

RICO v. MITSUBISHI MOTORS CORP.

Supreme Court of California, 2007.

42 Cal.4th 807, 68 Cal.Rptr.3d 758, 171 P.3d 1092.

CORRIGAN, ASSOCIATE JUSTICE.

Here we consider what action is required of an attorney who receives privileged documents through inadvertence and whether the remedy of disqualification is appropriate. We conclude that, under the authority of *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 82 Cal.Rptr.2d 799 (*State Fund*), an attorney in these circumstances may not read a document any more closely than is necessary to ascertain that it is privileged. Once it becomes apparent that the content is privileged, counsel must immediately notify opposing counsel and try to resolve the situation. We affirm the disqualification order under the circumstances presented here.

FACTUAL BACKGROUND

Two Mitsubishi corporations (collectively Mitsubishi or defendants), and the California Department of Transportation (Caltrans), were sued by various plaintiffs after a Mitsubishi Montero rolled over while being driven on a freeway. Subsequently, Mitsubishi representatives met with their lawyers, James Yukevich and Alexander Calfo, and two designated defense experts to discuss their litigation strategy and vulnerabilities. * * * Yukevich printed only one copy of the notes [taken during the six hour session,] which he later edited and annotated. Yukevich never intentionally showed the notes to anyone, and the court determined that the sole purpose of the document was to help Yukevich defend the case.

The notes are written in a dialogue style and summarize conversations among Yukevich, Calfo, and the experts. They are dated, but not labeled as “confidential” or “work product.” The printed copy of these compiled and annotated notes is the document at issue here.²

Less than two weeks after the strategy session, Yukevich deposed plaintiffs’ expert witness, Anthony Sances, at the offices of plaintiffs’ counsel, Raymond Johnson. Yukevich, court reporter Karen Kay, and Caltrans counsel Darin Flagg were told that Johnson and Sances would be late for the deposition. After waiting in the conference room for some time, Yukevich went to the restroom, leaving his briefcase, computer, and case file in the room. The printed document from the strategy session was in the case file. While Yukevich was away, Johnson and Sances arrived. Johnson asked Kay and Flagg to leave the conference room. Kay and Flagg’s departure left only the plaintiffs’ representatives and counsel in the conference room. Yukevich returned to find Kay and

² Because the document was confidential, the court ordered it sealed along with relevant portions of the reporter’s transcript where the contents of the document were discussed. The document has remained sealed since that time.

Flagg standing outside. Yukevich waited approximately 5 minutes, then knocked and asked to retrieve his briefcase, computer, and file. After a brief delay, he was allowed to do so.

Somehow, Johnson acquired Yukevich's notes. Johnson maintained that they were accidentally given to him by the court reporter. Yukevich insisted that they were taken from his file while only Johnson and plaintiffs' team were in the conference room. As a result, Mitsubishi moved to disqualify plaintiffs' attorneys and experts. The trial court ordered an evidentiary hearing to determine how Johnson obtained the document.

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The court ultimately concluded that the defense had failed to establish that Johnson had taken the notes from Yukevich's file. It thus ruled that Johnson came into the document's possession through inadvertence.

The court found the 12-page document was dated, but not otherwise labeled. It contained notations by Yukevich. Johnson admitted that he knew within a minute or two that the document related to the defendants' case. He knew that Yukevich did not intend to produce it and that it would be a "powerful impeachment document." Nevertheless, Johnson made a copy of the document. He scrutinized and made his own notes on it. He gave copies to his co-counsel and his experts, all of whom studied the document. Johnson specifically discussed the contents of the document with each of his experts.

A week after he acquired Yukevich's notes, Johnson used them during the deposition of defense expert Geoffrey Germane.³ The notes purportedly indicate that the defense experts made statements at the strategy session that were inconsistent with their deposition testimony. Johnson used the document while questioning Germane, asking about Germane's participation in the strategy session.

Defense Counsel Calfo defended the Germane deposition. Yukevich did not attend. Calfo had never seen the document and was not given a copy during the deposition. When he asked about the document's source, Johnson vaguely replied that, "It was put in Dr. Sances' file." Calfo repeatedly objected to the "whole line of inquiry with respect to an unknown document." He specifically said that, "I don't even know where this exhibit came from."

Only after the deposition did Johnson give a copy of the document to Calfo, who contacted Yukevich. When Yukevich realized that Johnson had his only copy of the strategy session notes and had used it at the deposition, he and Calfo wrote to Johnson demanding the return of all duplicates. The letter was faxed the day after Germane's deposition. The next day, defendants moved to disqualify plaintiffs' legal team and their experts on the ground that they had become privy to and had used Yukevich's work

³ Johnson also used the document at the subsequent deposition of defense expert Dennis Schneider.

product. As a result, they complained, Johnson’s unethical use of the notes and his revelation of them to cocounsel and their experts irretrievably prejudiced defendants.

The trial court concluded that the notes were absolutely privileged by the work product rule.⁴ The court also held that Johnson had acted unethically by examining the document more closely than was necessary to determine that its contents were confidential, by failing to notify Yukevich that he had a copy of the document, and by surreptitiously using it to gain maximum adversarial value from it. The court determined that Johnson’s violation of the work product rule had prejudiced the defense and “the bell cannot be ‘unrung’ by use of in limine orders.” Accordingly, the court ordered plaintiffs’ attorneys and experts disqualified.⁵

Plaintiffs appealed the disqualification order. The Court of Appeal affirmed.

