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January 25, 2017

Representative Taylor Barras
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

RE: HCR 114 OF 2016

Dear Mr. Speaker and Mr. President:

The Louisiana State Law Institute respectfully submits herewith its interim report to the legislature relative to rules of discovery in the Code of Civil Procedure.

Sincerely,

William E. Crawford
Director

WEC/puc

Enclosure

cc: Representative Robby Carter

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.us
Secretary of State, Mr. Tom Schedler
admin@sos.louisiana.gov

LOUISIANA STATE LAW INSTITUTE
CODE OF CIVIL PROCEDURE COMMITTEE

INTERIM REPORT TO THE LEGISLATURE
IN RESPONSE TO HCR 114 OF THE 2016 REGULAR SESSION

Relative to the rules of discovery in the Code of Civil Procedure

Prepared for the
Louisiana Legislature on

January 25, 2017

Baton Rouge, Louisiana

LOUISIANA STATE LAW INSTITUTE
CODE OF CIVIL PROCEDURE COMMITTEE

ENROLLED

2016 Regular Session

HOUSE CONCURRENT RESOLUTION NO. 114

BY REPRESENTATIVE ROBBY CARTER

A CONCURRENT RESOLUTION

To urge and request the Louisiana State Law Institute to study the laws regarding the rules of discovery in Louisiana and to submit a written report of its findings with recommendations relative to establishing consistent and specific procedures and rules for discovery including the discovery of expert reports, the discovery of surveillance of parties, and the discovery of witness statements.

WHEREAS, the rules of discovery have been created to facilitate fair and just outcomes of lawsuits; and

WHEREAS, the Code of Civil Procedure provides rules for the discovery of evidence and obtaining expert reports; and

WHEREAS, the Code of Civil Procedure also sets forth limitations on producing surveillance of a party and provides parameters for discovering recorded statements; and

WHEREAS, there is potential for the rules of discovery to be abused and exploited for tactical advantages in lawsuits; and

WHEREAS, the prevention of misuse of discovery to facilitate fair and just trials should be of the utmost importance to the people of Louisiana.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute to evaluate and analyze the rules of discovery in Louisiana, to consider these rules, and to make recommendations relative to establishing fair and consistent procedures for discovery, and in particular for the exchange of expert reports, the surveillance of parties, and the exchange and discoverability of non-party recorded statements.

BE IT FURTHER RESOLVED that a written report of its findings and recommendations be submitted to the House Committee on Civil Law and Procedure and

the Senate Committee on Judiciary A no later than sixty days prior to the 2017 Regular Session of the Legislature of Louisiana.

BE IT FURTHER RESOLVED that a suitable copy of this Resolution be transmitted to the director of the Louisiana State Law Institute.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

January 25, 2017

To: Representative Taylor F. Barras
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

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INTERIM REPORT TO THE LEGISLATURE
IN RESPONSE TO HCR 114 OF THE 2016 REGULAR SESSION

During the 2016 Regular Session of the Louisiana Legislature, House Bill 1065 was introduced and referred to the House Committee on Civil Law and Procedure. HB 1065 proposed changes to the discovery articles in the Code of Civil Procedure relating to pre-trial production of: (i) non-party witness statements, (ii) surveillance materials, and (iii) reports of expert witnesses. Upon consideration of HB 1065 by the House Committee on Civil Law and Procedure, and at the request of Representative Robby Carter, the Committee voted to defer action and instead convert the bill into a study resolution to be submitted to the Louisiana State Law Institute.

This resolution, House Concurrent Resolution No. 114 of the 2016 Regular Session, urges and requests the Law Institute to study the laws regarding the rules of discovery in Louisiana and to make recommendations relative to establishing consistent and specific procedures and rules for discovery, including the discovery of expert reports, surveillance of parties, and witness statements. In fulfillment of this request, the Law Institute assigned the project to its Code of Civil Procedure Committee, which operates under the direction of William R. Forrester, Jr. as Reporter.

The following materials were prepared by the Reporter for consideration by the Code of Civil Procedure Committee and are being circulated to the Committee for consideration at its upcoming meeting on February 3, 2017. A final report will be submitted to the legislature once these materials have been reviewed by the Committee and approved by the Council of the Law Institute.

Respectfully submitted,

William R. Forrester, Jr., Reporter
Code of Civil Procedure Committee
Louisiana State Law Institute

REPORTER'S FINDINGS AND RECOMMENDATIONS
IN RESPONSE TO HCR NO. 114 OF THE 2016 REGULAR SESSION

NON-PARTY WITNESS STATEMENTS

Under current Code of Civil Procedure Article 1424 (attached, page 9) both parties and non-party fact witnesses have an absolute right to obtain their own statements concerning the subject matter of an action. Article 1424(B) provides: "A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person." Presumably, once the non-party fact witness statement is in the possession of the witness who provided it, production can be compelled during discovery by any party to the action by serving a subpoena duces tecum on the witness. The work product protection set forth in Article 1424(A) should not apply.

The work product protection provided by Article 1424(A) has created difficult and arguably unnecessary issues when a party to the action wants to use pretrial discovery to obtain the statement of a non-party witness that is in the exclusive possession of an adverse party or his attorney, surety, indemnitor, or agent. When these non-party witness statements have been obtained by the adverse party, usually through an attorney, employer, or claims adjuster, "in anticipation of litigation or in preparation for trial" as provided by Article 1424(A), the work product protection may protect the statement from pretrial disclosure unless the requesting party files a motion to compel and proves that he will suffer "undue hardship or injustice" if the statement is not produced. Further, a related issue arises when the responding party successfully avoids pretrial production under the work product protection, then later attempts to use the witness statement for impeachment purposes at trial, alleging that the statement was rebuttal evidence that did not have to be produced or even identified in a pretrial order.

Nevertheless, the work product protection provided by Article 1424(A) has traditionally been considered by many litigators as an important protection of confidential information, such as witness statements, that is necessary for a thorough internal review of facts, as well as the formulation of strategy by counsel for settlement consideration or trial preparation. Accordingly, these litigators do not believe that they should be required to share their investigatory and research materials with an adverse party when they are paying for this information. Particularly, many litigators are of the opinion that they should not have to produce witness statements that they have obtained and for which they have paid when these witnesses were accessible to other parties as well.

To others, however, the work product protection afforded by Article 1424(A) is too often used improperly to deny or hide vital discoverable factual information from both adverse parties and the court. Additionally, critics complain that the vague and ambiguous requirements of material being obtained "in anticipation of litigation" and of showings of "undue hardship" are not suited to resolution through motions to compel, hearings, and court orders, which are too time consuming and expensive for litigants, particularly those with limited resources. In support

of this position, critics of the work product protection cite the Louisiana Supreme Court's decision in *Ogea v. Jacobs*, 344 So. 2d 953 (La. 1977) (attached, page 10).

In *Ogea*, a critical eyewitness to the plaintiff's oil rig accident suffered from several lapses in memory during his deposition, which was taken almost two years after the accident. However, the witness testified that within a few days of the accident he had prepared a written accident report that contained his statement as to the accident's basic cause. Because this accident report was in the possession of the insurer of the plaintiff's employer, the plaintiff filed a motion to compel production, which was denied on the basis of the work product protection. The Louisiana Supreme Court granted writs and, in a seven page opinion providing a detailed review of the circumstances surrounding the preparation of the report, reversed the trial court's judgment and instead ordered that the report be produced for inspection by the plaintiff. However, the type of drawn-out judicial participation in the discovery process illustrated by the *Ogea* case could be eliminated by removing witness statements from the work product protection provided by Article 1424(A).

To solve the problem discussed above, HB 1065 of the 2016 Regular Session proposed a substantial change to Article 1424 by eliminating the first sentence of Paragraph A, the traditional work product protection, and instead replacing it with a sentence that reads: "The court shall order the production or inspection of any writing, recorded statement, or electronically stored information, obtained or prepared by any witness unless the witness is a party to the litigation." The second sentence, exempting from production material that reflects the mental impressions, conclusions, opinions, or theories of an attorney, remained unchanged. The Reporter of the Code of Civil Procedure Committee believes that such a major change to the work product protection provided in Article 1424(A) to accomplish the limited objective of expanding the discoverability of non-party witness statements "throws the baby out with the bath water."

