Superior Court
of the
State of Delaware

Jan R. Jurden
Judge

New Castle County Courthouse
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Date Submitted: July 8, 2009
Date Decided: September 21, 2009

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Re: Dorothy and Allan Phillips
v. Pris-MM, LLC T/A Damon's Grill
C.A. No. 08C-08-160-JRJ

Upon Defendant's Motion to Compel Physical Exam: **DENIED**.

Dear Counsel:

I have reviewed the parties' submissions following the hearing on defendant's Motion to Compel Physical Exam. Defendant seeks an order compelling plaintiff to submit to a defense medical exam ("DME"). Defendant also seeks an order compelling plaintiff to pay Dr. Gelman's $1,000.00 cancellation fee. For the reasons that follow, the motion is **DENIED**.

Background

The pertinent facts are as follows. Plaintiff claims she injured her wrist in a slip and fall on defendant's property. Pursuant to Super. Ct. Civ. R. 35,

defendant arranged to have plaintiff examined by Dr. Andrew Gelman on June 22, 2009. When plaintiff arrived at Dr. Gelman's office for the DME, one of the administrative staff in Dr. Gelman's office gave plaintiff several forms to fill out. According to plaintiff, these were "new patient" forms. When plaintiff advised the staff member she was not a new patient, but rather, was reporting for a defense medical examination, the staff member told plaintiff to "take up the issue with the doctor."[1] In light of this, plaintiff did not fill out the forms and waited to see the doctor.

Approximately 10 minutes before her 3:30 p.m. appointment, plaintiff was taken to an examination room. Less than five minutes later, Dr. Gelman walked in. According to plaintiff, Dr. Gelman "[i]n a rude, arrogant and antagonistic manner" demanded to know why plaintiff had not filled out the forms.[2] Taken aback by Dr. Gelman's reaction, plaintiff apologized and told Dr. Gelman that she had brought her x-rays with her. According to plaintiff, Dr. Gelman said he did not need, nor did he intend to review, her x-rays and told her "rudely" that her appointment would have to be rescheduled.[3] Dr. Gelman then abruptly left the examination room. Plaintiff avers that all this occurred before her appointment was even scheduled to begin.

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[1] Pl.'s Resp. to Mot. to Compel, Phillips Aff. at 1, Docket Item ("D.I.") 13.
[2] Pl.'s Resp. to Mot. to Compel at 1.
[3] *Id.*

"[S]tartled" by Dr. Gelman's conduct, plaintiff left his office. Upset and rattled, she went to her car, calmed herself, and then returned to the office a few minutes later. Plaintiff asked the staff member if she could fill out the forms but was rebuffed.[4] She left the doctor's office around 3:40 p.m. According to plaintiff, Dr. Gelman's "manner and unreasonable conduct justifies a protective order on behalf of plaintiff from examination by Dr. Gelman in the future."[5] Further, according to plaintiff, the forms Dr. Gelman insisted plaintiff fill out "are essentially interrogatories forcing one to answer immediately, without consultation of counsel, reference to medical records and other documents . . . ."[6] Plaintiff argues that "[u]sing a hastily filled out form to attribute deception to a plaintiff if an item of past history is omitted is well known," and that such "techniques to attack the credibility of plaintiff and to bolster the credibility of the defense doctor have no place" in the DME process.[7] Plaintiff further contends that Dr. Gelman's "abusive manner" and stated refusal to review plaintiff's x-rays show he has "pre-judged" plaintiff's medical condition and he therefore should not be permitted to examine plaintiff.[8]

According to Dr. Gelman, plaintiff was asked to fill out "the standard orthopedic specialist information form," the "standard pain disability

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[4] *Id*.
[5] *Id*. at 2.
[6] *Id*.
[7] *Id*.
[8] Pl.'s Resp. to Mot. to Compel at 1.

questionnaire," and "an upper extremity quick form."[9] Dr. Gelman's version of events is as follows:

> The patient, with her husband present, were [sic] asked to complete . . . [the forms]. She refuse to complete such, and with this, I have told her that the exam would not be able to be complete. After her husband made a comical remark, I excused the Phillips from the evaluation asking that when she is able to cooperate that I would be glad to complete the examination.[10]

Following oral argument on this motion, defendant advised the Court that in light of plaintiff's allegations, Dr. Gelman is no longer willing to conduct a DME of plaintiff. Thus, the only issues left for the Court to decide are whether plaintiff should have to pay Dr. Gelman's $1,000.00 cancellation fee and whether plaintiff should have to "reimburse defendant for the cost of pursuing compliance with the rules of discovery."

Discussion

Super. Ct. Civ. R. 35 provides:

> (a) *Order for examination*. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the Court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall

[9] *See* Def.'s Mot. to Compel, "Progress Report" of Andrew J. Gelman, D.O., June 22, 2009, D.I. 12.
[10] *Id*.

> specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.
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> (b) *Report of examiner*. (1) If requested by the party against whom an order is made under Super. Ct. Civ. R. 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The Court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the Court may exclude the examiner's testimony if offered at trial.
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> (2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the same testimony of every other person who has examined or may thereafter examine the part in respect of the same mental or physical condition.[11]

The DME is a discovery tool utilized by the opposing party. "The purpose of the examination is to further the litigation process."[12] The plaintiff has no doctor-

[11] Super. Ct. Civ. R. 35(b)(2).
[12] *Jacobs v. Chaplin*, 693 N.E.2d 1010, 1013 (Ind. 1994).

patient privilege with the physician conducting the DME. The plaintiff is compelled to submit to questioning and a physical examination by a physician not only <u>not</u> of plaintiff's choosing, but a physician hired by the party <u>adverse</u> to plaintiff in the litigation. "Although in theory, I.M.E. is to be scientific rather than adversarial, experience suggests that it is often the latter. The party being examined may have to respond to limitless questions by a trained representative of the opposing side without check."[13] In most instances, the plaintiff has never met the physician. "A physician selected by the defendant to examine plaintiff is not necessarily a disinterested, impartial medical expert, indifferent to the conflicting interests of the parties."[14]

Lawyers who handle personal injury cases day in and day out may lose sight of the fact that litigation is stressful. Although some lawyers might disagree, in most instances, litigation is more stressful for lay people than it is for the lawyers who represent them.[15] A personal injury plaintiff appearing for a DME is often nervous and sometimes intimidated. This is particularly so when staff or the physician are gruff or seemingly impatient. Like lawyers who litigate personal

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[13] *Gensbauer v. May Dept. Stores Co.*, 184 F.R.D. 552, 553 (E.D. Pa. 1999).

[14] *Jakubowski v. Lengen*, 450 N.Y.S.2d 612, 614 (N.Y. App. Div. 1982); *see Metropolitan Prop. & Cas Ins. Co. v. Overstreet*, 103 S.W.3d 31, 36-38 (Ky. 2003) (recognizing that "the examining doctor may be encouraged by his employer to treat the examination as a *de facto* deposition," and "the examining physician will nearly always be hired with an adversarial mind set.")

[15] The Court implicitly acknowledges this stress whenever it charges a jury. The standard jury instructions states, "I am not telling you not to sympathize with the parties. It is only natural and human to sympathize with persons involved in litigation." *See e.g. Wilhelm v. Ryan*, 903 A.2d 745, 753 (Del. 2006).

injury cases, physicians who conduct DME's can become desensitized to the stress attendant to the DME process. When that occurs, situations like the one presented here are more likely to arise.

The plaintiff in this case attempted to discuss the patient forms she was asked to fill out with the nurse-receptionist. Rather than explain why Dr. Gelman needed the completed forms to conduct the DME, she told the plaintiff to "discuss it with the doctor." Then, before plaintiff could even attempt to do just that, Dr. Gelman chastised plaintiff, refused to look at her x-rays, refused to review the forms with her to acquire whatever information he needed to conduct the DME, and refused to examine her. He did all this at approximately 3:25 p.m., when her exam was not even scheduled to begin until 3:30 p.m. The plaintiff in this case perceived Dr. Gelman's manner as "rude, arrogant and antagonistic." Rather than scolding plaintiff and treating her like a schoolgirl who failed to turn in an assignment, Dr. Gelman could have simply explained his need for the information sought in the forms and then allowed plaintiff a few additional minutes to complete the forms (since she was early), or asked her the questions and recorded her answers. He did neither. Instead, he chastised plaintiff and stormed out of the examination room before the time her exam was scheduled to begin.

The Court does not find that plaintiff here acted inappropriately or in bad faith. Under the circumstances presented, the Court will not order plaintiff to bear

the cost of the Gelman DME.[16] Nor will the Court require plaintiff to pay any of defense counsel's fees or costs associated with this motion. Consequently, defendant's motion for reimbursement of Dr. Gelman's cancellation fee and the "cost of pursuing compliance with the rules of discovery" is **DENIED**.

Defendant's motion to compel a DME by Dr. Gelman is **MOOT** and therefore **DENIED**. Dr. Gelman has refused to conduct a DME of plaintiff, and plaintiff has not, to my knowledge, objected to undergoing a DME by another physician. If the new DME physician has forms which he or she would like filled out prior to the DME, defendant should provide those to the plaintiff in advance of the DME appointment. The Court is requiring the defendant to provide the forms in advance because it is sensitive to plaintiffs' concerns that such forms are "essentially interrogatories," and that the examination could lead to an informal discovery deposition.[17]

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[16] *See Geroski v. Betton*, 2003 WL 21001033, at *1 (Del. Super. April 8, 2003) (refusing to grant defendants' request for expenses and attorneys fees incurred in connection with compelling a DME where dispute was "argued in good faith.")

[17] *See e.g. Rochen v. Huang*, 558 A.2d 1108, 1110 (Del. Super. 1988) (allowing DME to be tape recorded where plaintiffs alleged, *inter alia*, that DME could be used as an informal discovery tool involving, in effect, a wide ranging deposition without the protections afforded in formal discovery.); *Jacob v. Chaplin*, 639 NE.2d 1010, 1013 (Ind. 1994) (allowing tape recording of DME, acknowledging "an examining physician may or may not act as a 'defendant's expert.'"); *Jakubowski*, 450 N.Y.S.2d at 614 (acknowledging that the "possible adversary status of the examining doctor for the defense is, under ordinary circumstances, a compelling reason to permit plaintiff's counsel to be present to guarantee, for example, that the doctor does not interrogate the plaintiff on liability questions in order to seek damaging admissions."); *Sharff v. Super. Ct. of City and County of San Francisco*, 282 P.2d 896 (Cal. 1955) (citation omitted) (allowing an attorney to accompany plaintiff to the DME, recognizing that the "doctor should . . . be free to ask such questions as may be necessary to enable him to formulate an intelligent opinion regarding the nature and extent of the plaintiff's injuries, but he should not be allowed to make inquiries into matters not reasonably related to the legitimate scope of the examination . . . a lay person should not be expected to evaluate the propriety of every question at his peril.")

Very truly yours,

Jan R. Jurden
Judge

JRJ:mls

cc: Prothonotary