

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

WALTER HARGROVES, as the
Personal Representative of the Estate
of DEBRA HARGROVES,

Petitioner,

v.

R.J. REYNOLDS TOBACCO COMPANY,
a foreign corporation, as successor by
merger to BROWN & WILLIAMSON
TOBACCO COMPANY and AMERICAN
TOBACCO COMPANY,

Respondents.

Case No. 2D07-204

Opinion filed September 28, 2007.

Petition for Writ of Certiorari from the
Circuit Court for Hillsborough County;
Perry A. Little, Judge.

Howard M. Acosta and Charles M. Schropp
of Law Offices of Howard M. Acosta, St.
Petersburg, and Kent G. Whittemore of The
Whittemore Law Group, P.A., St. Petersburg,
for Petitioner.

Stephanie E. Parker and John M. Walker,
Atlanta and Benjamin H. Hill, III and Troy
A. Fuhrman of Hill, Ward & Henderson, P.A.,
Tampa, for Respondent.

WHATLEY, Judge.

Walter Hargroves, as the personal representative of the estate of Debra Hargroves, petitions this court for a writ of certiorari quashing the circuit court order directing him to provide certain items pursuant to a discovery request by R.J. Reynolds Tobacco Company in Hargroves' wrongful death action against R.J. Reynolds. The circuit court entered the discovery order at issue after hearing motions to compel filed by R.J. Reynolds. Hargroves argues that the circuit court departed from the essential requirements of law in three of its rulings in that order. We find merit in Hargroves' arguments regarding two of those rulings.¹

First, the circuit court overruled Hargroves' objection based on the marital privilege. See § 90.504, Fla. Stat. (2006). Hargroves lodged that objection to R.J. Reynolds' question as to whether his wife had said anything else to him about the lawsuit before she died. R.J. Reynolds asserted that Hargroves had made a blanket waiver of the marital privilege by testifying without objection that he and his wife discussed filing the lawsuit before she passed away, that it was his wife's idea to file the lawsuit, and that she said she would like the two of them to file the action.

This testimony by Hargroves did not waive the husband-wife privilege as to all confidential communications about the lawsuit. See Courville v. Promedco of Sw. Fla., Inc., 743 So. 2d 41, 42 (Fla. 2d DCA 1999) ("When the attorney-client privilege is waived regarding a certain matter, the waiver is limited to communications on the same matter."). The testimony concerned the decision to file the lawsuit, and therefore, Hargroves waived the privilege only with regard to communications with his wife

¹ "Orders which improperly compel discovery of privileged information . . . are reviewable by certiorari." Palm Beach County Sch. Bd. v. Morrison, 621 So. 2d 464, 468 (Fla. 4th DCA 1993).

regarding that decision. Accordingly, we grant the petition for writ of certiorari and quash the order insofar as it can be interpreted to direct Hargroves to reveal any confidential communications by his wife about the lawsuit other than her statements about the decision to file the action.

Second, the circuit court overruled Hargroves' work product privilege objection to R.J. Reynolds' request for production of documents supporting specific allegations of Hargroves' complaint. Hargroves responded to R.J. Reynolds' request by producing four DVD's containing thousands of documents without specifying which documents supported which allegations. The circuit court directed Hargroves to identify the documents responsive to each specific request in R.J. Reynolds' third request for production. Hargroves argues that the court's directive departs from the essential requirements of law because his selection of which documents are responsive to which requests will reveal his protected mental impressions, conclusions, opinions, and theories about the case.

We agree with Hargroves' argument based on the supreme court's disapproval of Gardner v. Manor Care of Boca Raton, Inc., 831 So. 2d 676 (Fla. 4th DCA 2002), in Northup v. Acken, 865 So. 2d 1267 (Fla. 2004). In Northup, the supreme court held that "in Florida, when a party reasonably expects or intends to utilize an item before the court at trial, for impeachment or otherwise, the video recording, document, exhibit, or other piece of evidence is fully discoverable and is not privileged work product." Id. at 1270. The decision whether to use any item at trial is to be made prior to the trial court's entry of the pretrial case management order. Id.

In disapproving Gardner, the court held that an order requiring counsel to cull through previously disclosed documents and advise the opposing party which ones are relevant "goes entirely too far." Id. at 1272. The court reasoned as follows:

The 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.

Id. at 1272.

In the present case, the circuit court's directive to Hargroves essentially compels him to advise R.J. Reynolds which of the documents he has already produced is relevant to particular allegations of his complaint. We see no difference between this directive and the one in Gardner disapproved of by the supreme court. In addition, the court's directive is overbroad because it is not limited to documents that Hargroves has determined he will use at trial. See Kranias v. Tsiogas, 941 So. 2d 1173 (Fla. 2d DCA 2006).

Accordingly, we grant the petition for writ of certiorari and quash that part of the discovery order directing Hargroves to identify which of the already produced documents is responsive to R.J. Reynolds' request for production until such time as he is required to do so by the dictates of Northup.

We deny Hargroves' petition in all other respects without comment.

Petition for writ of certiorari granted in part and denied in part.

NORTHCUTT, C.J., Concur.
ALTENBERND, J., Concur with opinion.

ALTENBERND, Judge, Concurring.

I fully concur in the court's opinion. I write only to make two observations that affect my reasoning on these issues.

First, concerning R.J. Reynolds' specific questions to Mr. Hargroves at his deposition seeking to discover statements that his wife had made to him about the lawsuit prior to her death, I am inclined to believe that these questions were improper even if the marital privilege had been waived. I do not understand the relevance of this line of questions to the matters at issue in the lawsuit. I have a difficult time envisioning how these questions were designed to lead to admissible evidence.

Second, I have not reviewed each document on the four DVDs in the record, but I have reviewed a representative sample. They include many copies of cigarette advertisements, including television advertising from the 1950s and 1960s. Many, if not most, of the documents are copies of documents produced by R.J. Reynolds in prior lawsuits. At this point in the history of tobacco litigation, it is unlikely that R.J. Reynolds does not understand how plaintiffs' attorneys are using or plan to use these documents.

If the multitude of documents on these DVDs were records unique to this plaintiff or if it appeared that Mr. Hargroves' attorneys were trying to hide the proverbial needle in a haystack, then I would be less convinced that the case law cited in this opinion warranted the issuance of a writ of certiorari in this case.