

DISCOVERY OF PRETRIAL PHYSICAL EXAMINATION

Steele v. True Temper Corporation

86 Ohio L. Abs. 276 (C.P. 1961)

In an action for personal injuries, defendant's motion for a pretrial physical examination of plaintiff was granted. Plaintiff conceded it was within the court's discretion to order such an examination, but opposed the motion on the ground that the order should not be given unless conditioned upon the right of plaintiff to receive a copy of the physician's report. The court denied that plaintiff had such a right, and the motion was granted without being conditioned in this respect.¹

There is no statutory provision in Ohio governing the ordering of a physical examination of the plaintiff in personal injury actions, but the cases are clearly in support of the proposition that the court has this power.² There is, however, some conflict regarding plaintiff's right to discovery of the physician's report, with the majority of Ohio courts holding that such discovery will not be allowed.³ In *Carpenter v. Dawson* the court stated that:

[T]he medical report, including findings and conclusions of the examining physician, is made at the instance of counsel for the defendant in preparation of his defense and for the defendant's benefit, and as such, the report itself becomes confidential as far as other parties are concerned.⁴

A contrary result was reached in *Francisco v. Hoffman*⁵ where the court granted a pretrial medical examination and ordered that if counsel for the plaintiff or plaintiff's personal physician were not present at such examination, plaintiff's counsel could examine the report. However, it was to be used as evidence only in cross examination of the physician in the event he was introduced as a witness at the trial.

In comparison, the Federal Rules of Civil Procedure expressly provide for physical examinations in Rule 35(a).⁶ Rule 35(b)(1) provides that upon request, the examining party shall deliver a copy of the physician's report including findings and conclusions to the examined party. After this delivery, the examining party is entitled to receive, upon request, copies

¹ *Steele v. True Temper Corp.*, 86 Ohio L. Abs. 276 (C.P. 1961).

² *S.S. Kresge Co. v. Trester*, 123 Ohio St. 383, 175 N.E. 611 (1931); *Miami & M. Turnp. Co. v. Bally*, 37 Ohio St. 104 (1881); *Hoge v. Soissons*, 48 Ohio App. 221, 192 N.E. 860 (1933).

³ *In Re Bates*, 167 Ohio St. 46, 146 N.E.2d 306 (1957); *Theetge v. Cincinnati St. Ry.*, 60 Ohio Op. 372 (C.P. 1955); *Carpenter v. Dawson*, 60 Ohio Op. 370 (C.P. 1957). Annot., 70 A.L.R.2d 384 (1960).

⁴ *Carpenter v. Dawson*, *ibid.*

⁵ *Francisco v. Hoffman*, 60 Ohio Op. 371 (C.P. 1955), 131 N.E.2d 692, citing 17 Am. Jur. "Discovery and Inspection" § 56.

⁶ Fed. R. Civ. P.

of reports made by the examined party's physician.⁷ Various state courts have adopted rules similar to Rule 35(b)(1).⁸

The common pleas court in the *True Temper* case supports the Ohio view of non-discovery of physical examinations on two grounds. The first is based on tradition. Litigation has traditionally been an adversary process with the burden of proof resting on the plaintiff. Therefore, the defendant should not be required to divulge the aspects of his investigation and his evidence as long as a corresponding obligation does not fall on the plaintiff.⁹ An answer to the "tradition" argument is provided by Edwin F. Woodle¹⁰ who, in an article on Ohio discovery practice, recommends that courts should

⁷ The provision for exchange of reports by the examined party is to be reasonably construed, and does not place upon him the burden of securing copies of hospital records or physicians' office records. *Lindsay v. Prince*, 8 F.R.D. 233 (N.D. Ohio 1948). When plaintiff volunteers to undergo a physical examination, the absence of an order of court under Rule 35(a) does not defeat his right under 35(b) to obtain a copy of the report. *Keil v. Himes*, 13 F.R.D. 451 (E.D. Pa. 1952).

⁸ One of these states is New York. Although the New York courts have not been in absolute harmony, the clear weight of opinion now favors allowing plaintiff discovery of reports made by defendant's physician. The trend is pointed out in *Muratori v. 1231 Pugsley Ave. Realty Co.* 15 Misc. 2d 276, 157 N.Y.S.2d 630 (1956), where the court ordered that plaintiff be given a copy of the defendant's physician's report. The court said that the old rule, which encouraged a plethora of medical testimony, was hostile to the modern tendency to reduce to a minimum controversy on the medical aspects of personal injury actions. The Supreme Court of Florida is in accord with *Muratori*. In the case of *Fred Howland, Inc. v. Morris*, 143 Fla. 189, 196 So. 472 (1940), the court held that it is not unfair to require defendant to relinquish a copy of such report to plaintiff when plaintiff is the subject of the report, and by submitting to the examination may weaken his own case. (Additional fair play aspects of the exchange of medical reports are discussed below.)

