COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SJC No. 13152

CAROLE A. ASHE and JESSICA M. ASHE, CO-CONSERVATORS OF THOMAS M. ASHE,

APPELLANTS

V.

SHAWMUT WOODWORKING & SUPPLY, INC.,

APPELLEE

On Appeal from Suffolk Superior Court No. 1784-CV-00689

BRIEF OF APPELLANTS CAROLE A. ASHE AND JESSICA M. ASHE

August 5, 2021

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

Secondary Authority

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
SJC No. 13152

CAROLE A. ASHE and JESSICA M. ASHE, CO-CONSERVATORS OF THOMAS A. ASHE, Plaintiffs – Appellants	)
v.	)
SHAWMUT WOODWORKING & SUPPLY, INC. ET AL., Defendants – Appellees	)

STATEMENT OF ISSUES

Whether the trial court erred as a matter of law in ordering plaintiffs' conservatee to submit to a neuropsychological exam pursuant to Mass. R. Civ. P. 35 by a non-physician.

Whether the trial court erred as a matter of law in ordering plaintiffs' conservatee to submit to a neuropsychological exam where the defendant failed to establish good cause for such an exam as required by Mass. R. Civ. P. 35.

Whether the trial court erred as a matter of law in ordering plaintiffs' conservatee to submit to a neuropsychological exam where the defendant failed to provide the requisite notice mandated by Mass. R. Civ. P. 35, including the time, place, manner, conditions and scope of the examination.

STATEMENT OF THE CASE

The plaintiffs filed this action in March 2017 for injuries sustained by their conservatee, Thomas M. Ashe ("Ashe"), on August 23, 2016 when he fell approximately 45 feet from scaffolding at a construction site located at Gordon Hall, Harvard Medical School, in Boston, Massachusetts where he was working as

a bricklayer employed by Haven Restoration ("Haven"). The complaint alleged negligence against the co-defendants, Shawmut Woodworking & Supply, Inc. d/b/a Shawmut Design & Construction, the general contractor ("Shawmut", "Defendant") and Lanco Scaffolding, Inc. ("Lanco") the scaffolding installer, and asserts that the fall was caused by the unsafe condition of the scaffolding. (App. 003-010).

As a result of the fall, Ashe suffered serious and permanent injuries necessitating the appointment of his sister, Carol A. Ashe, and his daughter, Jessica M. Ashe, as his permanent co-conservators, and his sister, Carol A. Ashe as his permanent guardian. (Suffolk County Probate Court Docket No. 16P2005). In that capacity, they are serving as plaintiffs in this action. (App. 003).

Shawmut subsequently filed a motion for examination of Ashe pursuant to Mass. R. Civ. P. 35 by Karen A. Postal ("Postal"), a neuropsychologist whom it had retained as an expert. (App. 032-091). The motion was allowed by the trial court on March 4, 2021. (App. 027, 028). Thereafter, the plaintiffs filed a Petition for Interlocutory Review by a Single Justice of the Appeals Court seeking to vacate the order and remand the case to the Superior Court with direction to deny the motion because Postal is not a physician as required by Rule 35. Alternatively, the plaintiffs requested leave to appeal the issue of whether a superior court judge has the authority to expand Rule 35 so as to include physical and mental examinations

by non-physicians. The Single Justice granted the appeal on April 15, 2021 to provide for review before the full court. The Single Justice also stayed the trial judge's order for a Rule 35 examination of Ashe. (App. 200). Simultaneously, the plaintiffs filed an application for Direct Appellate Review by the Supreme Judicial Court of the trial court's order pursuant to Mass. R. App P. 11 which was allowed by this Court on July 29, 2021. (App. 202-203).

STATEMENT OF FACTS

Ashe has alleged serious and permanent injuries, including fractures to almost every bone in his face, several bones in his skull, and traumatic brain injuries. (App. 097). He was hospitalized at the Brigham & Women's Hospital and Spaulding Rehabilitation Hospital, both in Boston, Massachusetts for over two months, has had multiple surgeries to reconstruct the bones in his face and head, and several surgeries on his right eye. As a result of the accident, he is blind in his left eye and has limited vision in his right. (App. 097).

The plaintiffs have produced all of Ashe's medical records to the defendant dating from 10 years prior to the fall to the present. Notably, these records include two evaluations dated January 17, 2017 and May 7, 2018 that were performed by neuropsychologist, Jeffrey Sheer, Ph. D ("Sheer") at the request of Ashe's treating physician. (App. 055-077). In his reports, Sheer opined that Ashe suffered from functional deficits in memory, attention, and executive function (among other

shortcomings) and that his performance was below his pre-incident baseline condition. (App. 055-077). The plaintiffs have advised the defendant that they do not intend to call Sheer as an expert witness in their case-in-chief, nor have they disclosed any other neuropsychologist as an expert witness.

