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RECORDS AND REPORTING

MEMORANDUM

July 27, 1998

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (B. KEATING) BK MCB

RE: DOCKET NO. 951232-TC - DADE COUNTY CIRCUIT COURT REFERRAL OF CERTAIN ISSUES IN CASE NO. 92-11654 (TRANSCALL AMERICA, INC. D/B/A ATC LONG DISTANCE VS. TELECOMMUNICATIONS SERVICES, INC., AND TELECOMMUNICATIONS SERVICES, INC. VS. TRANSCALL AMERICA, INC. D/B/A ATC LONG DISTANCE) THAT ARE WITHIN THE COMMISSION'S JURISDICTION.

92-1018-PCO

Attached is an ORDER GRANTING MOTION FOR PROTECTIVE ORDER, to be issued in the above referenced docket. (Number of pages in order - 8)

BK/anr
Attachment
cc: Division of Communications
I: 951232MF.bk

pg 2 header

MUST GO TODAY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Dade County Circuit Court referral of certain issues in Case No. 92-11654 (Transcall America, Inc. d/b/a ATC Long Distance vs. Telecommunications Services, Inc., and Telecommunications Services, Inc. vs. Transcall America, Inc. d/b/a ATC Long Distance) that are within the Commission's jurisdiction.	DOCKET NO. 951232-TI ORDER NO. PSC-98-1013-PCO-TI ISSUED: July 27, 1998

ORDER GRANTING MOTION FOR PROTECTIVE ORDER

Transcall America, Inc., d/b/a ATC Long Distance (ATC) filed this complaint with the Dade County Circuit Court on May 21, 1992, against Telecommunications Services, Inc. (TSI) for alleged failure to pay for telecommunications services rendered. On July 5, 1994, TSI filed a counterclaim alleging breach of contract and improper billing of services. On February 24, 1995, the Court issued its Order Staying Action and Referring to the Florida Public Service Commission. Therein, the Court referred to this Commission for review all claims within the Commission's exclusive jurisdiction under Chapter 364. On January 29, 1997, TSI filed a Motion for Reconsideration of Order Staying Action and Referring to the Florida Public Service Commission and Motion for Leave to Amend Counterclaim with the Dade County Circuit Court. Transcall served its response to the motion on February 20, 1997, and the Commission served a response on April 18, 1997. On May 27, 1997, the Circuit Court issued its Order Denying Motion for Reconsideration and to Amend. This matter has, therefore, been set for hearing August 19 and 20, 1998.

On May 4, 1998, TSI served a Notice of Taking Depositions. By that notice, TSI noticed its intent to depose Floyd R. Self, counsel for Transcall, on June 1, 1998. On May 22, 1998, Transcall filed a Motion for Protective Order preventing the taking of Mr. Self's deposition. On June 2, 1998, TSI filed its Response to Transcall's Motion for Protective Order. Therein, TSI asks that Transcall's Motion be denied.

My determination on Transcall's Motion is set forth below.

I. Transcall

In its Motion, Transcall asserts that Mr. Self is Transcall's outside counsel and is a member of the firm that is representing Transcall in this Docket. Transcall asserts that TSI's purpose in taking Mr. Self's deposition is to discover his knowledge of the internal investigation conducted by Transcall regarding this case. Transcall argues that if Mr. Self is deposed regarding this matter, he will be required to disclose information protected by the work-product doctrine and the attorney-client privilege and the work-product exception in Rule 1.280 (b)(3), Florida Rules of Civil Procedure.

Specifically, Transcall argues that Mr. Self is not a fact witness to any events alleged to have occurred between the parties or to the internal investigation conducted by Transcall. Thus, Transcall argues that Mr. Self should not be deposed because the only knowledge that Mr. Self may have regarding this matter is related to his representation of Transcall and is protected.

In support of its assertions, Transcall argues that the federal courts have held that an attorney's knowledge regarding the existence of documents compiled for trial by the attorney is protected as work product. Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986). Transcall notes that in Shelton, the Court stated that:

> We view the increasing practice of taking opposing counsel's deposition as a negative development in the area of litigation, and one that should be employed only in limited circumstances.

805 F.2d at 1327. Transcall further notes that the court intimated that this practice would have a "chilling effect" on attorney/client communications. Id.

In addition, Transcall refers to the Court's assessment that it would, in fact, be much easier for an attorney to be able to depose opposing counsel in order to determine what information opposing counsel believes is relevant to the case, but that practice has been discouraged by the courts. Id. at 1327, citing Hickman v. Taylor, 329 U.S. 495, 513 (1947). Transcall asserts that the Florida courts have continued in discouraging the practice. *Citing* Smith v. Florida Power and Light, 632 So. 2d 696

(Fla. 4th DCA 1994)(selection of documents pertaining to case protected as opinion work product).

