

**15 Fla. L. Weekly Supp. 639b**

**Insurance -- Personal injury protection -- Discovery -- Depositions -- Where attorney for medical provider improperly asserted work-product privilege and instructed insured who was deposed as non-party witness not to answer questions regarding pre-deposition coaching, attorney is personally sanctioned**

COLONIAL MEDICAL CENTER, INC., as Assignee of David Tucker, Plaintiff, vs. MGA INSURANCE COMPANY, a foreign corporation authorized and doing business in the State of Florida, Defendant. County Court, 18th Judicial Circuit in and for Seminole County. Case No. 06-SC-000666. November 15, 2007. Donald L. Marblestone, Judge. Counsel: Lee M. Jacobson, Law Offices of Michael B. Brehne, P.A., Maitland, for Plaintiff. Melissa K. McCullough, Vernis & Bowling of Central Florida, P.A., Deland, for Defendant.

*ORDER ON DEFENDANT'S MOTION FOR SANCTIONS*

THIS CAUSE having come before this Court on Defendant's Motion for Sanctions against Plaintiff and having been heard on August 7, 2007, and the Court being otherwise fully advised in the premises;

The facts giving rise to these matters are as follows:

1. This is an action for PIP benefits.
2. David Tucker is the assignor in the above referenced cause of action. David Tucker assigned his purported coverage under the policy of insurance to Colonial Medical Center.
3. On March 22, 2007, counsel for the Defendant conducted a properly noticed deposition of David Tucker, who was deposed as a non-party witness.
4. David Tucker did not seek treatment until two (2) months post accident date.
5. At his deposition, Lee Jacobson (Jacobson) appeared on behalf of the Plaintiff.
6. Melissa McCullough (McCullough) of Vernis & Bowling of Central Florida appeared on behalf of the Defendant.
7. Benefits were suspended due to an Independent Medical Examination.

8. When Mr. Tucker spoke of the Independent Medical Examination and the fact that his benefits had been suspended, he became extremely agitated and knew terminology that was not congruent with his level of education or purported understanding.

9. Counsel for the Defendant became suspicious that the witness had been coached prior to the deposition. As such, McCullough asked Mr. Tucker if he had any conversations with Jacobson (counsel for the clinic).

10. Jacobson instructed the witness not to answer MGA's questions, thereby thwarting discovery.

11. Jacobson attempted to state that the questions and answers were "work product". While it is true that what Jacobson wrote down following this conversation is work product, the communications are not privileged and as such are discoverable.

12. The following testimony was obtained:

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Question: Prior to today, were you contacted by the Law Offices of Michael Breahne or by the attorney here today?

Answer: Yeah. Somebody brought something to my friend's house, like subpoena thing, stating I should come to court.

Question: Did you ever talk to this person to your right?

Answer: Yeah.

Question: You have talked to him before?

Answer: Yeah.

Question: When?

Answer: What's his name?

Question: Lee.

Answer: On the phone. I called somebody. I called him on the phone.

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Question: How did you know to call him?

Answer: Because my lawyer told me -- my brother in law gave my lawyer my number.

Question: Your lawyer put you in contact with Lee --

Answer: Yeah.

Question: -- or did the clinic?

Answer: No. My lawyer.

Question: What conversation --

Answer: My lawyer gave me Lee's number.

Question: What conversations did you have with Lee?

Mr. Jacobson: Don't answer that question.

Ms. McCullough: Are you instructing a non-party --

Mr. Jacobson: Yes, I am. That's work product.

Ms. McCullough: It's not work product. You can't instruct a witness not to answer on work product, maybe a privileged communication, possibly. It is up to him.

By Ms. McCullough

Question: What did he say to you.

Mr. Jacobson: Don't understand that question.

By Ms. McCullough

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Question: Are you refusing to answer the question?

Mr. Jacobson: You're not. I'm telling you not to, and she can bring it in front of the judge.

By Ms. McCullough

Question: Okay.

Mr. Jacobson: Witness statements are work product.