⁹ This argument, while of decreasing value in modern practice, is in line with the attitude toward discovery which has predominated in Ohio since *Chapman v. Lee*, 45 Ohio St. 356, 13 N.E. 736 (1887). Discovery in Ohio is provided under Ohio Rev. Code §§ 2308.43, 2317.07, 2317.32, 2317.33, 2317.48, and 2319.05. The scope of discovery extends to evidence "pertinent to the issues," *Ex Parte Schoepf*, 74 Ohio St. 1, 77 N.E. 276 (1906). Under Ohio Rev. Code § 2317.48, an action for discovery will lie for one unable without such discovery to file a petition or an answer in a separate cause of action. This statute provides discovery of "things" in the possession of an opponent, *Lawson v. Hudepohl*, 62 Ohio L. Abs. 332, 101 N.E.2d 254 (C.P. 1951). Production of books and writings may be obtained under Ohio Rev. Code § 2317.32. In comparison, Rule 26 of the Federal Rules of Civil Procedure extends the scope of discovery to "any matter, not privileged, which is relevant to the subject matter." The relatively limited availability of discovery in Ohio seems to stem "not so much from the absence of procedural rights as from the manner in which the courts of Ohio have interpreted, restricted, and restrained the application of those rights." Woodle, "Discovery Practice in Ohio—Pathway to Progress," 8 W. Res. L. Rev. 117 (1957). For a recent Ohio case using a liberal scope of discovery similar to that in the federal courts see *Dieckbrader v. N.Y. Cent. R.*, 51 Ohio Op. 239, 113 N.E.2d 268 (C.P. 1953). Encouraging dicta may be found in the most recent Ohio case on discovery, *Ex Parte Oliver*, 173 Ohio St. 125, 180 N.E.2d 599 (1962).

¹⁰ Woodle, *ibid.*

not rely on a doctrine that prevents a litigant from "prying into" the case of his opponent.¹¹ It may be vital to a plaintiff's case not only to have evidence to support his petition, "but to be prepared to meet the claims and defenses of his opponent. To be properly prepared, he should be informed concerning those claims and defenses in detail in advance of the trial."¹² Applied to discovery of physical examinations, Mr. Woodle's recommendation would not only benefit plaintiff's preparation, but also lead to settlement before trial in many cases where the main question was the amount of damages and not liability.

The second ground used by the court in *True Temper* is the fear of permitting an attorney's trial preparation to be available to his opponent through the use of discovery.¹³ This is called invasion of work product.¹⁴

¹¹ *Ibid.* at 141.

¹² *Ibid.*

¹³ *Steele v. True Temper Corp.*, *supra* note 1, at 285.

