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

REPLY BRIEF OF PETITIONER, LEONARD NORTHUP

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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.

ISSUES ON APPEAL

I. THE TRIAL COURT CORRECTLY DETERMINED THAT REQUIRING DISCLOSURE OF PRIOR DEPOSITIONS OF DR. DILLON WHICH MAY BE USED AS IMPEACHMENT AT TRIAL DID NOT VIOLATE THE WORK PRODUCT DOCTRINE.

The trial court's order, which is the subject of this appeal, was entered less than two months before trial and after Dr. Dillon had been deposed. This order does not violate the work product doctrine. This order merely required defense counsel to produce **all prior depositions** of Dr. Dillon and did not require counsel to identify which portions of these depositions may be used as impeachment at trial. This order was entered after both parties had exchanged pre-trial witness and exhibit lists [1] and has no more effect than a standard pretrial order requiring a party to list relevant documents which may be used at trial. Given the fact that Dr. Dillon's deposition had already taken place and that he was not impeached with prior depositions during this deposition, the **ONLY POSSIBLE** permissible use of these prior depositions would be for impeachment at trial.

Respondent acknowledges that prior depositions of Dr. Dillon are themselves not work product. However, he attempts to place himself within the

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' Respondent never identified any prior depositions of Dr. Dillon on his exhibit list which is in direct violation of the Order Setting Pretrial Conference and Jury Trial and Directing Mediation. Moreover, the pretrial order required each side to exchange potential exhibits before trial. This meeting would have taken place by February 13, 2002.

rule announced in Smith v. Florida Power and Light Co., 632 So. 2d 696 (Fla. 3rd D.C.A. 1994) by arguing that these documents should be protected because the grouping of these documents would reveal counsel's mental impressions. Smith is clearly distinguishable from this case. The rationale in Smith was that where a request is made for documents already in the possession of the requesting party, with the precise goal of learning what the opposing party's thinking and strategy may be, these documents should be protected. Plaintiff's counsel does not possess prior depositions of Dr. Dillon.[2] Moreover, Smith did not involve the issue of whether documents which may be used as impeachment at trial are required to be produced to the opposing party prior to trial.

Respondent also relies upon Sporck v. Peil 759 F. 2d 312 (3rd Cir. 1985) *cert. denied,* 474 U.S. 903, 106 S.C. 232, 88 L. Ed. 2d 230 (1985) and Shelton v. American Motors Corp.. 805 F. 2d 1823 (8th Cir. 1986) to support his position in this case. However, neither Sporck nor Shelton involves the issue of disclosure of documents that are intended to be used as impeachment at trial. In Sporck, the dispute arose **before** the deposition of the plaintiff, Mr. Sporck. Likewise, the dispute in Shelton arose **before** the deposition of one of AMC's attorneys.

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[2] Respondent throughout his brief argues that Dr. Dillon possesses all prior depositions he's ever given. However, there is absolutely no evidentiary basis for this statement. It is well settled that argument of counsel does not constitute evidence. Steinhardt v. Intercondominium Group, Inc., 771 So. 2d 614 (Fla. 4th D.C.A. 2000).

Again, here, the only possible use of prior depositions of Dr. Dillon could be for impeachment at trial.

The facts of this case are more clearly aligned with those in Gardner v. Manor Care at Boca Raton. Inc., 831 So. 2d 676 (Fla. 4th D.C.A. 2002). There, the Fourth District's order which required Plaintiff to identify documents which were relevant to the proceedings had no more effect than a standard pretrial order requiring a party to list relevant documents to be used during trial. The dissenting opinion in Gardner demonstrates the fallacy of respondent's position.

Judge Stevenson disagreed with the majority's opinion and indicated that the Petition for Writ of Certiorari should have been granted and the order quashed to the extent that it required Gardner to reveal "the manner in which" petitioner contends that the documents referenced in an interrogatory request had relevance. However, Judge Stevenson specifically stated, “[c]ertainly, Manor Care is entitled to know which documents might, and will, be used at trial, but, here, Manor Care subtly seeks something more, the actual legal strategy of Gardner.” Gardner at 679. Thus, the dissenting opinion in Gardner -- an opinion Respondent cites with approval -- recognizes a party is entitled to know which documents an opponent might use at trial. Petitioner only sought the identification of the depositions which might be used at trial – it does not

seek the disclosure of the "manner" or legal strategy regarding the use of these depositions.

