

Binder v. Superior Court

Court of Appeal of California, Fifth Appellate District

December 2, 1987

No. F007643

Reporter

196 Cal. App. 3d 893 *; 242 Cal. Rptr. 231 **; 1987 Cal. App. LEXIS 2381 ***

WILLIAM BINDER, Petitioner, v. THE
SUPERIOR COURT OF KERN COUNTY,
Respondent; HERBERT NEUFELD et al., Real
Parties in Interest

Disposition: [***1] Let a peremptory writ of mandate issue commanding respondent court to vacate that part of its order dated March 21, 1986, requiring defendant to produce any and all slides and/or photographs depicting lesions on the bodies of defendant's patients.

Core Terms

patient, photographs, disclosure, lesion, right to privacy, private information, ailments, melanoma, patient-physician, physician-patient, diagnosis, privacy, depicting, confidential communication, compel disclosure, diagnosed, discovery

Case Summary

Procedural Posture

Petitioner physician sought review by writ of mandate of an order of respondent Superior Court of Kern County that required petitioner to produce photographs depicting lesions on the bodies of petitioner's patients. Petitioner was defending an action for wrongful death based on medical negligence.

Overview

A medical negligence action was filed against petitioner physician for the wrongful death of a patient from belatedly diagnosed melanoma. Over petitioner's objections based on the physician-

patient privilege, the plaintiffs in the action obtained an order from respondent trial court requiring petitioner to produce any photographs in his possession, including photographs of patients, depicting a lesion suspected to be or diagnosed as melanoma. Petitioner sought a writ of mandate and the court granted the request. The court issued a peremptory writ of mandate ordering respondent court to vacate the part of its order that required the production of photographs of patients. The photographs were confidential communications between physician and patient within the meaning of [Cal. Evid. Code § 992](#), and their compelled disclosure violated the physician-patient privilege. Moreover, the patients had a constitutionally protected right of privacy in the photographs. The plaintiffs seeking production did not show that the photographs were relevant to any issue in the case, and there was no compelling state interest that justified abridging the patients' privacy rights.

Outcome


A peremptory writ of mandate was issued commanding respondent trial court to vacate the part of its order that required petitioner physician to produce photographs depicting lesions on the bodies of petitioner's patients. Compelled disclosure of the photographs would violate the physician-patient privilege, and the patients' constitutional right to privacy.

LexisNexis® Headnotes

Civil Procedure > Parties > Real Party in

Interest > General Overview

Civil Procedure > Parties > Capacity of
Parties > General Overview

[HN1](#) Cal. R. Ct. 56(c) allows a real party in interest to make a return to a writ by demurrer, verified answer or both.

Evidence > Privileges > Doctor-Patient
Privilege > General Overview


Civil Procedure > ... > Discovery > Privileged
Communications > General Overview

Healthcare Law > Medical Treatment > Patient
Confidentiality > General Overview

[HN2](#) See [Cal. Evid. Code § 992](#).

Healthcare Law > Medical Treatment > Patient
Confidentiality > General Overview

Constitutional Law > Substantive Due
Process > Privacy > General Overview


[HN3](#) The right of privacy is guaranteed by [Cal. Const. art. I, § 1](#), as an inalienable right.

Civil Procedure > ... > Discovery > Privileged
Communications > General Overview

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

Constitutional Law > Substantive Due
Process > Privacy > Personal Information

Constitutional Law > Substantive Due
Process > Privacy > General Overview


[HN4](#) The constitutional right of privacy is not absolute; it may be abridged when, but only when,

there is a compelling and opposing state interest. In an effort to reconcile these sometimes competing public values, it has been adjudged that inquiry into one's private affairs will not be constitutionally justified simply because inadmissible, and irrelevant, matter sought to be discovered might lead to other, and relevant, evidence. When compelled disclosure intrudes on constitutionally protected areas, it cannot be justified solely on the ground that it may lead to relevant information.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Civil Procedure > ... > Discovery > Misconduct
During Discovery > Motions to Compel


Civil Procedure > Discovery &
Disclosure > General Overview

[HN5](#) Since judicial discovery orders relating to private matters inevitably involve state-compelled disclosure of presumptively protected information, the principles of [Cal. Const. art. I, § 1](#), have equal application to purely private litigation.