¹⁴ The term "work product" was first used in the case of *Hickman v. Taylor*, 329 U.S. 495 (1947). See "Developments in the Law—Discovery," 74 Harv. L. Rev. 1027 (1960). According to the work product doctrine, the impressions, observations, and opinions which an attorney has recorded and transferred to his files shall be free from encroachments of opposing counsel except in unusual circumstances. This protection includes knowledge gained by an attorney through the efforts of an expert whom he has employed to investigate matters of a technical or scientific nature. *Colden v. R. J. Schofield Motors*, 14 F.R.D. 521 (N.D. Ohio 1952). The term "work product" has been variously characterized as a "privilege," "exemption," or "immunity." It matters little what terminology is emphasized so long as it is understood that the phrase encompasses something apart from confidential communications between an attorney and his client. The two concepts are distinguished by their underlying policies. The attorney-client privilege is intended to encourage full disclosure between an attorney and his client by guaranteeing the inviolability of their confidential communications. The "work product of an attorney" is protected in order to preserve our adversary system of litigation by assuring an attorney that his private files shall, except in unusual circumstances, remain free from encroachments of opposing counsel. Work product is discoverable upon a strong showing of good cause. The written statement of a witness is not the work product of an attorney since it records the mental impressions and observations of the witness himself and not the attorney. On the other hand, counsel's recordation of the oral statement of a witness is normally a part of his work product, for it will include his analysis and impression of what the witness has told him. *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55 (D.C. Ohio 1953). This distinction is not always made in Ohio cases which give wide extension to the attorney-client privilege. In *re Tichy*, 161 Ohio St. 104, 118 N.E.2d 128 (1954); In *re Shoup*, 154 Ohio St. 221, 94 N.E.2d 625 (1950); In *re Keough*, 151 Ohio St. 307, 85 N.E.2d 550 (1959); In *re Hyde*, 149 Ohio St. 407, 79 N.E.2d 24 (1948); In *re Kleman*, 132 Ohio St. 187, 5 N.E.2d 492 (1936); *Ex parte Schoepf*, 74 Ohio St. 1, 77 N.E. 276 (1906). See *Humphries v. Pennsylvania R. Co.*, 14 F.R.D. 177 (dictum) (D.C. Ohio 1953) that certain accident reports not privileged under the Federal Rules of Civil Procedure, as interpreted by the federal courts to mean privileged as in the law of evidence, would be privileged under the extension of the attorney-client privilege in § 11494 of the Ohio General Code (Ohio Rev. Code § 2317.02) as interpreted by the Ohio courts, citing the *Hyde* and *Shoup* cases. The court then held that the doctrine of *Erie R. v. Tompkins*, 304 U.S. 64 (1938), was not

Apparently the basis of this doctrine is to (1) protect the attorney's trial strategy, and (2) encourage diligence in the profession. By the latter it is meant that if the attorney knows his trial preparation is discoverable, he may become discouraged from putting forth his best efforts, especially in procuring expert advice. Protection of trial strategy is not reconcilable with the purpose of discovery which is the elimination of surprise at trial.¹⁵ This would seem, therefore, to be a matter best put to the discretion of the trial judge, *i.e.*, to allow the court to determine whether the protection of trial strategy is sufficient reason to deny discovery. The "diligence rationale" of the work product doctrine has doubtful application in the case of procuring a physical examination of a plaintiff in a personal injury case. It seems unlikely that any defense attorney would be so discouraged by the discoverability of such information that he would go into court unarmed with his own medical testimony.

It may be that Ohio courts in refusing discovery of the physician's report are concerned with certain "fair play" aspects. Thus, a plaintiff may have discovered the defendant's reports, but may withhold his own physician's reports from the defendant, claiming the physician-patient privilege.¹⁶ This difficulty may be overcome by conditioning plaintiff's right to discovery on his waiving all privilege with respect to his own relevant medical reports.¹⁷

The purposes behind discovery itself, to whittle away the sporting theory of litigation, to simplify and shorten personal injury cases,¹⁸ and to eliminate extended parades of expert medical witnesses are better served by rules similar to the Federal Rules of Civil Procedure which allow discovery of the defendant's physician's report.¹⁹ Furthermore, the confusion in jurisdictions which have no legislation on this matter, when compared to the lack of controversy in the federal courts under the Federal Rules of Civil Procedure, seems to indicate that this is a problem better handled by the legislature than left to the courts.

applicable and therefore the court need not apply Ohio law. See also *Eisaman v. Weimer*, 70 Ohio L. Abs. 199, 126 N.E.2d 92 (C.P. 1954); *Woodle*, *supra* note 9, at 462-472.

¹⁵ See *Barron & Holtzoff*, *Federal Practice & Procedure*, 641 (1961).

¹⁶ Ohio Rev. Code § 2317.02.

¹⁷ By requesting and obtaining a report of the examination so ordered or by taking deposition of the examiner, the examined party waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or who may thereafter examine him in respect of the same mental or physical condition. Fed. R. Civ. P. 35(b)(2). See *Lewis v. United Airlines Transp. Corp.*, 32 F. Supp. 21 (D.C. Pa. 1940). See note 7, *supra* for certain practical aspects of this exchange.

¹⁸ *Jacobs*, "Physical and Mental Examinations," U. Ill. L.F. 761 (1959). The author comments that if the facts are merely being discovered and not manufactured, the physician should be a court witness, "and there should be no fanciful theory of 'work product' to hide the scientific facts . . . Such a concept is the antithesis of the modern theory of discovery and merely encourages some medical experts to take undue liberties with the facts."

¹⁹ *Supra* note 8; Fed. R. Civ. P. 35(b)(1).