Additionally, the defendant has been provided with all of Ashe's pre-fall psychiatric treatment and counseling records dating back to 2008, as well as his post-fall psychiatric and counseling records from Brigham & Women's Hospital where he was treated by psychiatrist, Jessica Harder, M.D., between May 2017 and January 2018. (App. 098). The defendant also has all of Ashe's records from Stephanie Joyce Cho, M.D., of the Spaulding Rehabilitation Hospital's NeuroRehab clinic. (App. 098). Further, the defendants have deposed Ashe on three separate occasions. (App. 098).

Finally, on March 4, 2021, the trial court ordered Ashe to submit to a Rule 35 examination by the defendant's board-certified neurologist, Gerard D'Alton, M.D., a physician. (App. 167)**.**

SUMMARY OF ARGUMENT

The trial court erred as a matter of law in allowing the defendant's motion for an order that Ashe submit to a neuropsychological exam by a non-physician. Not only did this order contravene the plain language of Rule 35 which clearly and

unambiguously provides that such examinations be conducted only by a physician, (Infra 11-14), it also ignores the overwhelming case law that confirms this interpretation. (Infra 14-20). A more expansive definition of physician would not advance the purpose of Rule 35. (Infra 19, 20).

Further, the defendant neither pleaded nor established good cause to justify an examination by a non-qualifying practitioner. (Infra 20, 22). Here, the purported rationale for the order, namely that the examination by the defendant's expert would promote a level playing field by allowing the defendant the same opportunity as the plaintiffs to evaluate Ashe's condition, misstates the evidence. The facts simply do not show a prejudicial disparity between the parties with respect to discovery but instead demonstrate that they possess identical information upon which they can develop their respective cases. (Infra 22, 23).

Finally, the defendant wholly ignored the notice requirement set forth in Rule 35 by failing to specify the time, place, manner, conditions and scope of the examination thus negating the trial court's ability to assess whether good cause for it even existed. (Infra 23-25).

ARGUMENT

Standard of Review

The trial judge's misinterpretation of Rule 35 to allow an examination of Ashe by a neuropsychologist was an error of law mandating reversal by this Court.

See Adoption of Iliana, 96 Mass. App. Ct. 397 (2019) (trial judge misconstrued statute to limit mother's expert to those clinicians who treated her child constituted reversible error where statute had no such disqualifier).[1] On appeal, the court reviews questions of statutory interpretation de novo. Meikle v. Nurse, 474 Mass. 207, 209 (2016). In so doing, the court applies "the general and familiar rule … that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished. Id. at 210 citing Lowery v. Klemm, 446 Mass. 572, 576-77 (2006), quoting Hanlon v. Rollins, 286 Mass. 444,447 (1934)." Accordingly, the language of a statute is interpreted in accordance with its plain meaning, and if the language is clear and unambiguous, it is conclusive as to the intent of the Legislature. Commissioner of Correction v. Superior Court Dep't of the Trial Court for the County of Worcester, 446 Mass. 123, 124 (2006) citing Commonwealth v. Clerk-Magistrate of the W.

[1] The defendant prefers to characterize this case as a discovery matter over which the trial court has broad discretion. The defendant contends that by allowing the Rule 35 motion, the court was simply "leveling the playing field by permitting 'fulsome discovery' and equal access to the evidence for both parties." Opposition of Defendant to Plaintiffs' Petition for Relief Under G.L. c. 231, s. 118. While the plaintiffs acknowledge that a trial judge has such discretion, it cannot level the playing field by redrafting the applicable rules. Accordingly, under this analysis, the trial court's ruling was an abuse of that discretion.

Roxbury Div. of the Dist. Court Dep't., 439 Mass. 352, 355-56 (2003). See Ciani v. MacGrath, 481 Mass. 174, 178 (2019) ("Ordinarily, where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent.") (citations omitted). However, where the language is not conclusive, the court may look to extrinsic sources such as legislative history or other statutes for assistance. Id. The principal objective is to ascertain and effectuate the intent of the Legislature in a way that is consonant with sound reason and common sense. Id. See also G.L. pt. 1, title 1 c. 4, s. 6 (rules for construction of statutes) ("Words and phrases shall be construed according to the common and approved usage of the language …"). The language of a statute is not to be enlarged or limited by construction unless its object and plain meaning require it. Victor v. Commonwealth, 473 Mass. 793 (1996).