However, amending Article 1424(B) for the specific purpose of eliminating the discovery protection of all witness statements is worth considering and is not a radical new idea. In fact, in 1999 Texas amended its procedural law to carve out all witness statements as an exception to the work product privilege. *See* Texas Rules of Civil Procedure, Rules 192.3(h) and 192.5(c)(1) (attached, pages 18-21). Following the Texas approach, the Reporter suggests that witness statements can be eliminated from the work product protection afforded by Article 1424(B) by making a minor change to the beginning of that provision as follows:

Article 1424. Scope of discovery; trial preparation; materials

* * *

B. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party **or any person not a party**. **Notes taken by another person during a conversation or interview with a witness are not a witness statement.** Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Article 1469(4)

apply to the award of expenses incurred in relation to the motion. For purposes of this Paragraph, a statement previously made is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electronically stored, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

* * *

Comments – 2017

The first sentence of Paragraph B of this Article was amended to make statements of persons not a party to the action discoverable at the request of a party, without the showing of "undue hardship or injustice" required by Paragraph A of this Article. The amendment also provides that notes taken by another person during conversations or interviews with a witness are not witness statements.

In this way, the Reporter recommends that Code of Civil Procedure Article 1424 be amended accordingly to eliminate non-party witness statements from the work product privilege set forth in this provision. Under current law, if a party is in exclusive possession of a favorable witness statement, that statement can be voluntarily produced by the party. However, if the witness statement is unfavorable to the party who has possession of it, the statement's disclosure can be blocked in the name of the work product protection afforded by Article 1424(A). This forces the requesting party to file a motion to compel and make the required showing of "undue hardship or injustice," which seems unnecessary. More often than not, denying a party the statement of a key eye-witness creates a hardship during discovery and eventually at trial. In fact, the outcome of the case could very well depend on the content of eye-witness statements. As a result, Representative Carter is correct that restricting the discoverability of these key witnesses' statements can result in "hiding the ball," thereby undermining the purpose of discovery.

SURVEILLANCE MATERIAL

According to Representative Carter, Louisiana Supreme Court jurisprudence pertaining to the sequence for the production of surveillance material is being misused to create an unfair advantage in favor of the party responding to such requests for production. Specifically, some attorneys are able to avoid producing surveillance material in their possession during discovery by electing not to depose the party requesting such material, which is then used for cross-examination at trial although it has never been seen.

To remedy such improper conduct, House Bill 1065 proposed the addition of Article 1424(E). Subparagraph (1) of proposed Paragraph E would provide that all surveillance material must be produced by the responding party within ninety days of a request for such material. The provision would also give the responding party the right to depose the requesting party before producing the surveillance material, but only if the deposition is taken within ninety days of the request. Presumably, if the responding party fails to depose the requesting party within the ninety day time period, the surveillance material must nevertheless be produced to the requesting party without further delay. Arguably, then, the problem would be solved because the requesting party

would have the right to view the material prior to being deposed or cross examined at trial, due to the responding party's failure to comply with the ninety day time limitation.

Though the proposed enactment of Article 1424(E)(1) was well intended, the Reporter questions whether it is necessary to remedy the problem discussed above. For example, the addition of a mandatory ninety-day period for the production of all surveillance material is likely to conflict with the broad discretion provided to trial judges for the purpose of expediting trial dates by managing discovery through pretrial scheduling orders. *See* C.C.P. Article 1551. In fact, this time period is three times longer than the thirty-day period applicable to other discovery responses. Further, applying such a rule to all surveillance material creates a conflict existing Louisiana Supreme Court jurisprudence, including the leading case of *Bell v. Treasure Chest Casino*, 950 So. 2d 654 (La. 2007) (attached, page 22).

In the *Bell* case, the Louisiana Supreme Court confirmed that surveillance material is subject to discovery but recognized an important distinction with respect to the timing of the production of the two different types of surveillance material. When the surveillance material is taken of the actual incident, the timing of its production during discovery is treated like any other evidence – the surveillance material must be produced within thirty days of a request under Article 1462, and it can be obtained in any sequence under Article 1427. No additional legislation should be necessary with respect to this type of surveillance material, since the applicable time period is already provided by law. On the other hand, when the surveillance material has been obtained after the incident for purposes of cross-examining or impeaching a party or witness rather than being used as direct evidence, the Louisiana Supreme Court has stated that the responding party can delay the production of this material until after the party or witness is deposed. The purpose of this judicially created rule is to facilitate the use of surveillance material to expose spurious claims by maximizing the value of cross examination "in the search for truth." Because the Louisiana Supreme Court's holding in *Bell* leaves to the parties and the trial court the matter of setting specific deadlines necessary to implement this procedure, the ninety-day deadline contemplated by House Bill 1065 might serve a useful purpose in preventing the use of unproductive tactics by the responding party as well as the necessity, in some cases, of applying to the court for a scheduling order. Notwithstanding, and given the complexities with respect to the scheduling of discovery inherent in many cases, perhaps the better approach would be to allow the trial court in its discretion to resolve any problems with respect to the scheduling of discovery, should they arise.

In contrast to proposed Article 1424(E)(1), House Bill 1065's proposed Subparagraph (E)(2) of Article 1424 would apply where surveillance material was generated after the requesting party's request for the production of such material. In those cases, if the requesting party has not been deposed, the responding party must produce the surveillance material within ninety days of the conduction of such material; however, if the requesting party has been deposed, the responding party must produce the surveillance material immediately upon its conduction. And, if the surveillance material is produced after the requesting party's deposition, that party might presumably have the right to supplement his previous statements at his deposition, taking the position that his memory would have been better if he had seen the surveillance material in the first place.

Nevertheless, this amendment to Code of Civil Procedure Article 1424 is likely unnecessary, since the trial judge usually handles these types of concerns on a case-by-case basis. Additionally, Article 1428 already provides that discovery responses must be supplemented if the original response "is no longer true," as would be the case when the responding party did not have surveillance material in his possession at the time of the request for production but later conducts surveillance material that would have earlier been responsive to that request. If supplementation of discovery responses is not made by the responding party as required by Article 1428, the trial court may impose appropriate sanctions, including barring the responding party from using the surveillance material in any way. Further, if the responding party is planning to use the surveillance material at trial, the identity of such material should be disclosed in the pretrial order. If the responding party has attempted to hide the existence of surveillance material during discovery, the trial judge should prevent the responding party from using such material at trial. An objection by the requesting party in the pretrial order, spontaneously at trial, or in a motion in limine should be effective in preventing the responding party from using the surveillance material at trial to ambush either a party or a witness.

As a result, an amendment to the Code of Civil Procedure to prevent the improper withholding of surveillance material by the party responding to a request for production may not be necessary if timely action is taken by the trial judge. If the responding party is "playing games" by refusing to produce the requested surveillance material and/or to depose the requesting party, the requesting party should file a motion asking the trial court to rule, in accordance with the Louisiana Supreme Court's decision in *Bell*, that the responding party has waived any further right to withhold the surveillance material. If the trial court concludes that the responding party has been in bad faith in its refusal to produce surveillance material and/or to depose the requesting party, the trial court could impose sanctions that would bar the responding party from using the surveillance material at trial for any purpose.

REPORTS OF EXPERTS NOT EXPECTED TO TESTIFY

House Bill 1065's third and final objective was to render the work product protection inapplicable to reports prepared in anticipation of litigation or for trial by non-testifying expert witnesses, often referred to as consultants, under Article 1425 (attached, page 25). The bill proposes to eliminate in its entirety Article 1425(D)(2), which sets forth this protection, and to add a sentence to Subparagraph (D)(1) of the Article that would expressly require the production of reports prepared by "any person identified as an expert...even if that person is not expected to be called as a witness at trial."

