based upon the reasoning set forth in Smith. The Fourth District denied the petition.

The Court attempted to distinguish Smith by noting that unlike Smith, Gardner only involved a finite number of documents which Manor Care had produced. More importantly, the Fourth District noted that requiring disclosure of the documents petitioner thought to be relevant had no more effect than a standard pretrial order requiring a party to list relevant documents to be used during trial.

Although Smith can be distinguished from this case for the reasons set forth above, Gardner cannot be. Even though Gardner does not mention Dodson by name, it recognizes that a trial court can require a party to identify documents which a party intends to use at trial. The Second District's determination that Dr. Dillon's deposition transcripts are not subject to disclosure conflicts with Gardner and is directly contrary to Dodson.

2. **Statements are discoverable in every instance when they are intended to be presented at trial either for substantive, corroborative, or impeachment purposes.**

At the hearing on Plaintiff's motion to compel production of the depositions of Dr. Dillon, Respondent's counsel argued that Dodson did not apply to this case, because it involved the issue of surveillance film. He also argued Dr. Dillon's prior depositions were work product and did not have to be produced until they were actually used during the trial. He is wrong on both counts.

Dodson was heard by this Court as a result of a conflict between the Third District's decision in Collier v. McKesson, 121 So. 2d 673 (Fla. 3rd D.C.A. 1960) and the Fourth District's decision in Corack v. Travelers Ins. Co., 347 So. 2d 641 (Fla.

4th D.C.A. 1977). Corack held that the existence and content of such materials were discoverable, while McKesson held that surveillance films constituted work product and were not discoverable. This Court expressly disapproved the holding in McKesson. Id. at 708. In doing so, this Court agreed with Petitioner's argument that the existence and contents of surveillance films should be disclosed prior to trial and must be treated like any other evidence in order to avoid misuse. The Court rejected the defense argument that the discovery of surveillance films was not necessary to eliminate surprise, since the surveillance film involved facts more readily known by the plaintiff than the defendant and consequently there would be no surprise.

This Court referenced its prior holding in Surf Drugs, Inc. v. Vermette, 236 So. 2d 108 (Fla. 1970). There, guidelines were established to determine which materials or information were subject to discovery and which were classified as falling within the work product privilege, stating as follows:

> Generally those documents, pictures, **statements** and diagrams which are to be presented as evidence are not work product and anticipated by the rule for exemption from discovery. Personal views of the attorney as to how and when to present evidence, his evaluation of its relative importance, his knowledge of which witness will give certain testimony, personal notes and records as to witnesses, jurors, legal citations, proposed arguments, jury instructions, diagrams and charts he may refer to at trial, for his convenience, but not to be used as evidence, come within the general category of work product. Surf Drugs at 112.

Dodson specifically held that the contents of surveillance films and materials are subject to discovery in **every instance** where they are intended to be presented at trial either for substantive, corroborative, **or impeachment purposes**. As noted earlier, this Court expressly disapproved the Third District's decision in McKesson. That is

significant, since McKesson accepted the argument advanced by defense counsel in this case. That is, since surveillance films would be only used for impeachment that they were not discoverable prior to trial.

[6] The effect of the Second District's decision in this case is that respondent's counsel does not have to produce any depositions of Dr. Dillon until he actually uses them for impeachment at trial. This directly conflicts with Dodson.

In the Petition for Writ of Certiorari, the defendant submits that 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." (Tab 11; A. 382) Thus, by his own admission, defense counsel has acknowledged that he **has not made any determination or selection** regarding Dr. Dillon's previous depositions. In other words, defense counsel does not know which depositions will be used for impeachment and cannot know until Dr. Dillon testifies at trial. Thus, because defense counsel concedes he has made no selection – which arguably might be protected by Smith -- no work product exists to be disclosed. As no determination has been made, disclosure will not provide any guidance into defense counsel's thought process or strategy. In effect, all that the defense counsel has done at this point is gather some depositions previously given by Dr. Dillon. These depositions have been obtained by counsel, and from this collection he may choose to use selected

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**[6] Defense counsel's argument is also contrary to the rationale discussed by this Court in Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981). There, the Court disapproved the general reference to "any and all necessary impeachment or rebuttal witnesses" as not constituting adequate disclosure required by a pretrial order directing the parties to exchange names of witnesses.**

portions at trial. Accordingly, there are no mental impressions or opinions to be obtained by identifying this collection of depositions. Petitioner's counsel has acknowledged that these depositions are potentially relevant and like the surveillance film in Dodson, should be identified prior to commencement of trial.

### B. The Trial Court Acted within its Discretion by Requiring Production of Dr. Dillon's Depositions prior to Trial so that Petitioner's Counsel could Comply with Fla. Stat. § 90.108

Fla. Stat. § 90.108 is referred to as the rule of completeness. This rule of evidence provides that when any part of a writing or recorded statement is introduced by a party, the adverse party may require him or her **at that time** to introduce any other part or any other writing or recorded statement that, in fairness, ought to be considered contemporaneously. If the adverse party does not seek to invoke Section 90.108 at the time the writing or document is initially offered, the provision may not be utilized during cross examination or during the party's own case. See generally, Ehrhardt, Florida Evidence, Section 108.1 (2002 Edition) and authorities cited therein.

At the hearing on Petitioner's motion to compel, the trial court specifically referenced judicial economy as a basis for the ruling in this case. (Tab 9; A. 360-361) The trial court correctly determined it would be a waste of judicial resources to require a protracted recess each time defense counsel attempted to impeach Dr. Dillon so that plaintiff's counsel could for the first time review a stack of depositions.

### C. Dr. Dillon is Entitled to any of his Depositions in the Possession of Respondent's Counsel pursuant to Fla. R. Civ. P. 1.280 (b) (3)

The Motion to Compel included a letter written by petitioner's counsel requesting all depositions of Dr. Dillon in the possession of defense counsel. (Tab 8; A. 333) This letter referenced Fla. R. Civ. P. 1.280(b)(3) which provides that a person not a party may obtain a copy of a "statement" concerning the "action or its subject matter" previously made by that party without the showing necessary to overcome the work product doctrine. Petitioner's counsel has found no case authority interpreting this language. However, a "statement previously made" is defined in the rule and includes a stenographic statement such as a deposition. Since the "subject matter of this litigation" is medical malpractice, any prior depositions of Dr. Dillon given in a medical malpractice case "concern the subject matter of this litigation" and are therefore discoverable.

The trial court's order can also be upheld on the procedural grounds that any work product privilege was waived by failing to file a privilege log. No log was produced by Defendant. <u>See generally</u>, <u>TIG Insurance Corp. of America</u>, 799 So. 2d 339 (Fla. 4th D.C.A. 2001); <u>The Omega Consulting Group, Inc. v. Omegacal Consulting, Inc.</u>, 805 So. 2d 1058 (Fla. 4th D.C.A. January 23, 2002).

## V. **<u>Conclusion</u>**

The trial court's order should be affirmed and the decision of the Second District Court of Appeal should be vacated.

Respectfully submitted,

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***CERTIFICATE OF SERVICE***

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ___ day of December, 2002, to all counsel of record on the attached service list.

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## ***CERTIFICATE OF COMPLIANCE AND TYPE SIZE FONT***

Undersigned counsel certifies that this brief complies with the type size set forth in Federal Rule of Appellate Procedure 9.210. This brief is typed in Times New Roman 14.

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SCOTT M. WHITLEY, ESQ.

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