Rule 35 Must be Construed According to its Plain Meaning

In this case, it is indisputable that Rule 35 governs the examination of a party when the physical or mental condition of that party is in controversy. Rule 35 unequivocally states in pertinent part:

> 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 physician** or to produce for examination the person in his custody or legal control. Mass. R. Civ. P. 35 (a) (emphasis added).

Likewise, Rule 35 (b) is entitled "Report of examining physician," confirming that the rule contemplates that only physicians are authorized to conduct the examinations. Mass. R. Civ. P. 35 (b). See also 7 James W. Smith and Hiller B. Zobel, Massachusetts Practice, Rules Practice, Rules 17-37, s. 35.5 at 386 (1st ed. 1975) ("Rule 35 authorizes examinations only by a physician.").

"Physician" is commonly defined as "a person skilled in the art of healing *specifically:* one educated, clinically experienced and licensed to practice medicine as usually distinguished from surgery." Merriam-Webster.com Dictionary. Massachusetts General Laws similarly define physician. See G.L. c.112 s. 8A ("No person may, directly or indirectly, use the title "physician" … or in any other manner to indicate or imply in any way that such person offers to engage or engages in the practice of medicine or in the provision of health care services to patients within the commonwealth who is not registered by the board of registration in medicine as a physician under section 2."). See generally Comm. v. One 1987 Mercury Cougar Automobile, 413 Mass. 534 (1992) (while courts should look to dictionary and other accepted meanings in other legal contexts, their interpretation must be faithful to the purpose and construction of the statute as a whole). Conspicuously, neither definition includes any mention of a neuropsychologist. Because the defendant's proposed expert does not hold a

medical degree and is unlicensed to practice medicine, she is unqualified to conduct a Rule 35 examination under the plain and ordinary meaning of the rule.

Although this State's highest court has not opined on whether Rule 35 would allow an examination by a non-physician, as sought in this case and which is the subject of the plaintiffs' Application for Direct Appellate Review, generally the trial courts have refused to do so based on the plain meaning of the rule. See, e.g., Machado v. Calais Motors, No. 2006-01420 (Bristol Superior Court) (May 12, 2011) (Dupuis, J) (motion for examination by vocational expert denied); Patterson v. Hallamore et al, No. 2005-00540 (Norfolk Superior Court) (September 6, 2007) (Grabau, J), (the court denied the defendant's motion either to compel the plaintiff to undergo vocational testing or to preclude the plaintiff's vocational expert from testifying); Morin v. Lane Construction Company, No. 04-190 (Hampton Superior Court) (July 9, 2007) (motion for examination by rehabilitation counselor denied with court stating "As rule 35 … provides for examination by a physician; as the defendant's proposed examination would be by a rehabilitation counselor who is not a physician…the Defendant's Emergency Motion for Leave to Conduct Vocational Rehabilitation Evaluation and Testing is denied.").

The appeals courts have taken a similar position. See Melody v. MBTA, Appeals Court 04-J-554 (November 24, 2004) (Berry, J) (he Appeals Court overturned the trial judge's order for a vocational examination under Rule 35,

concluding that since the express language of Rule 35 limits examinations to physicians, it was an error to exceed that specific provision of the rule to allow the proposed assessment); Robinson v. Prudential Ins. Co. of America, 56 Mass. App. Ct.244, 248-51 (2002), (the Appeals Court concluded that only a physician, as opposed to a nurse or nurse practitioner, could perform a "medical examination.").[2] Significantly, the trial courts have repeatedly applied the reasoning in Melody to deny requests under Rule 35 for neuropsychological examinations by non-physicians, as sought here.

Indeed, one court expressly disallowed an examination by Postal, the defendant's proposed expert in this case. Specifically, in Coyman v. Turner Construction, No. 1684CV02449 (Suffolk Superior Court) (December 21, 2017) (Kazanjian, J), the trial court denied the defendant's motion for Postal to conduct a Rule 35 neuropsychological examination because "Dr. Postal is not a physician" and "there is no basis under Rule 35 or otherwise for the Court to order an examination."

[2] Even the majority of commentators opine that Rule 35 examinations are likely limited to physicians based on the plain language of the rule. See Palmer v. Youth Opportunities Upheld, Inc., 18 Mass. L. Rptr. 301, No. WOCV20012151A, 2004WL2341571, *4 (Oct. 5, 2004) citing 49 Lauriat, McChesney, Gordon, and Rainer, Mass. Practice, Discovery s. 7.2 at 587 (2002) (The rule does not define the term "physician," and thus it is not clear from the face of the rule whether examinations by any other type of expert other than a physician are allowed) and James W. Smith & Hiller B. Zobel, supra (Rule 35 "should probably be limited to an individual licensed to practice medicine in Massachusetts).

