# CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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## ***Haniff v Superior Court*** 3/1/17

**Civil Discovery Act; Motion to Compel; Vocational Rehabilitation Examination**

Haniff was employed by OnTrac-CA as a package delivery truck driver when he was injured in a motor vehicle accident on November 14, 2012. The accident occurred while Haniff was unloading packages from his parked truck on the campus of Stanford University. According to Haniff, an automobile owned by Moonhee Kim and parked by James Hohman, a Stanford University employee, rolled down a hill and struck Haniff. As a result of the accident, Haniff sustained multiple fractures of his right femur and pelvis and underwent surgery. He has not returned to work since the date of the accident.

In September 2013 Haniff filed a personal injury complaint naming Hohman and Kim as defendants. The record reflects that the complaint was later amended to add Stanford University as a defendant. Haniff seeks compensatory damages for, among other things, wage loss and loss of earning capacity.

Haniff was examined by an orthopedic surgeon, Curtis P. Comstock, M.D., at the request of Stanford University. In his October 26, 2015 report, Dr. Comstock stated his opinions that Haniff's fractures had healed and, although Haniff had not returned to work since the accident, there was "no medical contraindication" to Haniff obtaining gainful employment.

In September 2015 defendants Hohman and Kim served a "demand for vocational rehabilitation examination" on Haniff. The demand stated that the examination would be conducted on October 15, 2015, by Gregory Sells, a vocational rehabilitation counselor, and would consist of the following: "An

interview and administration of written examination, including interest testing and aptitude testing to examine plaintiff with respect to his employment history, prospects and interests. Plaintiff MOHAMMED HANIFF should allow 2 hours for the examination." Haniff objected to the demand for a vocational rehabilitation examination on the ground, as stated in his meet and confer letter, that the Code of Civil Procedure did not authorize a defense vocational rehabilitation examination.

In January 2016 defendants Hohman and Kim filed a motion for an order compelling Haniff to undergo a vocational rehabilitation examination. In support of their motion, they argued that good cause existed for a defense vocational rehabilitation examination because Haniff had claimed he was unable to hold gainful employment and had made "extensive" wage loss and loss of earning capacity claims. Hohman and Kim also argued that authority for a vocational rehabilitation examination was provided by "the broad discovery authority" of section 2017.010; the inherent authority of the court to allow a defense vocational rehabilitation examination in order to avoid injustice; and the persuasive decisions of other jurisdictions in which a defense vocational rehabilitation examination is allowed.

Haniff opposed the motion to compel him to undergo a vocational rehabilitation examination, arguing that there was no provision in the Civil Discovery Act (§ 2016.010 et seq.) that would permit a defendant to obtain an oral examination of a plaintiff by a vocational rehabilitation expert. He relied on the decision in *Browne v. Superior Court* (1979) 98 Cal.App.3d 610 for the proposition that the trial court cannot compel a vocational rehabilitation examination by an unlicensed expert because that method of discovery has no statutory authorization. In addition, Haniff argued that defendants had not shown good cause for a defense vocational rehabilitation examination because they could review his vocational rehabilitation expert's notes and records and cross-examine the expert at trial.

The trial court granted the motion to compel Haniff to undergo a vocational rehabilitation examination in its February 18, 2016 order. During the hearing on the motion, the court stated that the decision in *Browne*, 98 Cal.App.3d 610 did not control because it was distinguishable. The court was

also concerned about due process, stating: "It's fundamentally unfair for the plaintiffs to have to rely solely on your voc rehab expert . . . the defendants should be given an opportunity to hire their own expert to conduct the voc rehab examination the way that person wants to do it. There could be apples and oranges between the way the two voc rehab experts administer their exams. So it was a concern of mine."

Haniff filed a petition for writ of mandate in which he sought a writ commanding the trial court to vacate its order compelling him to undergo a vocational rehabilitation examination. He also requested a temporary stay of the trial court's February 18, 2016 order. This court issued a temporary stay and an order to show cause why a peremptory writ should not issue as requested in the petition for writ of mandate, and afforded the parties the opportunity for further briefing and oral argument.