Civil Procedure > ... > Discovery > Privileged
Communications > General Overview

Constitutional Law > Substantive Due
Process > Privacy > Personal Information

Constitutional Law > Substantive Due
Process > Privacy > General Overview

[HN6](#) The custodian of private information has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of it is entitled to expect that his right will be thus asserted. And, of course, the custodian of such private information may not waive the privacy rights of persons who are constitutionally guaranteed their protection.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Civil Procedure > ... > Discovery > Privileged
Communications > General Overview

[HN7](#)[\[↓\]](#) In balancing the respective interests of individual privacy and a compelling state interest, it is also the rule that if state scrutiny is to be allowed, it must be by the least intrusive manner.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a medical malpractice action on behalf of a patient who allegedly died due to his dermatologist's mistreatment of his cancerous skin lesions, defendant dermatologist petitioned the Court of Appeal for a writ of mandate to vacate the trial court's order compelling him to produce all patient photographs depicting skin lesions suspected to be or diagnosed as cancerous. The Court of Appeal granted the petition. It held that the photographs were nondiscoverable confidential communications pursuant to [Evid. Code, § 992](#) (physician-patient privilege), since their disclosure would have humiliated the physician's patients and discouraged other patients from allowing physicians to photograph their ailments or other conditions. It further held that disclosure would have violated the patients' right to privacy, since, as a nondiagnostic tool, they were not relevant, and could become relevant only by probing into the patients' history of treatment to determine whether a particular lesion depicted was cancerous. (Opinion by Best, J., with Hamlin, Acting P. J., and Ivey, J., * concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS

HEADNOTES

Classified to California Digest of Official Reports,
3d Series

[CA\(1\)](#)[\[↓\]](#) (1)

Mandamus and Prohibition § 63—Answer or Return.

--Real parties in interest failed to properly file a written return to a petition for writ of mandate (Cal. Rules of Court, rule 56(c)) as ordered by the Court of Appeal, where they only filed a unverified document entitled "Opening Brief" with attached exhibits that neither controverted the allegations contained in the petition nor put in issue any facts alleged in petitioner's memorandum. Thus, the Court of Appeal accepted the facts alleged in the petition as true and ignored the facts alleged by real parties.

[CA\(2\)](#)[\[↓\]](#) (2)

Witnesses § 15—Privileged Relationships and Communications—Physician and Patient—Claim and Waiver of Privilege—Photographs of Patients' Medical Condition.

--Photographs of patients' skin lesions taken by a dermatologist for the sole purpose of obtaining confidential and private information regarding the patients' condition to assist in rendering a proper diagnosis and treatment were "confidential communications" within the express meaning of [Evid. Code, § 992](#) (patient-physician privilege).

[CA\(3\)](#)[\[↓\]](#) (3)

Witnesses § 15—Privileged Relationships and Communications—Physician and Patient— Purposes of Privilege.

--The dual purposes of the patient-physician privilege ([Evid. Code, § 992](#)) are first, to preclude

* Assigned by the Chairperson of the Judicial Council.

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humiliation of the patient that might follow disclosure of his or her ailments, and second, to encourage the patient's full disclosure to the physician of all information necessary for effective diagnosis and treatment.

[CA\(4\)](#) (4)

Discovery and Depositions § 34.4—Physician-Patient Privilege—Disclosure of Photographs of Patients' Cancerous Skin Lesions.

--In a medical malpractice action on behalf of a patient who allegedly died due to his dermatologist's mistreatment of his cancerous skin lesions, the trial court's order compelling the dermatologist to disclose photographs of all of his patients' that depicted skin lesions suspected or diagnosed as cancerous violated the physician-patient privilege ([Evid. Code, § 992](#)). Disclosure would have shocked and humiliated present and former patients of the dermatologist, regardless of whether their identities were disclosed together with the photographs. Moreover, such disclosure would discourage patients from allowing physicians to photograph their ailments or other conditions.

[CA\(5\)](#) (5)

Discovery and Depositions § 34—Right of Privacy—Relationship to Patient-Physician Privilege.