Similarly, in Craffey v. Embree Construction Group, No. 13-01232 (Norfolk Superior Court) (February 23, 2015) (Wilkins, J), the court likewise denied the defendant's request for a neuropsychological examination of the plaintiff because the proposed neuropsychologist, William Stone, Ph.D., "is not a physician." In Gomes v. Brian Taxi, Inc., No. 2006-3190 (Suffolk Superior Court) (April 24,2008) (Giles, J), the court refused a defense request for neuropsychological evaluation because "Dr. Hebben is not a physician pursuant to Mass. R. Civ. P. 35."

In Morrison et al v. Wilson et al, No. 2007-03495 (Middlesex Superior Court) (November 26, 2008) (Haggerty, J), the trial judge denied a Rule 35 motion for a neuropsychological examination because "Rule 35 is limited to a physician."

More recently, in Kinsala v. Cavanaugh, No. 2015-0264 (Suffolk Superior Court) (March 22, 2017) (Wilkins, J), the defendants' request for a neuropsychological examination of the plaintiff was denied because the court found that "a Ph.D. psychologist is not a physician within the meaning of Mass. R. Civ. P. 35." The judge further added that the "[d]efendant's remedy is to find a physician who meets the language of Rule 35." The same reasoning applies to this case.

Finally, in Son Treme et al v. Michael Shea, et al, No. 2016-0208 (Hampshire Superior Court) (May 28, 2020), the defendants' request for a

neuropsychological examination by a non-physician was denied because the court found that, "case law favors the plaintiffs regarding the need to have a physician conduct the examinations." The court further stated that, "[t]he Single Justice decision of Justice Berry in 2004 adheres to the language in the Rule that 'a physician' means a medical doctor and not a psychologist. See Meldoy v. MBTA, (sic) Appeals Court 04-J-5534 (2004). This ruling has been consistently, although not universally, applied in the Superior Court."

Nor would a more expansive reading of Rule 35 advance the purposes of that rule or the rules of procedure more broadly. See Mass. R. Civ. P. 1 (The rules should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."). As discussed more fully below, a motion for examination under Rule 35 (a) is not allowed as a matter of routine and requires a greater showing of need than is met merely by demonstrating that such an examination will yield relevant evidence. See Doe v. Senchal, 431 Mass. 78, 82 (20000 ("Parties to a civil action generally may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. …Rule 35(a) by its express terms is more restrictive, requiring a greater showing of need.") (citations omitted).

Accordingly, the plain meaning and intent of Rule 35 compels this Court to find that where such an examination is warranted, it must be performed by a physician.

Extrinsic Sources Confirm that a Rule 35 Examination Should be Conducted by A Physician

Although unnecessary because of the clear and unambiguous language of Rule 35, an examination of extrinsic materials bolsters this restricted interpretation of the term physician. See Globe Newspaper Company v. Superior Ct, 379 Mass, 846, 851 (1980) ("Words or phrases in a statute are to be given their ordinary meaning. They are to be construed according to their natural import and approved usage….The statutory language itself is the principal source of insight into the legislative purpose… Where the language of the statute is plain and unambiguous … legislative history is not ordinarily a proper source of construction. However, if language is unclear, a court may look to outside sources for assistance in determining the correct construction.") (citations omitted).

"Physician" is used in numerous occasions throughout the Massachusetts General Laws. And, in certain contexts has been expanded by the Legislature to encompass other professionals. See, e.g., G. L. c. 94C, s. 1 (pertaining to controlled substances); c. 176B, s. 1 (pertaining to medical service corporations); c. 112, s. 163 (pertaining to mental health professionals); c. 233, s. 79G (pertaining to the admissibility of evidence of medical and hospital records). Significantly, G. L. c.

111, s. 222 which addresses interscholastic athletic head injury safety training programs, expressly differentiates between physicians and neuropsychologists. Had the Legislature seen fit to extend the application of Rule 35 to neuropsychologists, as sought here, it could have done so.