Writ review of discovery orders is rarely granted unless the discovery order may undermine a privilege, or it is necessary to answer questions of first impression. (*Oceanside Union School Dist. v. Superior Court* (1962) 58 Cal.2d 180, 185-186; *Raytheon Co. v. Superior Court* (1989) 208 Cal.App.3d 683, 686. In this case, writ review is appropriate to address a question of general importance in personal injury cases involving claims for wage loss and loss of earning capacity: Whether the trial court may compel the plaintiff to undergo a defense vocational rehabilitation examination although that is not one of the methods of discovery expressly authorized in the Civil Discovery Act (§ 2016.010 et seq.).

Haniff's primary argument is that writ relief is necessary to correct the trial court's abuse of discretion in ordering him to undergo a defense vocational rehabilitation examination, which he asserts is not one of the methods of civil discovery authorized by section 2019.010.

The Sixth District Court of Appeal begins its opinion by noting "after the adoption of the 1957 statutes dealing with civil discovery, our courts lack the power to order discovery beyond that permitted by the statutes." (*Cruz v. Superior Court* (2004) 121 Cal.App.4th 646, 650; see also *Roe v. Superior Court* (2015) 243 Cal.App.4th 138, 144.

The California Supreme Court's decision in *Emerson Electric* (1997) 16 Cal.4th 1101 also indicates that civil discovery cannot be expanded beyond the statutory limits. Referring to its prior decision in *Bailey v Superior Court* (1977) 19 Cal.3d 970, the court stated: "We concluded in *Bailey* that the Code of Civil Procedure did not permit videotaped depositions without the mutual consent of the parties. We emphasized that 'whether this court believes videotaping is as reliable as, or more advantageous than, the traditional means of recording a deposition is not the issue.' We explained that it was for the Legislature to determine whether methods of recording and reporting depositions other than stenographic and written transcriptions should be authorized. By amending the discovery statutes to permit videotaped depositions, the Legislature expressly so determined." (*Emerson Electric*, at p. 1109.)

A defendant's demand for a vocational rehabilitation examination of the plaintiff was addressed in *Browne*, 98 Cal.App. 3d 610, where the appellate court determined that the demand exceeded the statutory limits. In *Browne*, the plaintiff claimed future wage loss due to his injuries in a automobile-motorcycle accident. The defendants filed a motion to compel the plaintiff to submit to an interview and physical examination and/or testing by a vocational rehabilitation expert who was not a licensed physician. The defendants argued that a vocational rehabilitation examination was authorized under former section 2032, subdivision (a), which provided for a physical examination by a physician where the party's mental or physical condition was at issue. The *Browne* court concluded that the trial court had abused its discretion in granting the motion, as follows: "To read into the governing statute authority to conduct a physical examination by a non-physician would subvert the express legislative policy that such physical examinations be conducted only by a physician . . . . Since the proposed examiner is neither a licensed physician nor surgeon, no affirmative legislative authority exists for the ordered physical examination of petitioner. The court concluded that "whether such an examination by a qualified vocational rehabilitation counselor should be permitted in the first instance is a matter for the Legislature to determine and not the courts."

It is well established that California courts lack the power to order civil discovery by a method that is not authorized by the Code of Civil Procedure (see, e.g., *Cruz*, at p. 650). The next inquiry is to consider whether section 2019.010

may be construed to authorize a vocational rehabilitation examination as a method of civil discovery.

**Section 2019.010 sets forth six methods of civil discovery: "Any party may obtain discovery by one or more of the following methods: [¶] (a) Oral and written depositions. [¶] (b) Interrogatories to a party. [¶] (c) Inspections of documents, things, and places. [¶] (d) Physical and mental examinations. [¶] (e) Requests for admissions. [¶] (f) Simultaneous exchanges of expert trial witness information."**

To determine whether section 2019.010 may be construed to authorize a vocational rehabilitation examination as a method of civil discovery, the Justices apply the well established rules of statutory interpretation. The "fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute. We begin with the language of the statute, giving the words their usual and ordinary meaning. The language must be construed 'in the context of the statute as a whole and the overall statutory scheme, and we give "significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." ' " (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83)

"In other words, ' "we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' " ' If the statutory terms are ambiguous, we may examine extrinsic sources, including the ostensible objects to be achieved and the legislative history. In such circumstances, we choose the construction that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and avoiding a construction that would lead to absurd consequences." (*Smith*, at p. 83.)