--The patient-physician privilege and the right of privacy are closely related protections against public disclosure of private information. Therefore, the privacy interests of the patients of a dermatologist whose photographs of his patients' lesions were sought by plaintiffs in a medical malpractice action was invoked by implication, where the dermatologist, as custodian of the photographs, asserted the patient-physician privilege.

[CA\(6\)](#) (6)

Privacy § 3—Nature and Extent of Right.

--Although the inalienable right of privacy guaranteed by [Cal. Const., art. I, § 1](#), is a fundamental interest of our society, other state interests such as facilitating the ascertainment of truth pertaining to legal proceedings compete with this right. The right is not absolute, and may be abridged when, but only when, there is a compelling and opposing state interest.

[CA\(7a\)](#) (7a) [CA\(7b\)](#) (7b)

Discovery and Depositions § 34—Privileges—Right of Privacy.

--Compelled disclosure of private information cannot be justified solely because it may lead to relevant evidence in a legal proceeding. Even where such information is directly relevant, its discovery will not be automatically allowed. There must be a careful balancing of the compelling public need for discovery against the fundamental right of privacy. Even where the balance weighs in favor of disclosure, the scope of such disclosure will be narrowly circumscribed; where it is possible to do so, partial limitations should be imposed rather than outright denial of discovery.

[CA\(8\)](#) (8)

Discovery and Depositions § 34—Privileges—Right of Privacy.

--Since judicial discovery orders relating to private matters inevitably involve state-compelled disclosure of presumptively protected information, the principles of the Constitution recognizing the inalienable right of privacy ([Cal. Const., art. I, § 1](#)) have equal application to purely private litigation. The custodian of private information has a right and duty to resist attempts at unauthorized disclosures

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and the person who is the subject of it is entitled to expect that his or her right will be thus asserted. Of course, the custodian of such private information may not waive the privacy rights of persons who are constitutionally guaranteed their protection.

[CA\(9\)](#)[\[↓\]](#) (9)

Discovery and Depositions § 34—Privileges—Right of Privacy.

--In a medical malpractice action on behalf of a patient who allegedly died due to his dermatologist's mistreatment of his cancerous skin lesions, defendant physician was entitled to a writ of mandate vacating the trial court's order compelling the disclosure of all photographs of the physician's patients that depicted lesions suspected to be or diagnosed as cancerous, since disclosure would have violated the patients' right to privacy. The photographs by themselves merely depicted the patients' condition in very superficial terms and were not used in diagnosis; thus, they were not relevant to any issues in the case, and could only become relevant by probing into the patients' history of treatment to determine whether a particular lesion depicted was cancerous.

Counsel: Patterson, Ritner, Lockwood, Zanghi & Gartner, Horvitz, Levy & Amerian, George P. Schiavelli and Andrew N. Chang for Petitioner.

No appearance for Respondent.

Klein, Wegis & Duggan and John C. Hall for Real Parties in Interest.

Judges: Opinion by Best, J., with Hamlin, Acting P. J., and Ivey, J., * concurring.

Opinion by: BEST

Opinion

[*896] [**231] William Binder, M.D. (hereinafter defendant), defendant in an action for wrongful death based on medical negligence, seeks relief from the lower court's order compelling production of "any and all . . . photographs" in defendant's possession "depicting a lesion suspected or diagnosed as melanoma."

[CA\(1\)](#)[\[↑\]](#) (1) (See fn. 1.) [**232] Factual and Procedural History ¹

[***2] Real parties in interest (hereinafter plaintiffs) are the wife and two daughters of Herbert Neufeld. Defendant is a dermatologist specializing in the treatment of skin diseases. The decedent, Herbert Neufeld, consulted defendant on August 11, 1983, concerning a mole on Mr. Neufeld's left leg. Based upon a physical examination and defendant's overall clinical impressions, defendant diagnosed the lesion as "a possible compound nevus with a venous angioma" and recommended to Mr. Neufeld the lesion be removed for identification by a pathologist. However, Mr. Neufeld did not return to defendant's office for over nine months until May 15, 1984. At that time, the lesion was removed and sent to a pathologist who, with the aid of a microscope, diagnosed the lesion to be melanoma. Mr. Neufeld subsequently died. Plaintiffs allege defendant negligently failed to diagnose Mr. Neufeld's lesion as melanoma on August 11, 1983.

