

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In Re: Application for<br>Amendment of Certificates Nos.<br>298-W and 248-S in Lake County<br>by JJ'S MOBILE HOMES, INC.                                    | ) | DOCKET NO. 921237-WS   |
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| In Re: Investigation Into<br>Provision of Water and<br>Wastewater Service by JJ'S<br>MOBILE HOMES, INC. to its<br>Certificated Territory in Lake<br>County. | ) | DOCKET NO. 940264-WS<br>ORDER NO. PSC-94-1334-PCO-WS<br>ISSUED: October 31, 1994 |

ORDER DISPOSING OF DISCOVERY MOTIONS

This Order addresses Staff's Motion to Quash Notice of Taking Deposition and for a Protective Order, Public Counsel's Motion to Compel Answers to Deposition Questions and Production of Documents Referred to at Deposition, and Public Counsel's Motion for the Prehearing Officer to Reconsider Her Order Requiring Production of Documents as it Applies to the Office of Public Counsel. Each motion is addressed separately below.

Staff's Motion to Quash Notice of Taking Deposition  
and for a Protective Order

On August 15, 1994, George Wimpey of Florida, Inc. (Wimpey) filed a Notice of Taking Deposition of Jerrold E. Chapdelaine, an employee of the Commission. On August 22, 1994, the Staff of the Public Service Commission (Staff) filed a Motion to Quash Notice of Taking Deposition and for a Protective Order. On September 2, 1994, Wimpey filed a response to the motion. The Office of Public Counsel (OPC) filed a response on August 31, 1994.

During the Prehearing Conference held in this matter on September 30, 1994, counsel for Wimpey requested that the Prehearing Officer defer ruling on the motion and stated that the subpoena of Mr. Chapdelaine would be withdrawn if the parties reached a stipulation resulting in a sale of the utility. On October 6, 1994, Wimpey filed a motion to continue the proceedings, as a contract for sale of the utility had been negotiated. Therefore, the subpoena of Mr. Chapdelaine shall be considered withdrawn, and Staff's motion to quash the subpoena is moot.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

Public Counsel's Motion to Compel Answers to Deposition Questions  
and Production of Documents Referred to at Deposition

On September 13, 1994, JJ's Mobile Homes, Inc. (JJ's or the utility) took the deposition of James O. Collier for the purpose of discovery, for use at hearing, or any other purpose. Mr. Collier resides in Arkansas, and the deposition was taken by telephone. During the course of the deposition, OPC requested that Mr. Collier identify and disclose the information he received from JJ's attorneys in preparation for the deposition. JJ's objected on the grounds that the information was protected as attorney-client privilege and attorney work product.

On September 20, 1994, the Office of Public Counsel filed a Motion to Compel Answers to Deposition Questions and Production of Documents Referred to at Deposition. OPC requests that the Commission issue an order compelling Mr. Collier to disclose the contents of conversations with JJ's attorneys and produce documents written by JJ's attorneys and received by Mr. Collier prior to the deposition. OPC contends that all information collected by an expert is discoverable, including information provided by an attorney in the course of preparing the witness for a deposition. OPC has cited several federal decisions to support its position, particularly Boring v. Keller, 97 F.R.D. 404 (D.Colo. 1983) and Intermedics Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D.Ca. 1991).

On October 3, 1994, JJ's filed a Response to OPC's Motion to Compel Answers to Deposition Questions and Production of Documents Referred to at Deposition. JJ's first contends that OPC's motion is improper because the deposition was taken after the discovery cut-off date and was taken by JJ's to perpetuate testimony. JJ's contends that because the federal courts have split on the issue, the cases cited by OPC are unpersuasive. The utility cites Trawicks, Florida Practice and Procedure (1993), at Section 16-3.1, for the proposition that work product is divided into two categories: fact work product (factual information related to the case) and opinion work product (the attorney's mental impressions, conclusions, opinions or theories concerning the case). JJ's argues that to require an attorney to disclose opinion work product would have a chilling effect upon an attorney's ability to prepare for a case. JJ's states that it has produced the documents requested by OPC which are not attorney work product.

The fundamental question raised by OPC's motion is: must a party disclose the mental impressions, conclusions or theories of

its attorney which have been made available to an expert witness?

JJ's argues that the mental impressions, conclusions or theories of its attorneys which may have been conveyed to Mr. Collier in the course of preparation for his deposition are privileged as attorney work product. OPC argues that even though the materials might be considered privileged work product in other situations, because Mr. Collier is an expert, he must disclose the materials upon which he based his opinion.

Neither party has directly addressed Rule 1.280(b)(3), Rules of Civil Procedure, concerning the disclosure of trial preparation materials. Any discussion of this matter should begin with a review of Rule 1.280(b)(3), which states in relevant part:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials, when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

As noted by JJ's in its response, the types of work product are generally divided into two categories: fact and opinion work product. Rule 1.280(b)(3) permits the discovery of fact work product upon a showing of need and undue hardship, but requires a

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<sup>1</sup>At the deposition, JJ's attorney stated that the objection was based upon both attorney-client and work product privilege. However, this matter is examined only in the context of work product privilege, as the attorney-client privilege does not apply.

court to protect against the disclosure of opinion work product. Both federal and Florida courts have recognized the distinction between the types of work product and the difference in the protection provided. Upjohn Co. v. United States, 449 U.S. 383, 401 (1981); Southern Bell Telephone and Telegraph Co. v. Deason, 632 So.2d 1377 (Fla. 1994); Charles B. Pitts Real Estate v. Hater, 602 So.2d 961, 964 (Fla. 2d DCA 1992); State v. Rabin, 495 So.2d 257, 262 (Fla. 3d DCA 1986). However, these courts are divided as to whether opinion work product is absolutely protected.

