



Cited

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Munoz v. Superior Court

Court of Appeal of California, First Appellate District, Division One

June 30, 1972

Civ. No. 31070

Reporter: 26 Cal. App. 3d 643; 102 Cal. Rptr. 686; 1972 Cal. App. LEXIS 973

ANGEL MUNOZ, Petitioner, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent, THOMAS R. GOINGS, Real Party in Interest

Disposition: [***1] It is ordered that a peremptory writ of mandate issue requiring respondeat superior court to vacate its order requiring plaintiff to submit to a physical examination in the absence of her attorney or the representative of her attorney, and to make an order requiring petitioner to submit to such physical examination and granting her request to have her attorney present at the physical examination to be conducted by real party's doctor.

Core Terms

physical examination, writ of mandate, real party, psychiatric examination, trial court, undergo, personal injury action, reporter present, personal injury, lay person, peril

Case Summary

Procedural Posture

Petitioner injured person sought a writ of mandate to compel respondent Superior Court of Santa Clara County to set aside its order requiring petitioner to submit to a physical examination by defendant's doctors in an underlying action without the presence of petitioner's attorneys. Defendant in the underlying action was a real party in interest.

Overview

Respondent Superior Court of Santa Clara County ordered petitioner injured person to submit to a physical examination by defendant's doctors in an underlying action without the presence of her attorneys. Defendant in the underlying action was a real party in interest. Petitioner requested a writ of mandate to compel respondent to set aside its order. Defendant contended that petitioner should have been protected from improper questions, but the manner in which the protection was afforded should have been left to the discretion of respondent. Defendant argued that he afforded petitioner

protection from improper inquiries when he offered a stipulation, which was rejected by petitioner, that a court reporter could have been present at the examination and that all questions by the doctors would have been subject to objections. The court granted the writ of mandate and vacated respondent's order. The court held that the attorney's presence at an examination served a different purpose than that of a court reporter. Thus, the substitution was not allowed because the attorneys would have been present to prevent improper inquiries by the doctors.

Outcome

The court granted petitioner injured person's request for a writ of mandate to compel respondent court to set aside its order to require petitioner to submit to a physical examination by defendant's doctors without the presence of her attorneys. The court held that the substitution of a court reporter for petitioner's attorneys was improper because the court reporter served a different purpose than the attorneys.

LexisNexis® Headnotes

Torts > Procedural Matters > Discovery

HN1 Whenever a doctor selected by the defendant conducts a physical examination of the plaintiff, there is a possibility that improper questions may be asked, and a lay person should not be expected to evaluate the propriety of every question at his peril. The plaintiff, therefore, should be permitted to have the assistance and protection of an attorney during the examination.

Torts > Procedural Matters > Discovery

HN2 Since the court can order a plaintiff in a personal injury action to undergo a physical examination by a defendant's doctor the plaintiff should be permitted to have the assistance and protection of an attorney during a physical examination.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court ordered plaintiff in a personal injury action to submit to a physical examination by defendant's doctors without the presence of her attorney. Plaintiff rejected defendant's offered stipulation that a court reporter could be present at the time of the examination and that all questions by the doctor would be subject to objections to be ruled upon by the court.

The Court of Appeal ordered issuance of a peremptory writ of mandate requiring the trial court to vacate its order and to make an order requiring plaintiff to submit to a physical examination and granting her request to have her attorney present. The court held that, because of the possibility of improper questioning during such an examination, a plaintiff should be permitted to have the assistance and protection of an attorney, and that the presence of a reporter is not an adequate substitute. It distinguished a decision cited by defendant involving a psychiatric examination, noting the court's reasoning in that case that the subjective nature of a psychiatric examination requires an atmosphere conducive to freedom of expression on the part of the examinee. (Opinion by Molinari, P. J., with Sims and Elkington, JJ., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to McKinney's Digest

CA(1) (1)

Inspection and Physical Examination § 4 > Physical Examination > Parties to Civil Actions > Right to Presence of Attorney.

--In a personal injury action, it was error to order plaintiff to submit to a physical examination by defendant's doctors without the presence of her attorney, despite defendant's proffered stipulation that a court reporter could be present at the time of the examination and that all questions by the doctor would be subject to objections to be ruled upon by the court. In view of the possibility of improper questioning during such an examination, a plaintiff should be permitted to have the assistance and protection of an attorney and the presence of a reporter is not an adequate substitute.

Counsel: Boswick & Rowe and Barry Wolf for Petitioner.