On December 9, 1985, plaintiffs served defendant

¹ Plaintiffs failed to file a written return as ordered by this court. [HNI](#)[\[↑\]](#) California Rules of Court, rule 56(c) allows a real party in interest to make a return to a writ "by demurrer, verified answer or both." Here, plaintiffs have done none of these. There is no verified response to the allegations and facts set forth in the petition. They have filed only a document entitled "Opening Brief" with attached exhibits. This unverified document neither controverts the allegations in defendant's writ petition (*Chambers v. Superior Court* (1981) 121 Cal.App.3d 893, 896 [175 Cal.Rptr. 575]) nor puts in issue any "facts" alleged in their memorandum (*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 922, fn. 11 [120 Cal.Rptr. 707, 534 P.2d 403]). Accordingly, the facts alleged in defendant's petition must be accepted as true and the "facts" alleged by plaintiffs must be ignored. (*Chambers v. Superior Court*, supra

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with a request for production of, inter alia, any photographs in defendant's possession depicting a lesion suspected to be or diagnosed as melanoma.

Defendant objected on grounds that compliance with the request would [***3] violate the physician-patient privilege and that the request was overbroad [*897] and oppressive. Plaintiffs moved to compel defendant to respond to their request and, after hearing, the motion was granted on March 21, 1986. Defendant's motion for reconsideration was denied on July 15, 1986.

Defendant's customary practice is to have his nurses take Polaroid photographs of all patients' skin lesions. The photographs are for a general frame of reference only and are not intended to be diagnostic. Defendant has seen a total of over 25,000 patients. In order to comply with plaintiffs' request, defendant would have to review each of those patients' files since they are not indexed by diagnosis.

Defendant did turn over to plaintiffs numerous educational photographs which he has used for reference in treating his patients.

Discussion

I.

Are the photographs confidential communications within the meaning of [Evidence Code section 992](#)

[CA\(2\)](#)[↑] (2) [HN2](#)[↑] [Evidence Code section 992](#) defines a "confidential communication between patient and physician" as follows: "As used in this article, 'confidential communication between patient and physician' means information, including information obtained [***4] by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient

information or the accomplishment of the purpose for which the physician is consulted, and includes a diagnosis made and the advice given by the physician in the course of that relationship."

The subject photographs were taken in conjunction with and as part of defendant's [**233] examination of his patients. It is undisputed they were taken strictly in the course of the physician-patient relationship. It is further undisputed that the physician and patient understood the photographs would be disclosed to no third persons other than persons present during the taking of the photographs and medical personnel to whom disclosure would be reasonably necessary for the patient's treatment. Defendant caused the subject photographs to be taken of his patients' lesions for the sole purpose [***5] of obtaining confidential and private information regarding the patients' condition to assist in rendering proper diagnosis and treatment. The photographs clearly constitute "confidential communications" within the express meaning of [Evidence Code section 992](#). (See *Holm v. Superior Court* [**898] (1954) 42 Cal.2d 500, 508 [267 P.2d 1025] [photographs of accident scene taken by defendant's agent held to be confidential communications within the attorney-client privilege], disapproved on other grounds in [Suezaki v. Superior Court](#) (1962) 58 Cal.2d 166 [23 Cal.Rptr. 368, 373 P.2d 432, 95 A.L.R.2d 1073].)

The next question is whether the compelled disclosure of the photographs, as required by the trial court's discovery order, would violate the physician-patient privilege.

[CA\(3\)](#)[↑] (3) The dual purposes of the patient-physician privilege were stated in [Board of Medical Quality Assurance v. Gherardini](#) (1979) 93 Cal.App.3d 669, 678-679 [156 Cal.Rptr. 55] as follows: "The patient-physician privilege ([Evid. Code, §§ 990- 1007](#)) creates a zone of privacy

in the consultation or those to whom disclosure is reasonably necessary for the transmission of the

whose purposes are (1) 'to preclude humiliation of the patient that might follow disclosure of his

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ailments' [citations] [***6] and (2) to encourage the patient's full disclosure to the physician of all information necessary for effective diagnosis and treatment of the patient [citations].