Finally, Transcall states that the standard for applying the work product doctrine and the attorney-client privilege has been clearly defined by the Florida Supreme Court in Southern Bell v. Deason, wherein the Court determined that fact work product may only be discovered upon a showing of undue hardship or need, while opinion work product is generally protected. Southern Bell v. Deason, 632 So. 2d 1377 (Fla. 1994). Transcall argues that TSI cannot show that it will suffer any undue hardship if it is not allowed to depose Mr. Self. Transcall further argues that even if TSI could show undue hardship, the information that TSI seeks is opinion work product, and is, therefore, protected. Transcall asserts that TSI seeks to depose Mr. Self solely to gain information regarding his conclusions and mental impressions regarding this case, as well as information culled from interviews Mr. Self conducted of corporate employees after the events upon which this case is based occurred. Transcall argues that all of this information is protected. *Citing* Upjohn Co. v. United States, 449 U.S. 383 (1981)(memoranda, notes, and questionaires from corporate counsel's internal investigation protected). For these reasons, Transcall asks that Mr. Self not be required to appear for deposition.

II. TSI

In its Response, TSI argues that the information that it seeks from Mr. Self is essential to TSI's counter-claim, has been unobtainable from other sources, and is not covered by any privilege. TSI further asserts that this information must be obtained in order to fully develop the facts of this case; therefore, the need for the information outweighs any prejudice to Transcall. In addition, TSI argues that Transcall's assertions of the attorney-client privilege and the work product doctrine are premature and would be more appropriately raised in response to specific questions at deposition. For these reasons, TSI asks that Transcall's Motion for Protective Order be denied.

TSI argues that Rule 1.280, Florida Rules of Civil Procedure allows the discovery of any matter that is not privileged, including attorney work product if the material cannot be obtained otherwise without undue hardship to the opposing party. TSI asserts that the rationale for this doctrine is that a party should not be allowed to use the opposing party's work product to build

his case in instances where the information sought could be obtained through other ordinary means. *Citing* Southern Bell Telephone and Telegraph Co. v. Deason, 632 So. 2d at 1384. TSI argues, however, that privileges which restrain discovery are generally strictly construed by the courts because the primary purpose of discovery is to avoid the use of surprise as a trial tactic.[1]

TSI also argues that not all attorney work product is shielded by the work product doctrine. *Citing* Hickman v. Taylor, 329 U.S. 495 (1947). TSI asserts that attorney work product is discoverable if the underlying evidence is damaged or cannot be obtained, if it would be unfair and unjust to withhold the information, and if the information is not readily available otherwise to the party seeking it. *Citing* The Travelers Indemnity Co. v. Fields, 262 So. 2d 222 (Fla. 1st DCA 1972). TSI argues that its need to gain information from Mr. Self meets this standard.

TSI asserts that as counsel for Transcall in this matter, Mr. Self has conducted an investigation of Transcall's billing practices. TSI asserts that it is aware of no other investigation other than that which was performed by Mr. Self. TSI further asserts that it has attempted to gain information regarding Transcall's billing practices from Transcall employees produced by Transcall as witnesses possessing knowledge in this area. TSI states that these witnesses could not, however, remember any information regarding the billing practices. TSI notes that some of these witnesses referred TSI to legal counsel in response to questions regarding whether there was an investigation into Transcall's billing. As additional support, TSI has attached the deposition of Transcall's Director of Regulatory Affairs, Brian Sulmonetti, as Exhibit A to its Response.

TSI further asserts that it has asked Transcall to identify someone other than Mr. Self who would be able to answer questions regarding Transcall's billing and the investigation into Transcall's billing practices. TSI states that Transcall has only identified one other witness, Dan Merritt, as having knowledge in this area. TSI asserts that it has sought to subpoena Mr. Merritt to appear for deposition, but that Mr. Merritt has "evaded"

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[1] Dodson v. Persell, 390 So. 2d 704 (Fla. 1980); FDIC v. Cherry, Bekaert & Holland, 131 F.R.D. 202, 204(M.D. Fla. 1990); and Surf Drugs, Inc. v. Vermette, 236 So.2d 108 (Fla. 1970).

personal service. TSI's Response at 5. TSI argues that because it is unable to obtain this information in any other manner, it must depose Mr. Self.

In addition, TSI argues that while the information sought from Mr. Self may, in fact, be privileged, the Commission must have a record in order to make that determination. TSI also argues that it is entitled to discover the facts uncovered by Mr. Self in his investigation of TSI's counter-claims, as well as the identity of others with information regarding TSI's counter-claims.

TSI argues that the courts have allowed depositions of opposing counsel in similar situations. In Fireman's Fund Insurance Co. v. Superior Court, TSI states that the court allowed the defendant to depose plaintiff's counsel because no one else could supply the information sought. Fireman's Fund Insurance Co. v. Superior Court, 140 Cal. Rptr. 677, 72 Cal. App.3rd 786 (1977). TSI asserts that in that case, a bad faith insurance action, the plaintiff's attorney was the only negotiator for the plaintiff and was to provide information to the company to support the plaintiff's claim. The court, therefore, ordered plaintiff's counsel to appear for deposition because the court determined the attorney was the only knowledgeable witness to the facts, other than the defendant's own employees. TSI argues that Mr. Self is, similarly, the only witness with facts relevant to TSI's counter-claims. Thus, TSI argues it must be allowed to depose Mr. Self.[2] TSI adds that Transcall should not be allowed to shield pertinent facts from discovery by appointing its legal counsel as the only investigator then claiming privilege for any information obtained through counsel's investigation.