Ms. McCullough: Did you take a statement? Is that privileged in the court record?

By Ms. McCullough

Question: Did he take your statement?

Mr. Jacobson: It doesn't have to be privileged in the court record. We spoke. That's our conversation. End of story. You're allowed to know we spoke.

By Ms. McCullough

Question: When did you speak to him?

Answer: Yesterday.

Question: You did? And what time did you speak to him?

Answer: (No response)

Question: What time?

Answer: I can't remember what time.

Question: What questions did he ask you?

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Mr. Jacobson: Don't answer that question. It's work product.

By Ms. McCullough

Question: Did he provide you any information about the clinic?

Mr. Jacobson: Don't answer that question. It's work product.

By Ms. McCullough

Question: Did he discuss with you the results of the benefits being suspended that got you all riled up today, when you came in here all riled up?

Mr. Jacobson: Don't answer that question, David.

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Question: Did you and Lee -- did you and this attorney yesterday discuss your medical treatment?

Mr. Jacobson: Don't answer that question, David. It's work product. I don't know what you --

Ms. McCullough: I'm going to continue to --

Mr. Jacobson: I'll tell you what. Any questions you have about his discussions, the content of my conversations with him, I'm going to object to work product.

By Ms. McCullough

Question: What did you learn from your conversations with him yesterday?

Mr. Jacobson: Don't answer that question. Work Product.

By Ms. McCullough

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Question: Did he discuss the billing of this clinic with you?

Mr. Jacobson: Don't answer the question. Work Product.

By Ms. McCullough

Question: As a representative of the clinic, did he discuss the billing with you?

Mr. Jacobson: Don't answer the question.

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Question: Let me make myself clear. Any questions I ask you related to what the clinic or their attorneys have discussed with you, are you going to refuse to answer?

Mr. Jacobson: I'm going to instruct him not to answer. Work product.

Ms. McCullough: Work product privilege. Is that the only privilege, just so we're clear?

The Witness: I don't understand.

Mr. Jacobson: That's the objection I made. I'll give you 20 cases. You can't do your discovery through me. You should know that.

\* \* \* \* \*

Having reviewed the facts as recited above and considered the memoranda of law filed by each party as well as oral argument, it is hereby ORDERED AND ADJUDGED that:

A. Plaintiff's counsel Lee Jacobson improperly asserted a work-product privilege and instructed a non-party witness not to answer Defense Counsel Melissa McCullough's questions. Citing to a string of case law, Lee Jacobson asserted that Ms. McCullough's questions would ultimately illicit his mental thoughts and impressions.

Florida Statute 90.501 states as follows:

Except as otherwise provided by this chapter, any other statute, or the Constitution of the United States or of the State of Florida, no person in a legal proceeding has a privilege to:

- (1) Refuse to be a witness.
- (2) Refuse to disclose any matter.
- (3) Refuse to produce any object or writing.
- (4) Prevent another from being a witness, from disclosing any matter, or from producing any object or writing.

B. There is no recognized privilege that would allow Jacobson to instruct a witness not to answer a question in deposition.

C. Jacobson's remedy, pursuant to the Florida Rules of Civil Procedure 1.380 was to seek a protective order as to the questions and allow a ruling by this Court.

D. Defendant's Motion for Sanctions against Lee Jacobson, Esquire, is GRANTED.

E. Jacobson is personally sanctioned.

F. Jacobson is ordered to pay Defendant's Fees and Costs as outlined in the Affidavit filed by Melissa K. McCullough, Esquire, Ray Gonzalez, Esquire and Denise Wilson,

Paralegal (attached hereto as Exhibits A, B, and C respectively) on behalf of MGA Insurance Company. [Editor's note: attachments omitted]

G. The fees are as follows: \$ 300.

H. The costs are as follows: \$ 220.

I. Further, Ms. McCullough is allowed to proceed with an additional deposition of David Tucker. However, in the interest of judicial economy, Ms. McCullough should proffer the questions to this court for a ruling on same.

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