House Bill 1065 is not the first indication of problems with respect to the scope of the work product protection and its shielding of consultant reports from pretrial discovery. Critics of current law argue that parties with substantial resources can hire consultants to perform most of the underlying research and investigation involved in formulating expert opinions with respect to the case at hand, then upon request for production by the adverse party, use the work product protection afforded by Article 1425(D)(2) to hide the consultant's reports from the requesting party by asserting that the consultant is not expected to testify at trial. Nevertheless, the responding party's testifying expert may rely heavily on the favorable conclusions made in the consultant's reports in the opinions given during his deposition and/or at trial, despite the

responding party's refusal to produce the consultant's reports or even failure to disclose that these reports existed. As a result, the requesting party will be unable to determine whether the consultant's reports also included any conclusions that were unfavorable to the responding party, in addition to those that were favorable. Critics also argue that the requirement of Article 1425(D)(2) of a "showing of exceptional circumstances" by the requesting party in order to obtain a motion to compel production is seldom determined to be satisfied by the trial court, which leaves the requesting party at a disadvantage with respect to thoroughly probing the opinions of the responding party's testifying expert.

Although House Bill 1065's proposed revisions are a worthwhile attempt to improve the transparency of discovery as it relates to consulting experts, the bill goes too far by completely eliminating the work product protection with respect to consultant reports. Rather, the reports of some consultants remain subject to the work product protection from disclosure during discovery. As a compromise, then, we should consider the approach recently taken by Texas in its Rules of Civil Procedure, namely Rule 192.3(e), attached. The Texas Rule subjects consultants to full discovery only when their opinions have been "reviewed" by the testifying expert, which makes sense because in reality the consultant and the testifying expert could be considered as working hand-in-hand. Below is a proposed addition to Article 1425(D)(2) that is not as broad as the Texas Rule, since it pertains only to the disclosure of consultant reports. If such consultant reports are produced, they can be used as a basis to cross-examine testifying experts as to the extent of their review of and reliance upon the reports in formulating their own opinions. However, if the requesting party wants to go a step further and depose the consultant himself about the reports he prepared, Article 1425(D)(2)'s existing limitations with respect to the requirement of a showing of exceptional circumstances by the requesting party would apply.

Article 1425. Experts; pretrial disclosures; scope of discovery

* * *

(D)(2) A party may, through interrogatories or by deposition, discover facts known by and opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Article 1465 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. **However, upon request, a party must produce all reports prepared in anticipation of litigation or preparation for trial by experts who are not expected to be called as witnesses at trial if the reports have been reviewed by a testifying expert in formulating his opinions.**

* * *

Comments – 2017

A sentence has been added to Subparagraph (D)(2) of this Article to require the production of reports prepared in anticipation of litigation or preparation for trial by experts who are not expected to be called as witnesses at trial when the reports have been reviewed by a

testifying expert in formulating his opinions. This amendment is intended to apply only to the production of consulting expert reports; discovery through interrogatories or by deposition of the facts and opinions of an expert not expected to testify at trial is governed by the first sentence of Subparagraph (D)(2). This amendment is not intended to require non-testifying experts to prepare reports.

SUMMARY AND CONCLUSIONS

First, with respect to non-party witness statements, a sound argument can be made that all witness statements obtained in anticipation of litigation or in preparation for trial should be discoverable. More often than not, they provide the most reliable contemporaneous description of the incident before lawyers get involved in the matter. Furthermore, requiring the requesting party to file a motion to compel and prove "undue hardship" is not only difficult, but also time-consuming and expensive. Nevertheless, it is anticipated that there will be a strong resistance to amending this long-standing law, since federal courts and most states still vigorously apply the work product privilege to witness statements.

Concerning the issue of surveillance material, there is no pressing need to incorporate special procedures in the Code of Civil Procedure for purposes of dealing with the timing of production of surveillance material. Rather, determinations with respect to surveillance material should be made on a case-by-case basis through the use of scheduling orders, and, when necessary, motion practice.

Finally, with respect to reports of experts not expected to testify, parties should, in general, have the protection of the work product privilege for the reports of consultants prepared in anticipation of litigation or for trial. However, if the reports are reviewed by the testifying expert in formulating his opinions to be expressed at trial, the reports should be produced during discovery in order to facilitate cross-examination as to the basis of the testifying expert's opinions at his deposition. Under Article 1425(D), the interrogation of testifying experts at their depositions is virtually unlimited and should include anything the expert has used to support his opinions, other than input from counsel. Nevertheless, the proposed amendment does not create any obligation by the consultant to prepare a report, and if a report has not been prepared by the consultant, his deposition can only be taken upon a showing of exceptional circumstances as currently provided by Article 1425(D)(2).

Article 1424. Scope of discovery; trial preparation; materials

A. The court shall not order the production or inspection of any writing, or electronically stored information, obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. Except as otherwise provided in Article 1425(E)(1), the court shall not order the production or inspection of any part of the writing, or electronically stored information, that reflects the mental impressions, conclusions, opinions, or theories of an attorney.

B. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Article 1469(4) apply to the award of expenses incurred in relation to the motion. For purposes of this Paragraph, a statement previously made is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electronically stored, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

C. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

D. A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver if the disclosure is inadvertent and is made in connection with litigation or administrative proceedings, and if the person entitled to assert the privilege or work product protection took reasonably prompt measures, once the holder knew of the disclosure, to notify the receiving party of the inadvertence of the disclosure and the privilege asserted. Once notice is received, the receiving party shall either return or promptly safeguard the inadvertently disclosed material, but with the option of asserting a waiver. Even without notice of the inadvertent disclosure from the sending party, if it is clear that the material received is privileged and inadvertently produced, the receiving party shall either return or promptly safeguard the material, and shall notify the sending party of the material received, but with the option of asserting a waiver.

344 So.2d 953
Supreme Court of Louisiana.

Joseph A. OGEA
v.
Joseph C. JACOBS et al.

No. 58364.
|
April 11, 1977.

Employee brought action to recover against employer, employer's insurer, employer's jobsite executive and others for injuries sustained when metal floor plate fell on employee as he worked beneath oil drilling rig. The Twenty-Seventh Judicial District Court, Parish of St. Landry, Isom J. Guillory, J., denied employee's motion for production of accident report prepared by such executive, and employee applied for supervisory relief. The Court of Appeal denied such application. On writ of certiorari, the Supreme Court, Dennis, J., held that: (1) refusal to require disclosure of report would unfairly prejudice employee; (2) even if executive's expression of opinion as to ultimate cause of accident, within the report, would be inadmissible at trial, such would not render such opinion immune from discovery and (3) expression of such opinion was not a mental impression protected from discovery under state's discovery rules.

Order set aside and production ordered.

Summers, J., dissenting finding no error in the trial and Appeal Court judgments.

West Headnotes (12)

[1] **Pretrial Procedure**
Burden of proof

Party seeking to avoid production of a writing otherwise discoverable bears burden of proving that it was prepared or obtained in anticipation of litigation or in preparation for trial.

10 Cases that cite this headnote

[2] **Pretrial Procedure**
Statements and reports

In action in which employee sought to recover against employer, employer's insurer, employer's jobsite executive and others for injuries sustained when metal floor plate fell on employee as he worked beneath oil drilling rig and in which employee filed motion for production of accident report prepared by such executive, evidence did not satisfy defendants' burden of proving that report was prepared in anticipation of litigation; thus, trial judge erred in finding that report was prepared in anticipation of litigation unless such fact was established by stipulation.

6 Cases that cite this headnote

[3] **Pretrial Procedure**
Relevancy and materiality

Pretrial Procedure
Probable admissibility at trial

Parties may obtain discovery regarding any matter which is not privileged and which is relevant to subject matter involved in the pending action; it is not a ground for objection that the information sought will be inadmissible at trial if the information appears reasonably calculated to lead to the discovery of admissible evidence. LSA-C.C.P. art. 1422.

1 Cases that cite this headnote

[4] **Statutes**
Procedural Statutes

Comprehensive revision of civil discovery provisions is applicable as of its effective date.

Cases that cite this headnote

[5] **Pretrial Procedure**
Burden of proof

Requirement that a person seeking to discover written statements under federal rule must show that he has substantial need of the materials in the preparation of his case and that he is unable without

undue hardship to obtain a substantial equivalent of the materials by other means does not substantially differ from burden which must be borne by a party seeking discovery of statements prepared in anticipation of litigation under state statutory provision. Fed.Rules Civ.Proc. rule 26(b)(3), 28 U.S.C.A.; LSA–C.C.P. art. 1424.

