

October 2004

WORK PRODUCT LIMITATIONS

By Ted Babbitt

The Supreme Court of Florida recently had an opportunity to describe the limits of the work product privilege. Northrup v. Acken, 865 So. 2d 1267 (Fla. 2004) was a medical malpractice case in which a doctor's attorney was compelled by the trial court to provide copies to the plaintiff of all depositions that were intended by the doctor to be utilized in impeachment of the plaintiff's experts. The doctor appealed and the Second District at 827 So. 2d 1070 quashed the order of the trial court holding that the depositions constituted work product and, therefore, were privileged. Defense counsel successfully took the position in the District Court that disclosing impeachment exhibits would necessarily divulge his mental impressions and strategy since he was required to produce only those depositions which he intended to use as impeachment of plaintiff's experts at trial. The Second District relied on Smith v. Florida Power & Light Co., 632 So. 2d 696 (Fla. 3rd DCA 1994), which approved nondisclosure of similar depositions.

The Supreme Court in Northrup, *supra*, reviews the work product privilege. That privilege had its inception in Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L. Ed. 451 (1947). That landmark case recognized the need for lawyers to be able to devise strategy in private and held that the mental impressions, personal beliefs and trial preparation of a lawyer were not discoverable since they constituted the work product of that lawyer.

Florida expanded on the definition of work product in Surf Drugs, Inc. v. Vermette, 236 So. 2d 108 (Fla. 1970). In that case, the Supreme Court of Florida held that the scope of the attorney work product privilege protection is limited to materials which are not intended to be used in trial. In Dodson v Persell, 490 So. 2d 704 (Fla. 1980), the Florida Supreme Court in addressing the question of the discoverability of surveillance videos at Page 707 held:

Any work product privilege that existed ... ceases once the materials or testimony are intended for trial use. . . .

In holding that the depositions of an expert witness intended for use as impeachment at trial are discoverable, the Supreme Court puts an end to the question of whether impeachment exhibits must be listed as exhibits and produced upon request. At 1271, the Court holds:

The clearly erroneous position of the respondent in the trial court was that he was totally free to use depositions at trial and read portions thereof in the presence of the jury without ever disclosing the depositions until the impeachment actually occurred during trial. We conclude and specifically announce today that all materials reasonably expected or intended to be used at trial, including documents intended solely for witness impeachment, are subject to proper discovery requests under *Surf Drugs, Dodson*, and a host of lower court decisions, and are not protected by the work product privilege.

While not under review in this case, the Supreme Court in an effort to establish the bounds of discoverability, discusses and rejects the Fourth District's holding in Gardner v. Manor Care of Boca Raton, Inc., 831 So. 2d 676 (Fla. 4th DCA 2002). There the Supreme Court required defense counsel to cull through

various personnel files in order to determine which ones were relevant for trial and thereupon produce them and only them to the plaintiff's counsel. The Court holds that such an order goes beyond the bounds of discoverability since it requires counsel to spoon feed opposing counsel with those portions of the record which producing counsel feels are relevant to the cause. Such a ruling, in the opinion of the Supreme Court, goes entirely too far on the issue of discoverability. However, once an attorney is in a position to determine that materials will be used at trial, any privilege disappears. At 1272, the Court held:

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.

Presumably by the time a party is required to list exhibits and witnesses pursuant to a pretrial order, a decision must be made as to whether the exhibit will be used at trial. Indeed, the Supreme Court in Northrup so holds at Page 1270:

In essence, Florida litigants must make a simple and discrete decision prior to entry of a pretrial case management order by the trial court. An attorney must evaluate whether he or she intends to use evidence in his or her possession for strategy and trial preparation purposes only, which would qualify the selection of the particular items as a protected product of the thought processes and mental impressions of an attorney. On the other hand, if the evidence or material is

reasonably expected or intended to be disclosed to the court or jury at trial, it must be identified, disclosed, and copies provided to the adverse party in accordance with the trial court's order and the discovery requests of the opposing party.

This opinion settles once and for all the issue of whether impeachment exhibits are discoverable. If they are to be used at trial, no work product privilege applies.

NOTE: BECAUSE A NUMBER OF PEOPLE HAVE REQUESTED COPIES OF PAST ARTICLES, A COMPILATION OF THESE ARTICLES IS NOW AVAILABLE TO MEMBERS OF THE PALM BEACH COUNTY BAR ASSOCIATION, FREE OF CHARGE, BY CALLING (561) 684-2500.