DISCUSSION

Attorney Work Product

Plaintiffs contend that the Court of Appeal erred by holding that the entire document was protected as attorney work product. We reject that contention.

The Legislature has protected attorney work product under California Code of Civil Procedure section 2018.030.

* * *

Thus, the codified work product doctrine absolutely protects from discovery writings that contain an “attorney’s impressions, conclusions, opinions, or legal research or theories.” The protection extends to an attorney’s written notes about a witness’s statements. “[A]ny such notes or recorded statements taken by defendants’ counsel would be protected by the absolute work product privilege because they would reveal counsel’s ‘impressions, conclusions, opinions, or legal research or theories’ within the meaning of [the work product doctrine.]” When a witness’s statement and the attorney’s impressions are inextricably intertwined, the work product doctrine provides that absolute protection is afforded to all of the attorney’s notes.

⁴ The trial court also held that the document fell under the attorney-client privilege. The Court of Appeal held to the contrary. That issue is not before us and we express no view thereon.

⁵ The court continued the case to provide the plaintiffs an opportunity to retain new counsel. The court noted that it did not appear that the plaintiffs were made privy to the document's contents, so disqualification would be an effective remedy, because there was no issue about the plaintiffs providing new counsel with the information. The court also imposed a gag order on all who attended the hearing on the motion to disqualify, specifically instructing plaintiffs’ counsel and experts to keep the contents of the document confidential and not reveal any information about the document to plaintiffs and their new attorneys.

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Ethical Duty Owed Upon Receipt of Attorney Work Product

Because the document is work product we consider what ethical duty Johnson owed once he received it. Plaintiffs * * * argue that because the document was inadvertently received, Johnson was duty bound to use the nonprivileged portions of it to his clients' advantage. This argument fails.

* * *

Here, Yukevich's notes were absolutely protected by the work product rule.

* * *

The Court of Appeal [in *State Fund*] framed the issue as follows: "[W]hat is a lawyer to do when he or she receives through the inadvertence of opposing counsel documents plainly subject to the attorney-client privilege?" After determining that the documents were privileged and that inadvertent disclosure did not waive the privilege, the court discussed an attorney's obligation. * * *

The *State Fund* court went on to articulate the standard to be applied prospectively: "When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified." * * *

The existing *State Fund* rule is a fair and reasonable approach.⁹ The rule supports the work product doctrine, and is consistent with the state's policy to "[p]reserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases" and to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts."

⁹ We also reject plaintiffs' contention that *State Fund* only applies to materials protected by the attorney-client privilege. The Court of Appeal held that there was no distinction "between the attorney-client privilege and the work product privilege in this context [because] . . . [t]he *State Fund* standard applies to documents that are plainly privileged and confidential, regardless of whether they are privileged under the attorney-client privilege, the work product privilege, or any other similar doctrine that would preclude discovery based on the confidential nature of the document." We agree.

The *State Fund* rule also addresses the practical problem of inadvertent disclosure in the context of today's reality that document production may involve massive numbers of documents. A contrary holding could severely disrupt the discovery process. As amicus curiae The Product Liability Advisory Council, Inc. argues, "Even apart from the inadvertent disclosure problem, the party responding to a request for mass production must engage in a laborious, time consuming process. If the document producer is confronted with the additional prospect that any privileged documents inadvertently produced will become fair game for the opposition, the minute screening and re-screening that inevitably would follow not only would add enormously to that burden but would slow the pace of discovery to a degree sharply at odds with the general goal of expediting litigation."

Finally, we note that "[a]n attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice." The *State Fund* rule holds attorneys to a reasonable standard of professional conduct when confidential or privileged materials are inadvertently disclosed.

* * *

The standard was properly and easily applied here. Johnson admitted that after a minute or two of review he realized the notes related to the case and that Yukevich did not intend to reveal them. Johnson's own admissions and subsequent conduct clearly demonstrate that he violated the *State Fund* rule. We note, however, that such admissions are not required for the application of the objective standard in evaluating an attorney's conduct.

Disqualification of Counsel and Experts

The court properly applied the *State Fund* rule and determined that Johnson violated it. The next question is whether disqualification was the proper remedy. * * *

The *State Fund* court held that " '[m]ere exposure' " to an adversary's confidences is insufficient, standing alone, to warrant an attorney's disqualification. The court counseled against a draconian rule that " '[could] nullify a party's right to representation by chosen counsel any time inadvertence or devious design put an adversary's confidences in an attorney's mailbox.' " However, the court, did not "rule out the possibility that in an appropriate case, disqualification might be justified if an attorney inadvertently receives confidential materials and fails to conduct himself or herself in the manner specified above, assuming other factors compel disqualification."

After reviewing the document, Johnson made copies and disseminated them to plaintiffs' experts and other attorneys. In affirming the disqualification order, the Court of Appeal stated, "The trial court settled on disqualification as the proper remedy because of the unmitigable damage caused by Johnson's dissemination and use of the document." Thus, "the record shows that Johnson not only failed to conduct himself as required under

State Fund, but also acted unethically in making full use of the confidential document.” The Court of Appeal properly concluded that such use of the document undermined the defense experts’ opinions and placed defendants at a great disadvantage. Without disqualification of plaintiffs’ counsel and their experts, the damage caused by Johnson’s use and dissemination of the notes was irreversible. Under the circumstances presented in this case, the trial court did not abuse its discretion by ordering disqualification for violation of the *State Fund* rule.

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