Scotsman Mfg. Co. v. Superior Court of Orange County, 242 Cal. App. 2d 527

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

May 26, 1966

Civ. No. 8421

Reporter

242 Cal. App. 2d 527 * | 51 Cal. Rptr. 511 ** | 1966 Cal. App. LEXIS 1152 ***

SCOTSMAN MANUFACTURING CO., INC., Petitioner, v. SUPERIOR COURT OF ORANGE COUNTY, Respondent; THE ROBERTS BRASS MANUFACTURING COMPANY, Real Party in Interest

Prior History: [***1] PROCEEDING in prohibition to restrain the Superior Court of Orange County from enforcing a discovery order requiring petitioner to produce an expert's report.

Disposition: Writ granted.

Core Terms

discovery, preparation, real party in interest, work product, injustice, premises

Case Summary

Procedural Posture

Petitioner manufacturer sought a writ of prohibition to restrain enforcement of a discovery order issued by the Superior Court of Orange County (California), that required petitioner to produce a report prepared by an expert regarding his examination of a butane lamp that exploded. Petitioner contended that the expert's report was sought in preparation for litigation.

Overview

The court found that under the circumstances, denial of production of the expert's report did not unfairly prejudice real party in interest in its preparation of a defense, nor did the denial result in an injustice. Furthermore, the court found that to the extent that real party in interest based its claim of prejudice or injustice on the need to obtain the report within the limited time allowed for preparation of its defense, the appropriate remedy would be rescheduling of the date set for trial.

Outcome

The court granted the writ of prohibition sought by manufacturer.

LexisNexis® Headnotes

Civil Procedure > Discovery & Disclosure > General Overview

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Exceptions to Failure to Object

Civil Procedure > Attorneys > General Overview

Civil Procedure > ... > Privileged Communications > Work Product Doctrine > General Overview

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN1 **Civil Procedure, Discovery & Disclosure**
Cal. Civ. Proc. Code § 2016(b) and (g) provide respectively: The work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice, and that it is the policy of this State (i) to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of cases and (ii) to prevent an attorney from taking undue advantage of his adversary's industry or efforts.
More like this Headnote

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Civil Procedure > ... > Pleadings > Time Limitations > General Overview

Civil Procedure > Parties > Real Party in Interest > General Overview

HN2 **Pleadings, Time Limitations**
If prejudice or injustice to real party in interest results from an alleged restriction upon the time for preparation of a defense, its remedy lies in an order fixing another trial date. More like this Headnote

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Civil Procedure > Special Proceedings > Eminent Domain Proceedings > Experts

Evidence > Admissibility > Expert Witnesses > Helpfulness

Real Property Law > ... > Elements > Just Compensation > Property Valuation

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Expert Witness Discovery

Civil Procedure > ... > Privileged Communications > Work Product Doctrine > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Real Property Law > Eminent Domain Proceedings > Procedures

HN3 **Eminent Domain Proceedings, Experts**
Insofar as the product of an expert's employment relates to the preparation by the attorney of his client's case, it is a work product not subject to discovery, except as provided in Cal. Civ. Proc. Code § 2016(b); but if the expert becomes a potential witness the product is subject to

discovery. However, the fact the expert has the dual status of prospective witness and adviser, does not remove the product rendered exclusively in an advisory capacity, as distinguished from the product that qualifies him as an expert witness, from the work product limitation. The information and opinion of the expert on the subject matter about which he is a prospective witness are subjects of discovery by interrogation or deposition and, if submitted in a report confined thereto, by the report's production. However, wherever the report may include the information and opinions of the expert given to the attorney not only as a prospective witness but also as an adviser in the preparation of the defense, it is subject to the work product limitation. More like this Headnote

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Civil Procedure > ... > Privileged Communications > Work Product Doctrine > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Expert Witness Discovery

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

HN4 **Privileged Communications, Work Product Doctrine**
The information and opinions of the expert relevant to his status as a witness may be discovered through interrogation and deposition procedures. If, a litigant is unwilling to declare its intention respecting the prospective status of a professional as an expert witness, the trial court, in an appropriate proceeding, would be authorized to permit discovery by interrogation or deposition. More like this Headnote

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Headnotes/Syllabus

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1a) **(1a)** ***CA(1b)*** **(1b) Discovery—Under Statutory Procedures—Discretion of Court—Where Limitations on Discovery Are Involved.**

--It was an abuse of discretion to grant an application by one defendant for discovery of a report made to a codefendant by an expert employed by its attorney to assist in the preparation of the case where such report was a work product subject to discovery limitations (Code Civ. Proc., § 2016), where the basis for defendant's discovery motion (shortness of time to prepare its defense) did not constitute that prejudice or injustice which would provide an exception to the work product rule, and where, though codefendant refused to declare its intention respecting the expert's prospective status as a witness at the trial in order to allow discovery as to the subject matter of his potential testimony, the trial court, in an appropriate proceeding, could permit discovery by interrogation or deposition.