20 Cases that cite this headnote

[6] **Pretrial Procedure**
Statements of witnesses

Lapse of time combined with a witness' unavailability, reluctance, hostility, lapse of memory or apparent deviation from his prior statement may warrant an order for the production and inspection of such statement. LSA–C.C.P. art. 1422.

Cases that cite this headnote

[7] **Pretrial Procedure**
Grounds for refusal in general

That party seeking discovery has been responsible for delay in taking statements or depositions of witnesses should not prevent party from discovering earlier statements and reports. LSA–C.C.P. art. 1422.

1 Cases that cite this headnote

[8] **Pretrial Procedure**
Accident or investigation reports, records, and tests

In action by employee to recover against employer, employer's jobsite executive and others for injuries sustained when metal floor plate fell on employee as he worked beneath oil drilling rig, refusal to require disclosure of executive's report, in regard to his almost contemporaneous investigation of the accident, would unfairly prejudice employee, in that report appeared reasonably calculated to lead to discovery of admissible evidence and that, due to executive's lapses of memory, employee could not obtain equivalent data. LSA–C.C.P. art. 1422.

2 Cases that cite this headnote

[9] **Pretrial Procedure**
Accident or investigation reports, records, and tests

In action in which employee sought to recover against employer, employer's insurer, employer's jobsite executive and others for injuries sustained when metal floor plate fell on employee as he worked beneath oil drilling rig, even if such executive's expression of opinion as to ultimate cause of action, within accident report prepared by him, would be inadmissible at trial, such would not render the opinion immune from discovery. LSA–C.C.P. arts. 1422, 1424.

1 Cases that cite this headnote

[10] **Pretrial Procedure**
Probable admissibility at trial

Test of discoverability is not admissibility of the particular information sought, but whether the information appears reasonably calculated to lead to discovery of admissible evidence. LSA–C.C.P. art. 1422.

2 Cases that cite this headnote

[11] **Pretrial Procedure**
Accident or investigation reports, records, and tests

In action in which employee sought to recover against employer, employer's insurer, employer's jobsite executive and others for injuries sustained when metal floor plate fell on employee as he worked beneath oil drilling rig and in which employee filed motion for production of accident report prepared by such executive, expression of opinion, within such report by executive, who was neither an attorney nor an expert, as to ultimate cause of the accident was not a mental impression protected from discovery under state's discovery rules. LSA–C.C.P. arts. 1422, 1424.

2 Cases that cite this headnote

[12] **Appeal and Error**
Proceedings preliminary to trial

Ordinarily, trial judge's finding on issues relating to discovery is entitled to much weight.

Cases that cite this headnote

Attorneys and Law Firms

*954 Jacque B. Pucheu, Jr., Pucheu & Pucheu, Eunice, for plaintiff-relator.

V. Farley Sonnier, Davidson, Meaux, Onebane, Donohoe, Bernard, Torian & Diaz, Lafayette, for defendants-respondents.

Opinion

DENNIS, Justice.

This is a discovery dispute. It involves litigation arising from an oil drilling rig accident in whic plaintiff, Joseph A. Ogea, was injured by a metal floor plate which fell upon him as he worked on the ground beneath the rig. Ogea sued his employer's insurer, Highlands Insurance Company, his employer's toolpusher and jobsite executive, Gordon E. Davis, as well as another employee and an officer of his employer. The accident occurred on February 21, 1974, and suit was filed on February 19, 1975.

As plaintiff's attorney was taking the deposition of Mr. Davis on October 23, 1975, Mr. Davis, who was on the jobite at the time of the mishap, had several lapses of memory regarding events he may have observed and facts reported to him by other witnesses.[1] He testified, however, that within a few days after the incident he *955 prepared a written accident report containing data obtained from other employees and including his own opinion as to the basic cause of the accident. When asked what he had reported as the basic cause, Mr. Davis suffered another lapse of memory. Plaintiff's attorney then asked Mr. Davis for his present opinion of the accident's cause, but defense counsel instructed him not to answer.

After determining that the accident report was in Highlands' possession plaintiff filed a motion for its production on March 26, 1976. In support of his motion the plaintiff annexed pertinent portions of the deposition of Mr. Davis. Subsequent to arguments on the motion the trial judge refused to compel production of the accident report. In his written reasons for judgment, the trial judge found that the report had been prepared in anticipation of litigation and stated: 'the accident report is privileged, until 'good cause' is shown. Other than a general argument, no solid 'evidence' of good cause has been adduced by Plaintiff.'

The court of appeal denied plaintiff's application for supervisory relief, finding no error or abuse of discretion in the trial court's ruling. We granted writs because the holdings below appear to reflect a misapprehension of the rules of discovery. For the reasons hereinafter assigned, we reverse.

[1] The record presented for our review contains the full deposition of Mr. Davis. Apparently no additional evidence was introduced by either party at the hearing on the motion to produce. The deposition contains no direct evidence that Mr. Davis prepared the accident report in anticipation of litigation. He was never asked why he prepared the report. A party seeking to avoid production of a writing otherwise discoverable bears the burden of proving that it was prepared or obtained in anticipation of litigation or in preparation for trial. E.g., Sonier v. La. Power and Light Co., 272 So.2d 32 (L.App.1st Cir. 1973). Cf. Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni, 61 F.R.D. 653 (D.Puerto Rico, 1974); Technograph, Inc. v. Texas Instruments, Inc., 43 F.R.D. 416 (S.D.N.Y.1967).

[2] Accordingly, the trial judge was in error in finding that the accident report was prepared in anticipation of litigation, unless this fact was established by stipulation at oral argument upon the motion to produce. Because no transcript of that proceeding appears in the record and a resolution of the issue is not essential to our review of the dispute, we will assume this was the case and base our decision on other grounds.

[3] [4] Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, and it is not a ground for objection that the information sought will be inadmissible at trial if the information sought

appears reasonably calculated to lead to the discovery of admissible evidence. La.C.C.P. art. 1422 (Acts 1976, No. 574, s 1).[2] The defendants here can not contend that the accident report contains attorney-client communications, the mental impressions of an attorney or expert, or other privileged matter. See La.C.C.P. arts. 1422 and 1424 (Acts 1976, No. 574 s 1). Instead, they claim it is not subject to discovery because it was prepared in anticipation of litigation.

A writing obtained or prepared by an adverse party, his attorney, surety, underwriter, expert or agent in anticipation of litigation or in preparation for trial is immune from discovery unless the party seeking production or inspection shows that denial *956 thereof will unfairly prejudice him in the preparation of his case or will cause him under hardship or injustice. La.C.C.P. art. 1424 (Acts 1976, No. 574 s 1).[3] In the instant case the trial judge's determination that plaintiff failed to adduce 'solid evidence' showing 'good cause' for production of the report was tantamount to a finding that plaintiff failed to introduce real evidence that denial of discovery would cause unfair prejudice, undue hardship or injustice.[4]

*957 The words 'unfair prejudice,' 'undue hardship,' and 'injustice,' of course, are not terms of precision. They represent concepts which evolved in the federal rules of discovery from numerous judicial decisions rendered in the context of widely varying factual situations. Louisiana's discovery law is derived from the federal discovery rules. See, Preliminary Statement, Book 2, Title 3, Chapter 3, Louisiana Code of Civil Procedure of 1960. Likewise, most of the 1976 amendments to Louisiana's discovery provisions were patterned after the 1970 revision of the federal rules of discovery. Maraist, Recent Changes in Louisiana, Discovery Law: An Analysis of Act No. 574 of 1976, XXIV La.B.J. 161 (December, 1976). Consequently, Louisiana courts construing the Louisiana discovery provisions have frequently relied on federal jurisprudence under analogous federal provisions as persuasive authority on questions involving the discoverability of documents. Madison v. Travelers Insurance Co., 308 So.2d 784 (La.1975); Cousins v. State Farm Mutual Automobile Insurance Co., 258 So.2d 629 (La.App.1st Cir. 1972); American Mark Distributing Corp. v. Louisville & Nashville R.R. Co., supra; Geolograph Service Corp. v. Southern Pacific Co., supra; Self v. Employers Mutual Liability Insurance Co. of Wisconsin, 90 So.2d 547 (La.App.2d Cir. 1956).