While ruling that materials at issue were protected, the Supreme Court in Upjohn declined to say that work product would be protected in all instances. Id. at 401-2. The federal courts in the cases cited by OPC reached the result that work product is not subject to an absolute privilege and that the materials disclosed to an expert are discoverable. However, the federal courts are by no means unanimous in this result. A review of other recent federal decisions reveals cases which come to the opposite conclusion. For example, in N.C. Electric Membership v. Carolina Power and Light Co., 108 F.R.D. 283, 286 (M.D. N.C. 1985), the court found that in the case of materials supplied to an expert witness, "an attorney's opinion work product is absolutely privileged."

While declining to grant absolute protection, Florida courts have generally recognized that opinion work product must be afforded a high degree of protection. In Rabin v. State, 495 So.2d 257, 262 (Fla. 3d DCA, 1986), the court stated that "opinion work product is absolutely, or nearly absolutely, privileged." See also Ehrhardt, Florida Evidence § 502.9 (1994 Edition). In Smith v. Florida Power and Light, 632 So.2d 696 (Fla. 3d DCA 1994), the court found that even an attorney's selection of otherwise non-privileged documents could be considered protected work product. Most recently, in Southern Bell Telephone and Telegraph Co. v. Deason, 632 So.2d 1377, 1384 (Fla. 1994), the Supreme Court of Florida stated that "[w]hereas fact work product is subject to discovery upon a showing of 'need' and 'undue hardship,' opinion work product generally remains protected from disclosure."

The court in Gore v. State, 614 So.2d 1111 (Fla. 4th DCA 1992) addressed a situation similar to this one. During sentencing proceedings the State requested production of a documents provided by the defendant's attorney to an expert witness. The defendant claimed that the documents contained the attorney's thoughts and a

summary of the documents. The court held that the documents were protected work product.<sup>2</sup>

A review of case law indicates that while opinion work product is not absolutely privileged, there must be some overwhelming showing of necessity before that privilege will be violated. After reviewing the case law and the arguments presented by the parties, I find it appropriate to deny OPC's motion. To the extent that OPC has requested the identity of otherwise non-privileged information, JJ's shall produce that information to OPC within seven days of this Order, if it has not already done so.<sup>3</sup> However, to the extent that OPC has requested the content of conversation between Mr. Collier and JJ's attorneys and any other document or material which contains the attorneys' mental impressions, conclusions, opinions, or legal theories, that request is denied.

OPC points out on page 4 of its motion that had the information come from another individual besides JJ's attorneys, it would be discoverable, and that JJ's should not be allowed to shield the information from discovery simply by having the attorney convey the information. This decision does not lead to that result. Attorneys cannot make a document privileged simply by sending to a client. JJ's must disclose those documents which do not contain opinion work product.

Public Counsel's Motion for the Prehearing Officer  
to Reconsider Her Order Requiring Production of Documents  
as it Applies to the Office of Public Counsel

Order No. PSC-94-1202-PCO-WS, issued September 30, 1994, ruled on OPC's objection to JJ's First Request for Production of Documents, and required OPC to produce all documents in response to JJ's POD No. 2. On October 3, 1994, the Office of Public Counsel filed a Motion for the Prehearing Officer to Reconsider Her Order Requiring Production of Documents as it Applies to the Office of Public Counsel. OPC contends that because JJ's did not file a motion to compel, the Prehearing Officer should not have ruled upon OPC's objection. JJ's has not filed a response to OPC's motion.

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<sup>2</sup>The rule at issue in Gore, Rule 3.220(g)(1) of the Rules of Criminal Procedure, contains a definition of work product similar to the rule at issue in this docket, Rule 1.280(b)(3).

<sup>3</sup>In its response, JJ's indicated that it has provided OPC with documents which do not contain attorney work product.

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Pursuant to Rule 25-22.038(2), Florida Administrative Code, a party may seek reconsideration of an order by the Prehearing Officer. In consideration of OPC's request, the portion of Order No. PSC-94-1202-PCO-WS, which required OPC to respond to JJ's First Request for Production of Documents shall be stayed. Order No. PSC-94-1202-PCO-WS is affirmed in all other respects.

Based upon the foregoing, it is

ORDERED by Commissioner Julia L. Johnson, as Prehearing Officer, that the subpoena served by George Wimpey of Florida, Inc. upon Jerrold Chapdelaine shall be considered withdrawn, and Staff's Motion to Quash Notice of Taking Deposition and for a Protective Order shall be considered moot. It is further


ORDERED that the Office of Public Counsel's Motion to Compel Answers to Deposition Questions and Production of Documents Referred to at Deposition is denied as set forth in the body of this Order. It is further

ORDERED that if it has not already done so, JJ's Mobile Homes, Inc., shall provide within seven days of the issuance date of this Order, the documents requested by the Office of Public Counsel which do not contain or constitute the mental impressions, conclusions, opinions or legal theories of JJ's attorneys. It is further

ORDERED that the portion of Order No. PSC-94-1202-PCO-WS which required the Office of Public Counsel to respond to JJ's Mobile Home's Inc.'s First Request for Production of Documents is hereby stayed. It is further

ORDERED that Order No. PSC-94-1202-PCO-WS is affirmed in all other respects.

By ORDER of Commissioner Julia L. Johnson, as Prehearing Officer, this 31st day of October, 1994.

  
JULIA L. JOHNSON, Commissioner and  
Prehearing Officer

( S E A L )

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this Order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.