"The patient should be able to rest assured with the knowledge that 'the law recognizes the communication as confidential and guards against the possibility of his feelings being shocked or his reputation tarnished by their subsequent disclosure.' [Citation.] The matters disclosed to the physician arise in most sensitive areas often difficult to reveal even to the doctor. Their unauthorized disclosure can provoke more than just simple humiliation in a fragile personality. The reasonable expectation that such personal matters will remain with the physician are no less in a patient-physician relationship than between the patient and psychotherapist. The individual's right to privacy encompasses not only the state of his mind, but also his viscera, detailed complaints of physical ills, and their emotional overtones. The state of a person's gastro-intestinal tract is as much entitled to privacy from unauthorized public or bureaucratic snooping as is that person's bank account, the contents of his library or his membership [***7] in the NAACP."

[CA\(4\)](#)[\[↑\]](#) (4) In this case, disclosure of the subject photographs would subvert both objectives of the physician-patient privilege. First, it would undoubtedly shock and humiliate present and former patients of defendant to learn that pictures of their bodies and ailments would be turned over to strangers. Furthermore, it is probable the patients' sensibilities would be offended whether or not their identities are disclosed together with the photographs. Relying upon [Rudnick v. Superior Court](#) (1974) 11 Cal.3d 924 [114 Cal.Rptr. 603, 523 P.2d 643], plaintiffs argue the subject photographs are nothing more than harmless descriptions of the patients' ailments and are not protected by the physician-patient privilege: "It is the ailments which [plaintiffs] seek[] to have disclosed, not the identity of the patient or means

adverse reaction reports of various doctors whose patients had ingested a drug manufactured by the defendant. The court noted in dictum" . . . if the disclosure reveals the ailments but not the patient's identity, then such disclosure [***8] would appear not to violate the privilege." ([Id. at pp. 933-934, fn. 13.](#)) However, while that dictum may be correct under some circumstances, it is one thing to have [**234] a *description* of one's ailment read, but quite another to have that ailment actually *depicted* in a photograph. Thus, even if the dictum in *Rudnick* had been a part of the holding in that case, it is distinguishable from this case.

Furthermore, in *Rudnick* the Supreme Court did not address the second purpose underlying the physician-patient privilege, which is to encourage the patient's full disclosure of all information relevant to effective diagnosis and treatment of his or her condition. Many physicians, among others, oral surgeons, plastic surgeons, oncologists and orthodontists, as well as dermatologists, routinely take or have photographs taken of their patient's disease processes or other conditions in order to follow the progress of that process or condition or a particular course of treatment. In our view, a rule compelling disclosure of patient photographs would discourage patients from allowing physicians to photograph their ailments or other conditions.

We hold that compelling [***9] disclosure of the subject photographs in this case would violate the physician-patient privilege.

II

Would compelling disclosure of the photographs violate the patients' right to privacy

Dr. Binder contends that the disclosure of the photographs will not only violate the patient-physician privilege, but will also violate his patients' rights to privacy. [HN3](#)[\[↑\]](#) The right of privacy is guaranteed by [article I, section 1 of the California Constitution](#) as an inalienable right (

[*899] by which the patient could be identified." In *Rudnick* the plaintiffs sought to discover written

[California Constitution](#) as an inalienable right. (*White v. Davis* (1975) 13 Cal.3d 757, 773 [120 Cal.Rptr. 94, 533 P.2d 222].)

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[CA\(5\)](#)^[↑] (5) Dr. Binder, as custodian of his patients' records, has the duty to assert the privacy rights of his patients in the contents of those records. (*Craig v. Municipal Court* (1979) 100 Cal.App.3d 69, 77 [161 Cal.Rptr. 19].)

The patient-physician privilege and the right of privacy are closely related protections against public disclosure of private information. The patient-physician privilege "creates a zone of privacy" (*Board of Medical Quality Assurance v. Gherardini, supra*, 93 Cal.App.3d at p. 678) and, therefore, the privacy interests of the patients whose photographs are sought by plaintiffs [*900] [***10] was invoked by implication in Dr. Binder's assertion of the patient-physician privilege.