[5] To discover written statements under Federal Rule 26(b)(3)[5] it must be shown that a party 'has substantial need of the materials in the preparation of his case' and that 'he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.' We discern no substantial difference between this burden and that which must be borne by a party seeking discovery of statements prepared in anticipation of litigation under the Louisiana Code of Civil Procedure article 1424.

The notes of the Advisory Committee to Federal Rule 26 set forth the factors which *958 federal courts have considered relevant in determining whether this type discovery should be allowed:

'* * * The court in Southern Ry. v. Lanham, 403 F.2d 119 (5th Cir. 1968), while it naturally addressed itself to the 'good cause' requirements of Rule 34, set forth as controlling considerations the factors contained in the language of this subdivision. The analysis of the court suggests circumstances under which witness statements will be discoverable. The witness may have given a fresh and contemporaneous account in a written statement while he is available to the party seeking discovery only a substantial time thereafter. Lanham, supra at 127—128; Guilford (Guilford National Bank v. Southern Ry., 297 So.2d 921 (4th Cir.)), Supra at 926. Or he may be reluctant or hostile. Lanham, supra at 128—129; Brookshire v. Pennsylvania RR, 14 F.R.D. 154 (N.D. Ohio 1953); Diamond .v Mohawk Rubber Co., 33 F.R.D. 264 (D.Colo.1963). Or he may have a lapse of memory. Tannenbaum v. Walker, 16 F.R.D. 570 (E.D.Pa.1954). Or he may probably be deviating from his prior statement. Cf. Hauger v. Chicago, R.I. & Pac. RR, 216 F.2d 501 (7th Cir. 1954). On the other hand, a much stronger showing is needed to obtain evaluative materials in an investigator's reports. Lanham, supra at 131—133; Pickett v. L. R. Ryan, Inc., 237 F.Supp. 198 (E.D.S.C.1965).' Advisory Committee's Note, 48 F.R.D. 501; Fed.Rules Civ.Proc. rule 26, U.S.C.A., Notes of Advisory Committee on Federal Rules, at 158.

In recent analysis of the federal decisions, Moore observes: 'Under the Rule (26(b)(3)) as presently worded the factors to be taken into account in the exercise of the district court's discretion (include) the importance of the information sought in the preparation of the case

of the party seeking it, and the difficulty it will face in obtaining substantially equivalent information from other sources if production is denied. The latter factor finds illustration in many circumstances. Statements contemporaneous with the occurrence are in a sense unique and cannot be duplicated by later interviews or depositions. * * * Statements of witnesses who since the statements were taken have become unavailable afford another example. Hostility of a witness, deviation from a prior statement, Or lapse of memory are also factors to be considered.' (Footnotes omitted; emphasis supplied.) 4 Moore's Federal Practice, $26.64(3) at 26—419—432.

Plaintiff contends that he lacks independent recollection of the events and facts surrounding the accident. He was injured by an object which fell on him from a height of ten to fifteen feet. There being no evidence in the record to refute his reasonably contended lack of knowledge, we accept it as an established circumstance under which he seeks discovery of the accident report. Plaintiff argues that information substantially equivalent to that contained in the accident report, reflecting the results of an investigation conducted within days of the accident, and constituting a unique and immediate impression of the circumstances surrounding the accident, is unavailable to him despite his present ability to depose those persons present during the accident. He argues that there can be no realistically equivalent discovery of such facts through depositions relying solely on the memory of the witnesses.

The merit of plaintiff's argument is amply demonstrated by the testimony of Mr. Gordon Davis in his deposition. He was present and apparently looking directly at the plaintiff when the accident occurred. He gathered facts about the mishap from employee-witnesses under his supervision, which he set forth in the accident report along with his opinion of the cause of the accident. Yet when he was questioned about these facts and his opinion some twenty months after the accident his memory failed repeatedly regarding crucial portions of the data he recorded shortly after plaintiff's injury.

There is persuasive authority for the notion that statements taken shortly after the *959 accident are of unique value for discovery purposes and should be made available to parties merely because of the passage of time in itself:

'* * * Indeed, though there are cases to the contrary, there is now substantial authority for the proposition that statements taken from witnesses close to the time of the occurrence are unique, in that they provide an immediate impression of the facts. On this view, mere lapse of time is in itself enough to justify discovery. * * * The notion that the statement taken nearest to the event will most accurately reflect the perception the witness had of the event is amply supported by psychological studies, as well as by common sense. This fact lends strong support to the argument that lapse of time in itself creates necessity or justification for the production of statements taken near the time of the event.' Wright, Law of Federal Courts, s 82 at p. 367 (2d ed. 1971) (footnotes omitted).

See, e.g., McDougall v. Dunn, 468 F.2d 468 (4th Cir. 1972); Southern Railway Co. v. Lanham, 403 F.2d 119 (5th Cir. 1968); Southern Railway Co. v. Campbell, 309 F.2d 569 (5th Cir. 1962). See also, Wright & Miller, Federal Practice and Procedure: Civil, s 2025 at 220—21 and cases cited therein.

[6] We cannot conclude that in every case, because of the lapse of time in itself, a party denied production of a statement taken near the time of the event will be unfairly prejudiced in the preparation of his case or caused undue hardship or injustice. However, this circumstance combined with other factors, e.g., a witness' unavailability, reluctance, hostility, lapse of memory or apparent deviation from his prior statement, may produce a substantial likelihood that a litigant will be forced to trial without information in possession of his adverse party which appears reasonably calculated to lead to admissible evidence. In such a case the risk of prejudice to his case, undue hardship or injustice would warrant an order for the production and inspection of the writing.

[7] That the party seeking discovery was responsible for the delay in taking statements or depositions of witnesses, thereby enhancing the hardship likely to result from a denial of access to the earlier, almost contemporaneous, statements and reports, should not prevent him from discovering those documents. In Southern Railway Company v. Lanham, 403 F.2d 119 (5th Cir. 1968), the court aptly expressed the reasons for this conclusion:
'Discovery would not appear to prejudice appellant unduly though it is true that appellees will derive the benefit of appellant's diligence in securing statements from the crew. Our role in administering the discovery rules, however, is not to reward diligence or to penalize

laziness. A lawsuit is not a contest in concealment, and the discovery process was established so that 'either party may compel the other to disgorge whatever facts he has in his possession.' Hickman v. Taylor, 1947, 329 U.S. 495, 507, 67 S.Ct. 385, 392, 91 L.Ed. 451. Moreover, the fact that one party acts swiftly and first obtains the facts by the taking of statements or otherwise, gives that party no inherent right to secrete those facts and withhold them from the adverse party. If the adverse party can demonstrate good cause for the production of these facts, the Court should order the facts to be produced.' 403 F.2d at 130.

[8] Applying the principles set forth above, we find that denial of plaintiff's request for production of the accident report, containing as it does the results of Davis' almost contemporaneous investigation into the causes, facts and circumstances surrounding the plaintiff's injury, would unfairly prejudice the plaintiff in the preparation of his case, in view of his present inability, because of the passage of time and Davis' lapses of memory, to obtain equivalent data equally likely to lead to the discovery of admissible evidence.

Defendants' primary objection in this Court of production of the accident report is that it contains an expression of Gordon Davis' opinion as to the ultimate cause of *960 the accident. In fact, defendants offer to disclose all of the report except Davis' opinion, but they urge that this Court first rule that the opinion is immune from discovery. Arguing that Davis' opinion would be inadmissible at trial as lay opinion testimony, and, that if Davis is regarded as an expert, his opinion is entitled to an unqualified immunity from discovery under La.C.C.P. art. 1424, defendants further assert that Davis' opinion as to the accident's ultimate cause would not be likely to aid the plaintiff in obtaining admissible evidence.

[9] [10] We need not consider the merit of the contention that Davis' opinion would be inadmissible at trial. But see, McCormick on Evidence, ss 263, 264, at pp. 632—33 (Cleary ed. 1972). It is immaterial that the expression of opinion contained in the accident report might itself be inadmissible at trial. As is made abundantly clear in Article 1422 of the Louisiana Code of Civil Procedure, the test of discoverability is not the admissibility of the particular information sought, but whether the information appears reasonably calculated to lead to the discovery of admissible evidence. See, e.g., Fox v. Argonaut Southwest Insurance Co., 230 So.2d 400 (La.App.4th Cir. 1970). Cf. 4 Moore's Federal Practice, $26.56(4). We do not regard as serious the contention that Gordon Davis prepared the report as an expert, because there is no evidence to support such a finding.