CA(2) **(2) Id.—Under Statutory Procedures—Right to Discovery.**

--In a personal injury action based on the explosion of a butane lamp, where one defendant's attorney had employed an expert to examine and report on the lamp to assist in the presentation of its case, and a codefendant's motion for discovery of the report was based primarily on the short time left for preparing its defense, such ground did not constitute prejudice or injustice within the meaning of Code Civ. Proc., § 2016, subd. (b), providing an exception to the "work product rule."

CA(3) **(3) Id.—Under Statutory Procedures—Matters Discoverable.**

--If and when an expert, employed by a party's attorney to make an examination and report to assist in the presentation of his case, becomes a potential witness on behalf of his client, the information and opinion of the expert, to the extent that they relate to the subject matter about which he is a prospective witness, are subject to discovery by interrogation or deposition procedures, and by the production of any report confined to such matter.

CA(4) **(4) Id.—Under Statutory Procedures—Right to Discovery.**

--The policy objective of the work product rule (Code Civ. Proc., § 2016) is to encourage the thorough preparation of a case, including an investigation not only of its favorable but also its unfavorable aspects.

CA(5) **(5) Id.—Under Statutory Procedures—Right to Discovery.**

--Where an expert, employed by a party's attorney to make an examination, submits a report in both an advisory and a prospective witness capacity, its exemption from discovery does not depend on a preliminary showing that it contains advisory or unfavorable information.

Counsel: Welsh, Cummins & White and W. F. Rylaarsdam for Petitioner.

No appearance for Respondent.

Betts & Loomis and John K. Trotter, Jr., for Real Party in Interest.

Judges: Coughlin, J. Brown, P. J., concurred.

Opinion by: COUGHLIN

Opinion

[*528] [**512] Petitioner, Scotsman Manufacturing Co., Inc., seeks a writ of prohibition to restrain enforcement of a discovery order obtained upon motion of real party in interest, The Roberts Brass Manufacturing Company. The order was made in an action against petitioner, real party in interest, and others, to recover damages on account of injuries which the complaint alleges resulted from the explosion of a butane lamp installed in a trailer by petitioner, and containing a valve manufactured by real party in interest. The action was **[*529]** filed December 8, 1964. Service upon all defendants, except real party in interest, was effected in January 1965. In June of that year, petitioner's attorney employed Dr. D. A. Morelli to examine the butane lamp and report [***2] to him respecting such examination for the purpose of assisting him in the preparation of petitioner's case. In the same month Dr. Morelli examined the lamp and delivered to the attorney his report in [**513] the premises. On September 3, 1965, real party in interest was served with a cross-complaint filed in the action by one of the defendants; on October 1, 1965, was served with the original complaint; and on December 24, 1965, was served with a cross-complaint filed by petitioner. Thereafter, real party in interest discovered that experts employed by three of the parties to the action, including petitioner, had examined the lamp and made reports respecting their examinations; received copies of two of these reports; was refused a copy of the report by petitioner's expert; and on March 2, 1966, obtained the subject order directing petitioner to produce this report. Thereupon petitioner brought the instant proceeding to restrain enforcement of this order upon the ground, among others, the report of Dr. Morelli is a work product; there was no showing that denial of discovery thereof would unfairly prejudice real party in interest in preparing its defense or would result in [***3] an injustice; and granting the application for discovery of this report was an abuse of discretion. We have concluded these contentions are well taken.

CA(1a) **(1a)** The report in question followed employment of Dr. Morelli by petitioner's attorney to assist in the preparation of its case and constituted a work product subject to the discovery limitations prescribed by ***HN1*** section 2016 of the Code of Civil Procedure. (*San Diego Professional Assn.* v. *Superior Court*, 58 Cal.2d 194, 204 [23 Cal.Rptr. 384, 373 P.2d 448, 97 A.L.R.2d 761]; *Suezaki* v. *Superior Court*, 58 Cal.2d 166, 177 [23 Cal.Rptr. 368, 373 P.2d 432, 95 A.L.R.2d 1073]; *Brown* v. *Superior Court*, 218 Cal.App.2d 430, 437, 439-443 [32 Cal.Rptr. 527]; Generally see *Swartzman* v. *Superior Court*, 231 Cal.App.2d 195, 202-206 [41 Cal.Rptr. 721].) Subdivisions (b) and (g) of that section were added in 1963. They provide respectively: "The work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice . . .", and "It is the policy of this State (i) to [***4] preserve the rights of attorneys to prepare cases for trial with that degree **[*530]** of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of cases and (ii) to prevent an attorney from taking undue advantage of his adversary's industry or efforts."

