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**DISCOVERY AND WORK PRODUCT
by Ted Babbitt**

An opinion of the Fourth District Court of Appeals clarifies recent decisions about the work product exception to discovery. Grinnell Corp. v. The Palms 2100 Ocean Boulevard, Ltd., 31 Fla. L. Weekly D726 (Fla. 4th DCA, March 8, 2006) was an action brought under the Florida Condominium Act alleging the defective installation of fire sprinkler pipes in a condominium in Ft. Lauderdale. Interrogatories were sent to the defendant requesting all facts the defendant relied upon in their answer or affirmative defenses and requesting the identification of all records that supported those facts and every witness having knowledge of those facts. The defendant resisted discovery on the basis of work product. The trial court overruled that objection and required answers to the interrogatories and required that the defendant not only produce the requested documents but label them “as a broad general view” as well as identifying pages of deposition testimony that supported the defendant’s affirmative defenses.

The Fourth District affirmed the trial court with respect to its order compelling the answers to the interrogatories but reversed as to the requiring of the labeling and delineating documents and depositions.

The landmark case on work product is Hickman v. Taylor, 329 U.S. 495, 510-11 (1947), which protected from discovery an attorney’s mental impressions in the preparation of a case. In Northup v. Acken, 865 So. 2d 1267 (Fla. 2004), the Supreme Court of Florida drew a distinction as to the application of the work

product exception based upon whether the product of the attorney's work was to be presented at trial. The Court held that once an attorney, in good faith, expected to utilize information at trial it no longer was protected from discovery based upon work product.

In drawing that distinction, the Supreme Court reviewed an opinion of the Fourth District in Gardner v. Manor Care of Boca Raton, Inc., 831 So. 2d 676 (Fla. 4th DCA 2002). Gardner, supra, was a nursing home case in which the defendant sought discovery from the plaintiff and requested that the plaintiff determine which documents, which had already been produced, were relevant to the lawsuit. The Fourth District approved those discovery requests.

In Northup, supra, the Supreme Court explained that Gardner went too far in requiring plaintiff's counsel to evaluate which documents were relevant to the lawsuit. In Grinnell, the Fourth District quotes from the Supreme Court's opinion in Northup at Page 1272"

"[t]he overriding touchstone in this area of civil discovery is that an attorney may not be compelled to disclose the mental impressions resulting from his or her investigations, labor, or legal analysis unless the product of such investigation itself is reasonably expected or intended to be presented to the court or before a jury at trial. Only at such time as the attorney should reasonably ascertain in good faith that the material may be used or disclosed at trial is he or she expected to reveal it to the opposing party. Because the Fourth District's Gardner decision conflicts with this principle, **we must disapprove that portion of the opinion requiring counsel to evaluate the comparative relevance of documents for purposes of an opponent's**

discovery.” (Emphasis by Grinnell Court).

Subsequent to the Northup opinion, the Fourth District decided the case of Gabriel v. Northern Trust of Florida, N.A., 890 So. 2d 517 (Fla. 4th DCA 2005). Gabriel was a suit over an investment account in which the defendant sought production of documents that “relate to or otherwise support” the “essential” allegations of the complaint. The Fourth District, relying upon Northup, held that such information could not be obtained until such time as the attorney for the plaintiff reasonably intended to utilize the information at trial. In Grinnell, the Court stated:

“A fair reading of *Gabriel* is that it precludes production of any documents or fact unless a party reasonably expects or intends to present it at trial. Such a broad construction of the work product privilege interferes with the essential function of the discovery process of narrowing issues for trial.”
Grinnell at Page D728.

In receding from its opinion in Gabriel, the Fourth District in Grinnell reviewed the landmark cases on the broadness of discovery such as Allstate Ins. Co. v Boecher, 733 So. 2d 993 (Fla. 1999) and Surf Drugs, Inc. v. Vermette, 236 So. 2d 108 (Fla. 1970). Those cases sought to put an end to “surprise” trial tactics, reasoning that both sides were entitled to information to fully prepare for trial and evaluate cases for potential settlement. The Grinnell Court concluded that couching discovery in terms of “relevance” is perfectly appropriate because Fla. R. Civ. P. 1.280(b)(1) itself utilizes the term “relevance” when it permits

discovery of “any matter, not privileged, that is relevant to the subject matter of the pending action.” At Page D728, the Court holds:

“Because the rule contemplates that a party may ask about matters ‘relevant to the subject matter of a pending action,’ it is clear that the concept of ‘relevance’ is appropriate in framing discovery requests.”

The Court then reviewed Dupree v Better Way, Inc., 86 So. 2d 425 (Fla. 1956) which involved an interrogatory requiring a party to provide “names and addresses of any other persons believed by you or known by you or your attorney to have knowledge concerning facts pertaining to the [] accident” and concluded that:

“We see no difference between a fact ‘pertaining’ to an incident under *Dupree*, and a document or fact ‘supporting’ an affirmative defense, which was the phrasing used in the interrogatories and request for production in the case at bar.” Grinnell at Page D728.

The Grinnell Court explained that there is a distinction between the divulging of an attorney’s strategy or legal impression and the **facts** obtained by an attorney as a result of the attorney’s diligence in preparation of the case. While the strategy and impressions of an attorney may be protected by work product, the facts are not. The Court thus concludes at Page 7:

“Without violating the work product privilege, a litigant may be required in an interrogatory to specify the facts supporting a claim or defense.”

The conclusion of the Fourth District in Grinnell is consistent with the form interrogatories approved by the Supreme Court in 1985. Those form

interrogatories were the product of a special committee appointed by the Supreme Court entitled “The Abuse of Discovery Committee” and were designed to avoid unnecessary duplication in response to interrogatories propounded by multiple parties. Those interrogatories, which are required to be utilized initially before the propounding of any further interrogatories, contain the following questions:

“17. List the names and addresses of all persons who are believed or known by you, your agents, or your attorneys to have any knowledge **concerning any of the issues in this lawsuit,**”

“19. State the name and address of every person known to you, your agents, or your attorneys, who has knowledge about, or possession, custody, or control of, any model, plat, map, drawing, motion picture, videotape, or photograph **pertaining to any fact or issue involved in this controversy. . . .**”

The Grinnell Court, after approving the trial court’s order requiring answers to the subject interrogatories, quashed the Court’s order requiring the defendant to label certain documents that had been produced and identify deposition testimony, which supported certain defenses explaining that Fla. R. Civ. P. 1.350(b) establishes the procedure for the production of documents which includes the choice of either producing them as they are kept in the usual course of business or identifying the documents as they correspond with the request for production. The Court explained that requiring counsel to go through documents already produced and depositions already taken to classify them with respect to

the issues in the case was precisely the type of order prohibited by the Supreme Court in Northup, supra.

This case clarifies for the bench and bar required discovery production and the limitations of the work product protection of such discovery.

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