[11] Nevertheless, defendants cite several federal cases in which opinions were deleted from otherwise discoverable documents prepared in anticipation of litigation. Southern Railway Co. v. Lanham, supra, (the court ordered the deletion of the opinion of an investigating claim agent as to the cause of an accident from an accident report ordered produced); Holmes v. Gardler, 62 F.R.D. 70 (E.D.Pa.1974); Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D.Pa.1973). These cases are inapposite because of the difference between the Louisiana discovery provisions and the federal rule under which they were decided.

Federal Rule of Civil Procedure 26(b)(3) in part provides: '* * * (W)hen the required showing (for production of documents, etc.) has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney Or other representative of a party concerning the litigation.' (Emphasis supplied.)

Thus, the federal rule affords protection to opinions of a broader class of individuals than that found in Louisiana Code of Civil Procedure Article 1424, which prohibits discovery of the written opinions, conclusions, mental impressions and theories of experts and attorneys only.

The written opinion of Gordon Davis, neither an attorney nor an expert, but a party to the present litigation, as to the ultimate cause of the accident giving rise to plaintiff's injuries is not a mental impression protected from discovery under the Louisiana discovery rules. Both Davis' opinion as to the cause of the accident and the data he gathered from the other employee-witnesses appear reasonably calculated to lead to the discovery of admissible evidence.

[12] Ordinarily the trial judge's finding on such issues is entitled to much weight. In a case such as this, however, where the plaintiff adduced abundant evidence in support of his motion, and yet the trial court found 'no evidence' of good cause for discovery or unfair prejudice to the plaintiff's case, we conclude that the finding below must

have been produced by a misunderstanding or error of law.

Accordingly, the order of the trial judge denying production of the accident report is set aside, and its production for inspection by the plaintiff is hereby ordered.

MARCUS, J., concurs.

SUMMERS, J., dissents finding no error in the judgments of the trial and appeal court judgments.

All Citations

344 So.2d 953

Footnotes

1 During the deposition Davis indicated that he could not remember who had told him that the floor plate had fallen and struck the plaintiff; he could not remember if he saw the floor plate fall; he could not remember whether Mr. Jacobs, a co-defendant, had been able to maneuver the floor plate to the end of the rig platform before the accident; he did not recall who had aided him in going to plaintiff's assistance immediately after the accident; he could not remember whether he had seen a floor plate lying around in the vicinity after the accident; he did not recall the persons with whom he had discussed the accident; he could not remember what others had told him about the accident; and, he could not remember what conclusions he had reached respecting the ultimate cause of the accident at the close of his investigation.

2 On recommendation of the Louisiana State Law Institute the legislature, by Act No. 574 of 1976, enacted a comprehensive revision of the civil discovery provisions of the Louisiana Code of Civil Procedure, which became effective on October 1, 1976. Being procedural only, and not operating to affect contractual or vested property rights, these provisions became applicable in the present case as of their effective date. Shreveport Long Leaf Lumber Co. v. Wilson, 195 La. 814, 197 So. 566 (1940). Nevertheless, because the new discovery rules which govern here are basically similar to the former ones, we would have reached the same result by applying them.

3 The limitations on discovery of information gathered in anticipation of litigation contained in former La.C.C.P. art. 1452 now appear in La.C.C.P. art. 1424, which, in pertinent part, provides:
'The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, expert, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects the mental impressions, conclusions, opinions, or theories of an attorney or an expert.'

4 Under the discovery provisions existing before the effective date of La. Acts of 1976, No. 574, Article 1492 required a preliminary showing of 'good cause' as a prerequisite for obtaining an order compelling production of documents, regardless of whether they were prepared in anticipation of litigation, or merely prepared in the ordinary course of business. La.C.C.P. art. 1492, repealed by La. Acts 1976, No. 574; e.g., Tibbs v. Housing Authority of New Orleans, 204 So.2d 70 (La.App.4th Cir. 1967). The mere fact that a document might be discoverable within the broad terms of La.C.C.P. art. 1436—i.e., relevant, not privileged and likely to lead to the discovery of admissible evidence—was not automatically regared as establishing 'good cause' for its production. E.g., Geolograph Service Corp. v. Southern Pacific Co., 172 So.2d 128 (La.App.1st Cir. 1965). Although it was recognied that in some instances, as where the relevancy of the document sought was apparent, and where its usefulness in the preparation of the case of the party seeking production was obvious, 'good cause' could be inferred from the motion for production itself. American Mark Distributing Corp. v. Louisville & Nashville R.R. Co., 180 So.2d 869 (La.App.4th Cir. 1965).
Once the preliminary showing of 'good cause' was made, if it appeared that the document sought had been prepared in anticipation of litigation, then, under the terms of La.C.C.P. art. 1452 (superseded by La.C.C.P. art. 1424), an additional showing of unfair prejudice, undue hardship or injustice was required to justify an order compelling its production. Documents prepared in anticipation of litigation and reflecting the mental impressions, conclusions, opinions, or theories of attorneys and experts were accorded an absolute immunity against discovery. State, through Department of Highways v. Spruell, 243 La. 202, 142 So.2d 396 (1962). It seems clear that a showing which would have satisfied the requirements of La.C.C.P. art. 1452 (superseded by La.C.C.P. art. 1424) would have been sufficient to establish 'good cause' under La.C.C.P. art. 1492 (superseded by La.C.C.P. art. 1461). In fact, courts have often equated a showing of good cause

with a demonstration that denial of discovery would unduly prejudice the preparation of petitioner's case or cause him hardship or injustice. See, Geolograph Service Corp. v. Southern Pacific Co., supra, and federal cases quoted therein.

Before the 1970 amendments to the Federal Rules of Civil Procedure governing discovery, Rule 34, which was the source of former Article 1492 of the Code of Civil Procedure, provided inter alia:

'Upon motion of any party Showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; * * *.' (Emphasis supplied.)

Thus, as in Louisiana, a preliminary showing of 'good cause' was necessary for an order compelling discovery of any document—regardless of whether it was prepared in anticipation of litigation, or merely prepared in the ordinary course of business.

The federal courts applying this rule came to use a dual standard for determining whether 'good cause' was established: being satisfied that mere relevancy of the document sought was enough when it was not prepared in anticipation of litigation. Connecticut Mutual Life Insurance Co. v. Shields, 17 F.R.D. 273 (S.D.N.Y.1955); Houdry Process Corp. v. Commonwealth Oil Refining Co., 24 F.R.D. 58 (S.D.N.Y.1959); Bell v. Commercial Insurance Co. of Newark, N.J., 280 F.2d 514 (3d Cir. 1960); but requiring much more than mere relevancy—i.e., the courts would look to the importance of the materials to the preparation of the case of the party seeking discovery, the necessity for the materials, and the alternative sources for securing reasonably equivalent information—where the materials sought were prepared in anticipation of litigation. E.g., Brown v. New York, New Haven & Hartford Railroad Co., 17 F.R.D. 324 (S.D.N.Y.1955); Guilford National Bank of Greensboro v. Southern Railway Co., 297 F.2d 921 (4th Cir. 1962); Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958).

The 1970 amendments to the federal discovery provisions eliminated the requirement of a preliminary showing of 'good cause' for discovery of documents and tangible things under Rule 34, but retained the requirement of a special showing of necessity for production of trial preparation materials by expanding the scope of Rule 26(b).

Thus, the showing of special necessity to obtain production of materials prepared in anticipation of litigation under present Rule 26(b)(3) is substantially identical to that previously required under the stricter 'good cause' standard applied to questions of discovery of those materials under former Rule 34. See generally, Notes of the Advisory Committee on Federal Rules 26 and 34, 48 F.R.D. 492, 497—508, 525, 526—27 (1970); See also, 4 Moore's Federal Practice, $26.64 at 26—412 through 26—457.

