PERRY v. W. S. DARLEY & CO.
United States District Court, E. D. Wisconsin, 1971.
54 Federal Rules Decisions 278.

Professor's Note: Read this case with a view toward distinguishing the three types of witnesses in civil litigation: (1); lay witnesses; (2) expert consultants, who are employed by a party, or retained to assists the hiring lawyer assess the technical aspects of a case; and (3) experts who have been designated to testify at trial, resulting in the waiver of conditional work product protection.

I have inserted footnotes—which are not a part of the original opinion. If I took the time to do so, you should take the time to digest them before class.

Court's Opinion: MYRON L. GORDON, DISTRICT JUDGE.

The plaintiff Robert Perry, a volunteer fireman, seeks damages for injuries allegedly sustained when he was struck by a fire truck as he attempted to activate a pump manufactured and installed on the truck by the defendant.[1] The defendant has moved for an order compelling disclosure of the names of certain experts who examined the truck and pump shortly after the accident; the refusal to disclose the names occurred during the oral deposition of Ward Johnson, an employee of the workmen's compensation carrier for the fire department for which Mr. Perry works.[2]

Counsel for the plaintiffs objected to disclosure of the experts' names on the basis that such information "constitutes both privileged communication and work product." However, the defendant argues in its brief that the experts are potential witnesses who "have knowledge or relevant facts" and that it is entitled, pursuant to Rule 26(b)(1), to the "identity and location of persons having knowledge of any discoverable matter."[3]

The plaintiffs state that

> It should be noted that the [defendant's] question did not seek the disclosure of the identity of experts which plaintiffs expect to call as witnesses[4] upon the trial, which disclosure is explicitly required * * * . Federal Rule 26(b)(4)(A). However, significantly, no similar requirement is made for the disclosure of identity of

[1] This was a products liability case against a third party. The plaintiff could pursue only administrative remedies against his employer.

[2] The fire company's insurance carrier was thus asserting the interests of the fire company's employee Perry.

[3] Note that FRCP 26(b)(1) does not expressly distinguish between lay or expert witnesses who may be "persons having [such] knowledge."

[4] What kind of witness is the court referring to at this point?

experts not retained or specially employed for purposes of testifying at trial. See Rule 26(b)(4)(B).[5]

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See also 8 Wright & Miller, Federal Practice and Procedure: Civil § 2029, at 247 (1970).

In addition, the Advisory Committee note to Rule 26(b)(4) states, in part:

> It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness. 48 F.R.D. 487, 503 (1970).

The plaintiffs concede, as stated above, that they have a duty to disclose the identity of any expert whom they expect to call as a witness at the trial**.**[6] As to experts who have been engaged "in anticipation of litigation or preparation for trial," however, the plaintiffs point to the provisions of Rule 26(b)(4)(B) to the effect that, when such experts are "not expected to be called as * * * [witnesses] * * * at trial," facts known or opinions held by them are discoverable

> ... only * * * 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.[7]

* * *

Rule 26(b)(4)(B) makes no distinction between the identity of an expert and facts known or opinions held by him, although it is stated in 8 Wright & Miller, *Federal Practice and Procedure: Civil* * * * that, "Apparently one party can find out the names of experts specially retained by another party who are not to be called."[8] However, in an affidavit attached to the defendant's motion, the attorney for the defendant states that, because the experts viewed the fire truck well before the commencement of the present action, "this in and of itself is sufficient cause to require the plaintiff to turn over not only the names of the expert or experts but the

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[5] What kind of "expert" is the court referring to at this point?

[6] The retaining party thus designates that party's consultant as an expert witness, thus waving the former work product protection. Why would the retaining attorney want to do that?

[7] What *case* is this passage referring to? What FRCP effectively codified that case?

[8] But would that information not infringe upon the retaining party's work product? Should an adversary be permitted to: (a) inquire as to the identity of any consultant that the retaining party decided not to use?; or (b) take the deposition of that unused consultant? Would it matter if the party with the financial resources effectively monopolized the few potential experts in the area, to keep the other party from having access to a local consultant?

reports of said expert or experts."[9]

In my opinion, no showing of "exceptional circumstances" has been made by the defendant in the case at bar, nor is there any evidence to indicate that the experts were actors or viewers "with respect to [the] transactions or occurrences that are part of the subject matter of the lawsuit."[10] Rule 26(b)(4) imposes a more rigorous standard upon the discovery of facts known and opinions held by an expert than is imposed with regard to other witnesses; I am not persuaded that such standard should be relaxed in the present case with regard to the identity of the experts who viewed the fire truck shortly after the accident.

Therefore, it is ordered that the defendant's motion for an order compelling answers to certain questions propounded to Ward Johnson be and hereby is denied.

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[9] Of the three possible types of witness, which would they be in this circumstance? Should there be an exception for reports written, or people dispatched to the scene of an accident in the ordinary course of business–which could overlap with doing so in anticipation of litigation?

[10] Assume that these Johnny-on-the-spot fire department employees, with the relevant expertise are on the scene, and observe whether the allegedly defective pump was working/not working; or that there was a grinding noise coming from that pump; or that they saw smoke coming from that pump. Should the trial judge's ruling be the same?