Following these rules, the DCA first examines the statutory language in question. The plain language of section 2019.010 expressly authorizes only six specific methods of discovery: (1) oral and written depositions; (2) interrogatories to a party; (3) inspections of documents, things, and places; (4) physical and mental examinations; (5) requests for admissions; and (6) simultaneous exchanges of expert trial witness information. On its face, section

2019.010 does not provide that a vocational rehabilitation examination is one of the permitted methods of discovery. Section 2019.010 also lacks a provision authorizing the trial courts to compel a party to submit to a method of discovery not expressly permitted in the statute.

Two additional rules of statutory interpretation also aid the interpretation of section 2019.010. First, " '**a "familiar rule of construction is that where a statute enumerates things upon which it is to operate it is to be construed as excluding from its effect all those not expressly mentioned."**'" (*Wright v. City of Santa Clara* (1989) 213 Cal.App.3d 1503, 1507.) Under this rule of statutory interpretation, a vocational rehabilitation examination is excluded as a method of discovery since a vocational rehabilitation examination is not one of the discovery methods enumerated in section 2019.010.

Second, " 'inserting' additional language into a statute 'violates the cardinal rule of statutory construction that courts must not add provisions to statutes." (*People v. Guzman* (2005) 35 Cal.4th 577, 587) " 'This rule has been codified in California as **Code of Civil Procedure section 1858, which provides that a court must not "insert what has been omitted" from a statute.**' " In other words, " ' "this court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." ' " (*Roe*, at p. 144.) Under this rule of statutory construction, the Court may not construe section 2019.010 to authorize a vocational rehabilitation examination or to authorize the trial court to compel a party to undergo a method of civil discovery not expressly mentioned in the statute. Such a construction would improperly add provisions to the statute.

The Court may also " 'examine the history and background of the statutory provision in order to ascertain the most reasonable interpretation of the measure.' " (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 543.) Even where, as here, " 'the plain language of the statute dictates the result,' " the legislative history may provide additional authority confirming the court's interpretation of the statute. Having reviewed the available legislative history of section 2019.010, The Justices find it confirms their plain language interpretation of the statute.

Section 2019.010 was enacted as part of the 2004 Civil Discovery Act and continued former section 2019, subdivision (a) without change. Former section 2019, subdivision (a) was enacted as part of the Civil Discovery Act of 1986, which was a comprehensive revision of the law governing discovery in civil cases. (Stats. 1986, ch. 1334, § 2; see *Toyota Motor Corp. v. Superior Court* (2011) 197 Cal.App.4th 1107, 1119.) The 2004 Civil Discovery Act "reorganized and renumbered the provisions of the Civil Discovery Act of 1986, but the 2004 Act was not intended to effect any substantive changes in the law. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 396, fn. 2.)

The legislative indicates that the Legislature intended to authorize only the six methods of civil discovery enumerated in former section 2019, subdivision (a) and continued as section 2019.010 without change. There is no indication that the Legislature intended to either authorize a vocational rehabilitation examination as a method of civil discovery or authorize the trial court to compel a party to submit to a method of civil discovery not expressly enumerated in the statute.

The DCA will therefore determine under the rules of statutory interpretation that **section 2019.010 does not authorize a defense vocational rehabilitation exami**nation, since that is not one of the methods of discovery enumerated in the statute. Accordingly, the trial court acted outside the scope of the court's discretion when it ordered Haniff to undergo a vocational rehabilitation examination. This determination is consistent with other appellate decisions that have addressed the statutory limits on discovery (see, e.g., *Roe*, at p. 144).