TSI further emphasizes that simply because information about Mr. Self's investigation may include a mixture of fact and opinion work product does not preclude a deposition of Mr. Self. TSI asserts that it may be able to glean facts from the deposition

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[2]*Citing* Colonial Penn Insurance Co. v. Blair, 380 So. 2d 1305 (Fla. 5th DCA 1980)(where defendant could not obtain transcript by any other means and the transcript was imperative to preparing his defense, the court excepted transcript from work product privilege).

necessary in the preparation of its case.[3] Also, TSI argues that Transcall's reliance on Upjohn Company v. United States is misplaced because the situation in that case is distinguishable. Upjohn Company v. United States, 449 U.S. 383 (1981). TSI argues that in Upjohn the IRS clearly was seeking the attorney's opinion work product whereas TSI seeks only factual information.

TSI asserts that taking an attorney's deposition is a means of discovery that has been accepted by the courts.[4] If the party that seeks to depose the opposing party's counsel can demonstrate that it truly needs the discovery, that the only realistic way to get the information is to depose the attorney, that the work product doctrine and the attorney-client privilege will not be violated, and that the need for the information outweighs the burden to the opposing party's attorney, then the deposition should be allowed. TSI argues that such is the situation in this case.

Finally, TSI argues that prohibiting Mr. Self's deposition at this point would be premature. TSI asserts that Mr. Self can provide information on non-privileged matters. TSI adds that the proper place to invoke the work product doctrine or the attorney-

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[3]*Citing* Wheaton v. Marshall, 631 So. 2d 323 (Fla. 4th DCA 1994)(in finding counsel's memorandum protected as work product, court noted a party could obtain factual information, but be denied the rest); Landrum v. Tallahassee Memorial Regional Medical Center, 525 So. 2d 994 (Fla. 1st DCA 1988)(work product exception does not completely prohibit discovery of witness statements to attorneys or identity of knowledgeable witnesses).

[4]*Citing* West Peninsular Title Co. v. Palm Beach County, 132 F.R.D. 301 (S.D. Fla. 1990); Young, Stern & Tannenbaum, P.A. v. Smith, 416 So. 2d 4 (Fla. 3rd DCA 1982); and S.J. Spector V. Alter, 138 So. 2d 517(Fla. 3rd DCA 1962).

client privilege is at the deposition.[5] Thus, for the foregoing reasons, TSI asks that Transcall's Motion be denied.

III. Determination

Upon consideration, I find that TSI has failed to demonstrate the necessity of deposing Mr. Self. See West Peninsular Title Company v. Palm Beach County, 132 F.R.D. 301 (S.D. Fla. 1990)(the party seeking the deposition of opposing counsel must demonstrate the necessity of the deposition), *citing* Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986) and In re Arthur Treacher's Franchise Litigation, 92 F.R.D. 429 (E.D. Pa. 1981). As emphasized by the Shelton court, deposing opposing counsel is disruptive, results in increased costs and delays, and interferes with the attorney-client relationship. Shelton v. American Motors Corp., 805 F.2d at 1327. It should, therefore, only be employed in limited circumstances where it is shown that

> (1) no other means exist to obtain the information than to depose opposing counsel. . . (2)the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.

Id. At 1327; citing Fireman's Fund Insurance Co. V. Superior Court, 140 Cal.Rpter. 677, 679; 72 Cal. App.3d 786 (1977). TSI has failed to sufficiently demonstrate that these circumstances exist in this case. Thus, I hereby grant Transcall's Motion for Protective Order.

Based on the foregoing, it is therefore

ORDERED by Commissioner Joe Garcia, as Prehearing Officer, that the Motion for Protective Order filed by Transcall America, Inc. d/b/a/ ATC Long Distance is granted.

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[5]*Citing* Young, Stern & Tannenbaum, P.A. v. Smith, 416 So. 2d 4 (Fla. 3rd DCA 1982); S.J. Spector v. Alter, 138 So. 2d 517 (Fla. 3rd DCA 1962); and Marco Island Partners v. Oak Development Corp., 117 F.R.D. 418, 419 (N.D. Ill. 1987), which refers to Hunt International Resources Corp. V. Binstein, 98 F.R.D. 689, 690 (N.D. Ill. 1983)(court determined it would be premature to quash a deposition based upon an assertion of privilege prior to actual questioning).

By ORDER of Commissioner Joe Garcia, as Prehearing Officer, this 27th day of July, 1998.

JOE GARCIA
Commissioner and Prehearing Officer

(S E A L)

BK

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.