The 1976 amendments to the Louisiana discovery articles deleted the requirement for production of documents that a party seeking discovery make a preliminary showing of 'good cause,' See La.C.C.P. art. 1461 (enacted by La.Acts 1976, No. 574), as well as the requirement that a litigant always obtain a court order compelling production of documents and tangible things. See, La.C.C.P. art. 1462 (enacted by La.Acts 1976, No. 574). Documents falling within the scope of La.Code of Civil Procedure Article 1422 are now discoverable of right, unless they were prepared in anticipation of litigation. In that event they are discoverable only upon a showing by the party seeking discovery that he will be unfairly prejudiced in the preparation of his claim or will be subjected to undue hardship or injustice by the failure of the court to order their production. La.C.C.P. art. 1424 (enacted by La.Acts 1976, No. 574).

5 Federal Rule of Civil Procedure 26(b)(3) provides inter alia:

'* * * a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he his unable without undue hardship to obtain the substantial equivalent of the materials by other means. * * *'

End of Document

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 9. Evidence and Discovery (Refs & Annos)
B. Discovery
Rule 192. Permissible Discovery: Forms and Scope; Work Product; Protective Orders; Definitions (Refs & Annos)

TX Rules of Civil Procedure, Rule 192.3

192.3. Scope of Discovery

Currentness

(a) *Generally.* In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b) *Documents and Tangible Things.* A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person's possession, custody, or control.

(c) *Persons with Knowledge of Relevant Facts.* A party may obtain discovery of the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts. An expert is "a person with knowledge of relevant facts" only if that knowledge was obtained first-hand or if it was not obtained in preparation for trial or in anticipation of litigation.

(d) *Trial Witnesses.* A party may obtain discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial. This paragraph does not apply to rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.

(e) *Testifying and Consulting Experts.* The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by a testifying expert:

(1) the expert's name, address, and telephone number;

(2) the subject matter on which a testifying expert will testify;

(3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;

(4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;

(5) any bias of the witness;

(6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony;

(7) the expert's current resume and bibliography.

(f) *Indemnity and Insuring Agreements.* Except as otherwise provided by law, a party may obtain discovery of the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the indemnity or insurance agreement is not by reason of disclosure admissible in evidence at trial.

(g) *Settlement Agreements.* A party may obtain discovery of the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial.

(h) *Statements of Persons with Knowledge of Relevant Facts.* A party may obtain discovery of the statement of any person with knowledge of relevant facts--a "witness statement"--regardless of when the statement was made. A witness statement is (1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording. Notes taken during a conversation or interview with a witness are not a witness statement. Any person may obtain, upon written request, his or her own statement concerning the lawsuit, which is in the possession, custody or control of any party.

(i) *Potential Parties.* A party may obtain discovery of the name, address, and telephone number of any potential party.

(j) *Contentions.* A party may obtain discovery of any other party's legal contentions and the factual bases for those contentions.

Credits

Aug. 5, 1998 and amended Nov. 9, 1998, eff. Jan. 1, 1999.

Vernon's Ann. Texas Rules Civ. Proc., Rule 192.3, TX R RCP Rule 192.3

Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure are current with amendments received through September 1, 2016. Bar Rules, Rules of Disciplinary Procedure, Code of Judicial Conduct, and Rules of Judicial Administration are current with amendments received through September 1, 2016. Other state court rules and selected county rules are current with rules verified through September 1, 2016.

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Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 9. Evidence and Discovery (Refs & Annos)
B. Discovery
Rule 192. Permissible Discovery: Forms and Scope; Work Product; Protective Orders; Definitions (Refs & Annos)

TX Rules of Civil Procedure, Rule 192.5

192.5. Work Product

Currentness

(a) *Work Product Defined.* Work product comprises:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

(b) *Protection of Work Product.*

(1) Protection of Core Work Product-Attorney Mental Processes. Core work product--the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories--is not discoverable.

(2) Protection of Other Work Product. Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.

(3) Incidental Disclosure of Attorney Mental Processes. It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1).

(4) Limiting Disclosure of Mental Processes. If a court orders discovery of work product pursuant to subparagraph (2), the court must--insofar as possible--protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.

(c) *Exceptions.* Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery:

(1) information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions;

(2) trial exhibits ordered disclosed under Rule 166 or Rule 190.4;

(3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts;

(4) any photograph or electronic image of underlying facts (e.g., a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and

(5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence.

(d) *Privilege.* For purposes of these rules, an assertion that material or information is work product is an assertion of privilege.

Credits

Aug. 5, 1998, Nov. 9, 1998 and Dec. 31, 1998, eff. Jan. 1, 1999.

Vernon's Ann. Texas Rules Civ. Proc., Rule 192.5, TX R RCP Rule 192.5

Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure are current with amendments received through September 1, 2016. Bar Rules, Rules of Disciplinary Procedure, Code of Judicial Conduct, and Rules of Judicial Administration are current with amendments received through September 1, 2016. Other state court rules and selected county rules are current with rules verified through September 1, 2016.

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950 So.2d 654
Supreme Court of Louisiana.

Linda Duncan BELL
v.
TREASURE CHEST CASINO,
L.L.C. and Juanita Morgan.

No. 2006-CC-1538.
|
Feb. 22, 2007.

Synopsis

Background: Patron brought personal injury action against casino, alleging that she was struck in the back by a pushcart operated by an employee. The trial court granted patron's motion to compel pre-deposition production of security camera videotape. Casino appealed. The Court of Appeal reversed. The Supreme Court granted patron's petition for writ of certiorari.

[Holding:] The Supreme Court, Traylor, J., held that videotape showing the actual event was discoverable pre-deposition.

Reversed and remanded.

West Headnotes (2)

[1] **Pretrial Procedure**
Photographs;X Rays;Sound Recordings

Videotape from casino's security camera, which captured incident in which pushcart operated by employee allegedly struck and injured patron, was discoverable by patron in her personal injury action arising out of the incident, prior to deposition of patron, despite casino's claim that videotape contained impeachment evidence; the importance of the videotape's showing of the actual circumstances of the accident, and its assistance to the parties in the search for truth, far outweighed any potential impeachment value.

3 Cases that cite this headnote

[2] **Appeal and Error**
Depositions, Affidavits, or Discovery
Pretrial Procedure
Discretion of Court

A trial judge has broad discretion in regulating pre-trial discovery, which discretion will not be disturbed on appeal absent a clear showing of abuse of that discretion.

12 Cases that cite this headnote

Attorneys and Law Firms

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Stephen Jay Herman, for Louisiana Trial Lawyers Association, Amicus Curiae.

Opinion

TRAYLOR, Justice.

**1 We granted this writ application to determine whether the court of appeal erred in reversing the judgment of the trial court. For the reasons which follow, we reverse the ruling of the court of appeal and reinstate the judgment of the trial court.

FACTS and PROCEDURAL HISTORY

On July 14, 2004, the plaintiff, Linda Duncan Bell (Bell), was allegedly struck in the back by a pushcart and injured while playing a slot machine at the Treasure Chest Casino (Treasure Chest). The pushcart was operated by Juanita Morgan, a Treasure Chest employee. At the time of the accident, Treasure Chest operated security cameras

throughout the casino, one of which captured the event on videotape.

After Bell filed the instant suit, she propounded discovery to Treasure Chest, asking that the videotape be produced. Treasure Chest refused to produce the videotape, stating that it contained impeachment evidence which was not required to be produced until after Bell was deposed, according to this Court's opinion in *Wolford v. JoEllen Smith Psychiatric Hosp.*, 96-2460 (La.5/20/97), 693 So.2d 1164.

**2 Following Bell's filing of a motion to compel, the trial court ordered Treasure Chest to produce the videotape within fourteen days. Treasure Chest appealed the decision, and the court of appeal, citing *Wolford*, summarily reversed, stating that the plaintiff had not set forth special circumstances which would warrant pre-deposition production of the videotape.

The narrow issue before the Court is whether Treasure Chest is required to produce a surveillance videotape of the actual accident which was created for purposes other than impeachment, prior to plaintiff's deposition.