[CA\(6\)](#)^[↑] (6) Even though the inalienable right of privacy guaranteed by the California Constitution is a fundamental interest of our society, other state interests such as facilitating the ascertainment of truth pertaining to legal proceedings compete with this right. (*Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 524-525 [174 Cal.Rptr. 160].) As noted in the *Board of Trustees* case, *supra*, [HN4](#)^[↑] "The constitutional right of privacy is 'not absolute'; it may be abridged when, but only when, there is a 'compelling' and opposing state interest." (*Id.*, at p. 525.)

[CA\(7a\)](#)^[↑] (7a) The following guidelines assist in determining when disclosure of private information may be compelled: "In an effort to reconcile these sometimes competing public values, it has been adjudged that inquiry into one's private affairs will *not* be constitutionally justified simply because inadmissible, and irrelevant, matter sought to be discovered *might* lead to other, and relevant,

that it may lead to relevant information." [Citations.]

"And even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a 'careful balancing' of the 'compelling public need' for discovery against the 'fundamental right of privacy.' [Citations.]

"Other apposite authority on the subject follows.

[CA\(8\)](#)^[↑] (8) [HN5](#)^[↑] Since 'judicial discovery orders [relating to *private* matters] inevitably involve *state-compelled* disclosure of presumptively protected information, the principles [of art. I, § 1] have equal application to purely private litigation.' [Citation.] [HN6](#)^[↑] "The custodian [of private information] [**235] has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of [it] is entitled to expect that his right will be thus asserted.' [Citation.] And, of course, the custodian of such private information may not waive the privacy rights of persons who are constitutionally guaranteed their protection.

[CA\(7b\)](#)^[↑] (7b) "Even where the balance, because of a "compelling state purpose," weighs in favor of disclosure of private information, [***12] the scope of such disclosure will be narrowly circumscribed; such an invasion of the right of privacy "must be drawn with narrow specificity." [Citation.] And: "Where it is possible to do so, ". . . the courts should impose partial limitations rather than outright denial of discovery." [Citation.]" (*Id.* at pp. 525-526.) [HN7](#)^[↑] In balancing the respective interests, it is also the rule that "if state scrutiny is to be allowed, it must be by the least intrusive manner." [*901] (*Board of Medical Quality Assurance v. Gherardini, supra*, 93

evidence. [Citation.] "'When compelled disclosure intrudes on constitutionally protected areas, it cannot be justified solely on [***11] the ground

[Cal.App.3d 669, 680.](#))

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[CA\(9\)](#)[\[↑\]](#) (9) Since medical records are the type of information which is protected by the right of privacy, the first question is whether the private information sought to be discovered is directly relevant to the issues of the instant litigation. ([Board of Trustees v. Superior Court, supra, 119 Cal.App.3d at p. 525.](#)) It is not enough the information may lead to relevant evidence. (*Ibid.*) Plaintiffs' argument for relevance is limited to a single contention: "[Plaintiffs] are entitled to all information available to Dr. Binder, both prior to and subsequent to the visit by Herbert Neufeld, which would go to his [***13] knowledge concerning the condition of melanoma. Clearly, prior photographs . . . would be demonstrative of Dr. Binder's data base in diagnosis of melanoma"

Defendant contends plaintiffs' argument is fatally flawed for the simple reason that while Dr. Binder's knowledge of melanoma is relevant, photographs of his former patients are clearly not relevant. Defendant's contention has merit since it is undisputed that the photographs by themselves merely depict the patients' condition in very superficial terms and are not used in diagnosis. Thus, in order for the photographs to become relevant, plaintiffs would necessarily have to probe the patients' history of treatment to determine whether a particular lesion depicted was or was not, in fact, a melanoma. Plaintiffs have not shown that the subject photographs are directly relevant to any issue in this case.

Let a peremptory writ of mandate issue commanding respondent court to vacate that part of its order dated March 21, 1986, requiring defendant to produce any and all slides and/or photographs depicting lesions on the bodies of defendant's patients.