CA(2) **(2)** In a declaration filed in support of the motion for discovery the attorney for real party in interest asserted it would be greatly prejudiced in preparing its defense of the action and an injustice would result unless discovery of the subject report were allowed because it had not been brought into the action until eight months after the other parties were served, and there was very little time

remaining for preparation of its defense, as the case had been set for pretrial on May 13, 1966, and for trial on June 6, 1966. This is the only legal showing before the trial court tending to support the claim of real party in interest that denial of the requested discovery would unfairly prejudice it in the preparation of its defense or result in an injustice. This claim of prejudice or injustice, obviously, is premised upon the need to obtain information [***5] contained in the report within the allegedly limited time allowed for preparation of a defense. Thus, any prejudice or injustice in the premises is attributable primarily to the fact that the court set the case for hearing on June 6, 1966, with its consequent limitation upon the time for preparation of a defense, rather than upon any denial of discovery of Dr. Morelli's report. ***HN2*** If prejudice or injustice to real party in interest results from an alleged restriction upon the time for preparation of a defense, its remedy lies in an order fixing another trial date.

Before this court, real party in interest asserts in its "Points and Authorities," which are a part of its response to the petition for writ of prohibition, that during oral argument before the trial court its attorney advised petitioner's attorney if the [**514] latter would indicate his intention not to use Dr. Morelli nor his report "in any manner in the trial of this case," real party in interest would dismiss its motion for discovery, but petitioner's attorney refused to indicate his intention in the premises. Relying upon this asserted fact, real party in interest contends that, under the decision in *Swartzman* [***6] v. *Superior Court, supra*, 231 Cal.App.2d 195, 202-204, the report of Dr. Morelli no longer is a work product subject to the limitations upon discovery prescribed by section 2016 of the Code of Civil Procedure.

In *Swartzman* v. *Superior Court, supra*, 231 Cal.App.2d 195, 200-204, **[*531]** the appellate court approved a trial court policy requiring the exchange of appraisal reports between parties to an eminent domain proceeding, and also approved an order prohibiting the taking of the deposition of an appraiser employed by the condemning agency based upon a refusal by the landowner, implied from his conduct, to exchange appraisal data. In the course of its opinion the appellate court cogently analyzed the different statuses of an expert, employed by a litigant's attorney to examine a subject of litigation and to assist in the preparation of his client's case, as each relates to the discoverability of the results of the expert's examination, his information in the premises, his opinions, and reports by him to the attorney. As noted therein, ***HN3*** insofar as the product of this employment relates to the preparation by the attorney of his client's case, it is a work product [***7] not subject to discovery, except as provided in subdivision (b) of Code of Civil Procedure, section 2016; but if and when the expert becomes a potential witness on behalf of the client the product of his employment is subject to discovery. However, the mere fact the expert may have the dual status of a prospective witness and of adviser to the attorney, does not remove the product of his services rendered exclusively in an advisory capacity, as distinguished from the product of services which qualify him as an expert witness, from the work product limitation upon discovery. ***CA(3)*** **(3)** Under the ruling in *Swartzman*, the information and opinion of the expert respecting the subject matter about which he is a prospective witness are subjects of discovery by interrogation or deposition procedures and, if submitted in a report confined thereto, by production of such a report. On this basis the valuation reports of appraisers in eminent domain proceedings are subject to discovery under the generally applicable rules. However, wherever the report may include the information and opinions of the expert given to the attorney not only in his capacity as a prospective witness but also as an adviser [***8] in the preparation of the client's defense, it is subject to the work product limitation prescribed by statute.

CA(4) **(4)** The report may contain information and opinions respecting unfavorable aspects of a client's case as well as those favorable thereto and to require its production would violate the policy declared in section 2016 to encourage the thorough preparation of a case including an investigation, not only of its favorable but also its unfavorable aspects. ***CA(5)*** **(5)** Furthermore, where the expert has submitted a report pursuant to his employment in both an advisory and prospective witness capacity, **[*532]** it would defeat the policy objective of the work product rule to require a showing, as a condition to assertion of the work product limitation, that his report actually contained advisory or unfavorable information, and such a requirement should not be imposed. On the other hand, ***HN4*** the information and opinions of the expert relevant to his status as a witness may be discovered through interrogation and deposition procedures. ***CA(1b)*** **(1b)** If, as asserted in the instant case, petitioner is unwilling to declare its intention respecting the prospective status of Dr. Morelli as an expert witness, the trial [***9] court, in an appropriate proceeding, would be authorized to permit discovery by interrogation or deposition. (*Swartzman* v. *Superior Court, supra*, 231 Cal.App.2d 195, 204-205.)

Under the circumstances heretofore noted denial of production of the subject [**515] report would not unfairly prejudice real party in interest in preparing its defense nor result in an injustice.

Let a writ of prohibition issue as prayed.

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