DISCUSSION

In the *Wolford* case, the plaintiff was injured in October of 1990 while performing an obstacle course exercise which was part of a physical therapy program. She brought suit against the hospital which ran the program, and made a discovery request for any surveillance videotapes in the hospital's possession. The hospital admitted possessing two surveillance videotapes, one made in 1993 and the other in 1995, but refused to produce the videotapes until after the plaintiff had given a supplemental deposition.

This Court stated that videotapes such as these, "ostensibly picturing a personal injury plaintiff engaged in physical activity," were "highly relevant to the plaintiff's claim for damages as the result of physical injury." *Wolford*, 693 So.2d at 1166. We agreed with our previous opinion on the subject, *Moak v. Illinois Central Railroad Company*, 93-0783 (La.1/14/94), 631 So.2d 401, to the extent that such videotapes were generally discoverable. We held, though, that the production of videotapes specifically created for the purpose of impeaching plaintiffs as to the extent of their injuries were to be delayed until after a plaintiff's deposition, but that plaintiffs were entitled to such videotapes a reasonable time before trial. **3 *Wolford*, 693 So.2d at 1168. We further held, agreeing with our opinion in *McNease v. Murphy Construction Company*, 96-0313 (La.11/8/96), 682 So.2d 1250, that special circumstances *656 might necessitate pre-deposition disclosure of impeachment videotapes.

Throughout the opinion, this Court, although using the generic term "surveillance videotape," clearly was speaking of surveillance videotapes made *after* an injury had occurred, for the purpose of impeaching a plaintiff as to the extent of his or her personal injury and any claimed limitations resulting therefrom. As stated, in such a case, the plaintiff would have the burden of showing special circumstances allowing pre-deposition disclosure. In other cases, such as the instant one, where a surveillance videotape shows the actual accident and was not created for the specific purpose of impeaching the plaintiff, surveillance videotapes are, as we stated in *Moak*, generally discoverable under our discovery rules. Because the videotapes are generally discoverable, it is the defendant, rather than the plaintiff, which must show special circumstances which would require postponing the production of the material.

[1] At the hearing of the motion to compel the production of the videotape at issue in this case, the trial judge correctly distinguished between a videotape made specifically for impeachment purposes, as was the case in both *Moak* and *McNease*, and a security surveillance tape made for purposes other than impeachment and which shows the occurrence of the actual accident, as would an eyewitness. The importance of the videotape's showing of the actual circumstances of the accident, and its assistance to the parties in the search for truth, far outweigh any potential impeachment value.

[2] As stated by the dissenters in *Wolford*, a trial judge has broad discretion in regulating pre-trial discovery, which discretion will not be disturbed on appeal absent **4 a clear showing of abuse of that discretion. Here, the trial judge has not clearly abused her discretion.

DECREE

For the foregoing reasons, we reverse the ruling of the court of appeal and reinstate the judgment of the trial court.

REVERSED AND REMANDED.

CALOGERO, C.J., concurs and assigns reasons.

CALOGERO, Chief Justice, concurs and assigns reasons: I am in total agreement with the majority's decision to require the defendant in this case to produce the surveillance video of plaintiff's accident prior to the plaintiff's deposition. I write separately to reassert my opinion that *Wolford v. JoEllen Smith Psychiatric Hospital,* 96-2460 (La.5/20/97), 693 So.2d 1164, was wrongly decided by this court, for the reasons expressed in my dissent. Further, I believe that the majority of this court, on the right occasion, should take steps to overrule *Wolford.* This court should not have established a strict rule that requires a plaintiff to give a deposition before having access to the defendant's surveillance video, because that rule does not respect the district court's broad discretion to make decisions regarding pre-trial discovery. The rule expressed by this court in *Moak v. Illinois Railroad,* 93-0783 (La.1/14/94), 631 So.2d 401, should be reinstated.

All Citations

950 So.2d 654, 2006-1538 (La. 2/22/07)

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Article 1425. Experts; pretrial disclosures; scope of discovery

A. A party may through interrogatories or by deposition require any other party to identify each person who may be used at trial to present evidence under Articles 702 through 705 of the Louisiana Code of Evidence.

B. Upon contradictory motion of any party or on the court's own motion, an order may be entered requiring that each party that has retained or specially employed a person to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony provide a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor and the data or other information considered by the witness in forming the opinions. The parties, upon agreement, or if ordered by the court, shall include in the report any or all of the following: exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

C. If the court orders the disclosures of Paragraph B of this Article, they shall be made at the times and in the sequence directed by the court. In the absence of directions from the court or stipulation by the parties, the disclosures ordered pursuant to Paragraph B of this Article shall be made at least ninety days before the trial date or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Paragraph B of this Article, within thirty days after the disclosure made by the other party. The parties shall supplement these disclosures when required by Article 1428.

D.(1) Except as otherwise provided in Paragraph E of this Article, a party may, through interrogatories, deposition, and a request for documents and tangible things, discover facts known or opinions held by any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Paragraph B, the deposition shall not be conducted until after the report is provided.

(2) A party may, through interrogatories or by deposition, discover facts known by and opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Article 1465 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(3) Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this Paragraph; and with respect to discovery obtained under Subparagraph (2) of this Paragraph, the court shall also require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

E.(1) The expert's drafts of a report required under Paragraph B of this Article, and communications, including notes and electronically stored information or portions thereof that would reveal the mental impressions, opinions, or trial strategy of the attorney for the party who has retained the expert to testify, shall not be discoverable except, in either case, on a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(2) Nothing in this Article shall preclude opposing counsel from obtaining any facts or data the expert is relying on in forming his opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches, or into the validity of the expert's opinions.

F.(1) Any party may file a motion for a pretrial hearing to determine whether a witness qualifies as an expert or whether the methodologies employed by such witness are reliable under Articles 702 through 705 of the Louisiana Code of Evidence. The motion shall be filed not later than sixty days prior to trial and shall set forth sufficient allegations showing the necessity for these determinations by the court.

(2) The court shall hold a contradictory hearing and shall rule on the motion not later than thirty days prior to the trial. At the hearing, the court shall consider the qualifications and methodologies of the proposed witness based upon the provisions of Articles 104(A) and 702 through 705 of the Louisiana Code of Evidence. For good cause shown, the court may allow live testimony at the contradictory hearing.

(3) If the ruling of the court is made at the conclusion of the hearing, the court shall recite orally its findings of fact, conclusions of law, and reasons for judgment. If the matter is taken under advisement, the court shall render its ruling and provide written findings of fact, conclusions of law, and reasons for judgment not later than five days after the hearing.

(4) The findings of facts, conclusions of law, and reasons for judgment shall be made part of the record of the proceedings. The findings of facts, conclusions of law, and reasons for judgment shall specifically include and address:

(a) The elements required to be satisfied for a person to testify under Articles 702 through 705 of the Louisiana Code of Evidence.

(b) The evidence presented at the hearing to satisfy the requirements of Articles 702 through 705 of the Louisiana Code of Evidence at trial.

(c) A decision by the judge as to whether or not a person shall be allowed to testify under Articles 702 through 705 of the Louisiana Code of Evidence at trial.

(d) The reasons of the judge detailing in law and fact why a person shall be allowed or disallowed to testify under Articles 702 through 705 of the Louisiana Code of Evidence.

(5) A ruling of the court pursuant to a hearing held in accordance with the provisions of this Paragraph shall be subject to appellate review as provided by law.

(6) Notwithstanding the time limitations in Subparagraphs (1), (2), and (3) of this Paragraph, by unanimous consent of the parties, and with approval by the court, a motion under this Paragraph may be filed, heard, and ruled upon by the court at any time prior to trial. The ruling by the court on such motion shall include findings of fact, conclusions of law, and reasons for judgment complying with the provisions of Subparagraph (4) of this Paragraph.

(7) The provisions of this Paragraph shall not apply to testimony in an action for divorce or annulment of marriage, or to a separation in a covenant marriage, to a property partition, or to an administration of a succession, or to testimony in any incidental or ancillary proceedings or matters arising from such actions.

(8) All or a portion of the court costs, including reasonable expert witness fees and costs, incurred when a motion is filed in accordance with this Paragraph may, in the discretion of the court, be assessed to the non-prevailing party as taxable costs at the conclusion of the hearing on the motion.