It should be stressed that Petitioner has not requested nor does the trial court's order require Respondent to identify which portions of Dr. Dillon's prior depositions he intends to use as impeachment at trial. Such an order would involve violation of the work-product doctrine, since that truly would require counsel to reveal mental impressions and trial strategy. However, the trial court's order merely requires production of **all** prior depositions of Dr. Dillon.

The absurdity of Respondent's position is illustrated by the following hypothetical example. If Respondent's argument is followed to its logical conclusion, then a defense lawyer defending a personal injury action would not be required to list on his exhibit list or produce prior to trial any of plaintiff's medical records in his possession, since according to Respondent, the plaintiff would know all doctors that have treated him during his lifetime. The records would not have to be produced until they were actually used for impeachment at trial. Clearly, any such rule would be in direct conflict with the prior pronouncements of this Court in Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981), Dodson v. Persell 397 So. 2d 704 (Fla. 1980), and Surf Drugs, Inc. v. Vermette, 236 So. 2d 108 (Fla. 1970).[3]

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[3] Respondent references Surf Drugs in his brief but does not comment on that portion of the opinion which states that statements which are to be used at trial are not protected by the work product privilege. 236 So. 2d at 112.

The basis for Respondent's work-product claim is that to require production of all of Dr. Dillon's depositions would require disclosure of counsel's mental impressions and selection process. However, during the argument on Petitioner's Motion to Compel and in Respondent's brief, Respondent concedes he does not know which of Dr. Dillon's prior depositions will be used for impeachment and cannot know until trial. (Answer Brief p. 6, 23) Accordingly, as no selection has been made, no work-product exists and no protection is afforded.

The trial court correctly ruled that defense counsel should produce **ALL** prior depositions of Dr. Dillon. The Second District erroneously quashed this order and incorrectly determined that the issue of use of these prior depositions at trial was not an issue before them. The only possible use of these prior depositions was for impeachment at trial. To affirm the decision of the Second District, this Court must determine a trial court judge cannot require a party to disclose documents which may be used at trial. This, in effect, overrules the decisions in Surf Drugs and Dodson.

II. STATEMENTS ARE DISCOVERABLE IN EVERY INSTANCE WHEN THEY ARE INTENDED TO BE PRESENTED AT TRIAL EITHER FOR SUBSTANTIVE, CORROBORATIVE, OR IMPEACHMENT PURPOSES.

This court in Dodson v. Persell 397 So. 2d 704 (Fla. 1980) held that documents which may be used for impeachment at trial must be disclosed, and that any work product privilege that existed ceases once the materials are intended for trial use. Respondent acknowledges Dodson but attempts to distance himself from its holding by arguing that this rule only applies when

that party's counsel has determined that the material will be used and introduced as evidence at trial. (Answer Brief p. 23). In essence, respondent argues that he does not have to produce prior depositions of Dr. Dillon unless or until he decides to use the depositions at trial. He is wrong!

Dodson resolved a conflict between the Third and Fourth Districts. The Third District had ruled that impeachment material which was work product retained that status unless or until actually used as impeachment at trial. This is the same argument advanced by Respondent's counsel. See Collier v. McKesson, 121 So. 2d 673 (Fla. 3rd D.C.A. 1960). However, the Fourth District held that such materials were discoverable. Spencer v. Beverly, 307 So. 2d 461 (Fla. 4th D.C.A. 1975). This Court expressly disapproved the holding in McKesson and rejected the argument that "discovery of the surveillance films is not necessary to eliminate surprise because the surveillance film involves facts more readily known by the plaintiff than the defendant and consequently there is no surprise." Dodson at 706. This Court has previously rejected an argument similar to that being advanced by Respondent and likewise should be rejected here.

CONCLUSION

The Order of the trial court requiring production of all of Dr. Dillon's depositions is correct and should be affirmed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this ___ day of March, 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 Times New Roman 14 point font.

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