No appearance for Respondent.

Popelka, Allard, Humphreys, Williams & Stenberg and James C. Jones, Jr., for Real Party in Interest.

Judges: Opinion by Molinari, P. J., with Sims and Elkington, JJ., concurring.

Opinion by: MOLINARI

Opinion

[*644] [**686] In this case we issued an alternative writ of mandate upon a petition seeking a writ of mandate from this court directing respondent court to set aside its order compelling petitioner to submit to a physical examination by real party in interest's doctors without the presence of her attorney. Said order was made in an action brought by petitioner against real party for personal injuries arising out of an automobile accident.

CA(1) (1) In *Sharff v. Superior Court*, 44 Cal.2d 508, 510 [282 P.2d 896, 64 A.L.R.2d 494], it was held that *HNI* "Whenever a doctor selected by the defendant conducts a physical examination of the plaintiff, there is a possibility that improper questions may be asked, and a lay person should not be expected to evaluate the propriety of every question at his peril. The plaintiff, therefore, should be permitted to have the assistance and protection of an attorney during the examination. [Citation.]"

Real party argues that while petitioner should be protected from improper questions, the manner in which this protection is afforded should be left to the sound discretion of the trial court. Accordingly, he argues that in [*645] the present case such protection was afforded by a stipulation which real party offered to make at the time the instant motion was argued and which the trial court was willing to incorporate in its order. The proffered stipulation was that a court reporter could be present at the time of the examination and that all questions by the doctor would be subject to objections to be ruled upon by the court. The stipulation was rejected by petitioner.

In *Gonzi v. Superior Court*, 51 [***3] Cal.2d 586, 589 [335 P.2d 97], it was held that a plaintiff in an action for damages for personal injuries was entitled to have a reporter present while she was undergoing a physical examination by a doctor employed by the defendant. However, there is no suggestion in *Gonzi* that a reporter may be deemed a substitute for an attorney. Rather, the court seems to treat the reporter's [**687] presence as supplemental to the presence of an attorney and considers that a reporter's presence is proper to insure that a disinterested person is present to report what occurs during the examination. The attorney's presence at the examination serves a different purpose. He is present to prevent inquiries not reasonably related to the legitimate scope of the examination. (See *Sharff v. Superior Court, supra*, 44 Cal.2d 508, 510.)

Moreover, *Gonzi* clearly indicates that the presence of a reporter is not considered to be an adequate substitute for the plaintiff's attorney when it states as follows: "We held that *HN2* since the court could order a plaintiff in a personal injury action to undergo a physical examination by the defendant's doctor [citation] the plaintiff should be [***4] permitted 'to have the assistance and protec-

tion of an attorney during the examination.' . . ." (51 Cal.2d at p. 589.)

In *Whitfield v. Superior Court*, 246 Cal.App.2d 81 [54 Cal.Rptr. 505], it was held that the trial court did not abuse its discretion in denying a request by the plaintiff to have an attorney and a reporter present at a psychiatric examination to be conducted by the defendant's doctor. (At p. 86.) *Whitfield* distinguished the case before it from *Sharff and Gonzi* on the basis that these two cases involved purely physical examinations where there was no compelling reason why persons should be excluded from the examination, while the case under consideration involved a psychiatric examination whose subjective nature required an atmosphere that was conducive to freedom of expression on the part of the examinee. (At p. 85; see *Durst v. Superior Court*, 222 Cal.App.2d 447, 450-451 [35 Cal.Rptr. 143, 7 A.L.R.3d 874].) The denial of a hearing in *Whitfield* by the Supreme Court is an indication of its approval that such a distinction may be made without doing violence to the principle it de-

clared in *Sharff and Gonzi*. (*DiGenova* [***5] v. *State Board of Education*, 57 Cal.2d 167, 178 [18 [*646] Cal.Rptr. 369, 367 P.2d 865]; *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal.2d 295, 306 [29 Cal.Rptr. 33, 379 P.2d 513].)

The instant case does not involve a psychiatric examination but a purely physical one. Accordingly, the rule declared in *Sharff and Gonzi* is applicable and petitioner is entitled to the presence of her attorney at such examination.

It is ordered that a peremptory writ of mandate issue requiring respondent superior court to vacate its order requiring plaintiff to submit to a physical examination in the absence of her attorney or the representative of her attorney, and to make an order requiring petitioner to submit to such physical examination and granting her request to have her attorney present at the physical examination to be conducted by real party's doctor.