Hohman and Kim argue to the contrary that the trial court did not abuse its discretion by expanding discovery beyond its statutory limits, for several reasons. To begin with, Hohman and Kim argue that there is good cause for a nonphysical vocational rehabilitation examination because Haniff has claimed he cannot work despite Dr. Comstock's finding that there is no medical reason barring Haniff from obtaining gainful employment. Hohman and Kim rely on the decision in *Johnston v. Southern Pacific Co.* (1907) 150 Cal. 535 for the proposition that the trial court has the inherent power to allow the defendant's

expert to examine the plaintiff, in order to counter the plaintiff's expert and to allow the defendant to prepare for trial. They also argue that a defense vocational rehabilitation examination is proper because their expert should have equal access to Haniff as a matter of due process.

The Justices explained that Hohman and Kim have provided no authority for the proposition that the Legislature's statutory limits on the methods of discovery, as set forth in section 2019.010, may be violative of the constitutional right to due process. Further, as stated in *Browne*, denial of a defense vocational rehabilitation examination "does not leave the defendants in a fundamentally unfair or unpreferred position at trial." (*Browne*, at p. 616, fn. 4.) In *Browne*, the defendants were "afforded access to all of the notes and records of the examination of petitioner conducted by the state vocational rehabilitation counselor, augmented by the latter's deposition; that examiner, if called, will be subject to thorough cross-examination by real parties aided by a comparable professional counselor, if desired."

Hohman and Kim also contend that the appellate court in *Lee v. Superior Court* (2009) 177 Cal.App.4th 1108 rejected the argument that section 2019.010 provides an exclusive list of discovery methods in civil cases. *Lee* concerned the scope of discovery in a civil commitment proceeding under the Sexually Violent Predators Act (SVPA; Welf. & Inst. Code, § 6600 et seq.). The decision in *Lee* specifically concerned the district attorney's authority under Welfare and Institutions Code section 6603, subdivision (c)(1) to obtain a defendant's medical and psychological records in a SPVA proceeding. The *Lee* court did not address the methods of civil discovery that are available under section 2019.010 in a personal injury case, such as the case at bar. "It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered." (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1335.)

Alternatively, Hohman and Kim contend that a defense vocational rehabilitation examination is authorized under section 2017.010, which provides in part: "Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the

determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." Hohman and Kim assert that under section 2017.010 they are entitled to a defense vocational rehabilitation examination in order to obtain relevant information "regarding what jobs Haniff is qualified to perform and how much he could earn."

Haniff responds that section 2017.010 does not apply because that section "concerns the *scope of discovery*, whereas . . . section 2019.010 identifies the *methods of discovery* . . . ." Section 2017.010 has been construed to authorize discovery of information that is relevant because "it 'might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement. . . .' Admissibility is not the test and information unless privileged, is discoverable if it might reasonably lead to admissible evidence." (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 591.) Thus, section 2017.010 governs the scope of the information that may be sought by the various methods of discovery, which is a broad but not unlimited scope. (See, e.g., *State Farm Mutual Automobile Ins. Co. v. Lee* (2011) 193 Cal.App.4th 34, 40-41)

Accordingly, since section 2017.010 concerns the scope of civil discovery, and not the methods of civil discovery, section 2017.010 may not be construed to authorize a vocational rehabilitation examination. Hohman and Kim may use other discovery methods, such as depositions and interrogatories, to obtain relevant information regarding Haniff's wage loss and loss of earning capacity claims and the opinions of his vocational rehabilitation expert.

Since a vocational rehabilitation examination is not one of the civil discovery methods authorized by section 2019.010, the Sixth DCA concludes under the applicable legal principles that the trial court acted outside the scope of the court's discretion when it ordered Haniff to undergo a vocational rehabilitation examination. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) The contention that a defense vocational rehabilitation examination should be an available discovery method as a matter of fundamental fairness and trial preparation in a personal injury case where, as here, the plaintiff seeks compensatory damages for wage loss and loss of earning

capacity, is better addressed to the Legislature. (See, e.g, *Waste Management of the Desert, Inc. v. Palm Springs Recycling Center, Inc.* (1994) 7 Cal.4th 478)

The Justices, therefore, issue a peremptory writ of mandate directing the trial court to vacate its order granting the motion for an order compelling Haniff to undergo a vocational rehabilitation examination and to enter a new order denying the motion. Upon finality of this decision, the temporary stay order is vacated. Costs in this original proceeding are awarded to petitioner Mohammed Haniff.

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