Nor does the analogous federal rule mandate broadening a Rule 35 examination under state law. In 1988, Fed. R. Civ. P. 35 substituted "physical examination by a physician, or mental examination by a physician or psychologist" for the term "physical or mental examination by a physician." This revision thus suggests that the term "physician" did not include psychologist. See generally Harborview Residents' Committee, Inc. v. Quincy Housing Authority, 368 Mass. 425 (1995) (applying maxim of statutory construction that an expression of one thing is an implied exclusion of other things omitted from the statute). The federal rule was again revised in 1991 to allow for "a physical or mental examination by a suitably licensed or certified examiner." (Emphasis added). As explained in the Notes of Advisory Committee on Rules, while the 1988 amendment authorized mental examinations by licensed clinical psychologists, the 1991 revision extended that amendment to include other certified or licensed professionals, such as dentists or occupational therapists, who are not physicians or clinical psychologists, but who may be well-qualified to give valuable testimony about the physical or mental condition that is the subject of dispute. The Notes emphasize that the amendments

focused on the suitability of the examiner, stating, "The court is thus expressly authorized to assess the credentials of the examiner to assure that no person is subjected to a court-ordered examination by an examiner whose testimony would be of such limited value that it would be unjust to require the person to undergo the invasion of privacy associated with the examination." Fed. R. Civ. P. 35 advisory committee's note – 1991 amendment.

The Kinsala court squarely addressed the effect of the revised federal rule on its interpretation of Mass. R. Civ. P. 35 and rejected expanding the plain language of the state rule. In so holding, the court stated, "The need to amend the federal rule may suggest a need to amend Mass. R. Civ. P. 35 but does not alter the plain meaning of the Massachusetts rule." Kinsala v. Cavanaugh, Suffolk Superior Court, Civil Action No. 2015-0264. See also Palmer v. Youth Opportunities, 18 Mass. L. Rptr 301 (2004) (although changes to the federal rule could be regarded as persuasive evidence, it was not binding authority).

Because the Legislature has not chosen to expand the definition of physician for purposes of Rule 35 despite its willingness to do so in other contexts and notwithstanding the revisions to the analogous federal rule, this Court should adhere to established rules of statutory construction and affirm that only physicians are authorized to conduct physical or mental examinations under Mass. R. Civ. P. 35.

The Defendant Did Not Establish Good Cause for a Rule 35 Examination

Mass. R. Civ. P. 35 provides that an order for an examination "may be made only on motion for good cause shown." A finding of good cause imposes a high bar and necessitates a greater showing of need than is met merely by demonstrating that such an examination will yield relevant evidence. See Doe v. Senchal, 431 Mass. at 81. Accordingly, in every case where a party requests a mental or physical examination, a judge must decide as an initial matter whether the party has adequately demonstrated the existence of the Rule's requirements that the medical condition alleged be in controversy and that the movant has established good cause for the test to proceed. Id. at 82-83 "[T]he requirements of rule 35 are not met 'by mere conclusory allegations of the pleadings – nor by mere relevance to the case - but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination.") quoting Schlagenhauf v. Holder, 379 U.S. 104, 118-19 (1964) (discussing federal counterpart to Rule 35).

In assessing whether good cause for an examination exists, the court focuses on whether the parties have equal access to medical evidence in order to ensure that the rules achieve their stated policy goal of "secur[ing] the just, speedy, and inexpensive determination of the action." Palmer v. Youth Opportunities, 18 Mass.

L. Rprt 301, No. WOCV20012151 A, 2004 WL 2341571 (Oct. 4, 2004) (quoting Mass. R. Civ. P. 1). The court has specifically enumerated the factors to be considered in evaluating whether good cause exists, including whether: (1) the movant has exhausted all other means of discovery; (2) there are any other sources for this information or whether the examination will be the only source of evidence on this issue; (3) the movant already possesses such information; (4) the party to be examined will assert the condition at trial and present expert testimony of his/her own in support of the claim; (5) the requested examination presents a risk of harm to the examinee; and (6) the age and condition of the person to be examined. Id. 2004 WL2341571 at *3. Merely alleging that the plaintiff intends to make his/her physical condition an issue at trial, without more, is not a sufficient showing of good cause to the degree necessary to order a Rule 35 examination. Id. at 4.

Notably, the defendant failed either to mention good cause in its motion for an examination or set forth any reasons that would otherwise establish it, thereby invalidating the motion on its face. Nonetheless, the facts of this case simply do not support a finding of good cause that would justify yet another examination of Ashe by Postal. The plaintiffs have already produced and/or the defendant has obtained by subpoena, all of Ashe's medical and psychiatric records from 10 years prior to the accident to the present. These records include two evaluations following the accident that were performed by an independent neuropsychologist,

Sheer, at the request of Ashe's treating physician. These materials are in the defendant's possession and can be reviewed and commented upon by Postal without subjecting Ashe, who is in a delicate medical condition, to further intrusive examinations. Moreover, the defendant has failed to proffer testimony from Postal by way of an affidavit to inform the court why good cause for another neuropsychology examination exists. Further, the defendant has had every opportunity to comply with Rule 35 by finding a qualifying physician and, in fact, has finally done so. Lastly, the plaintiffs have advised the defendant that they do not intend to present either Sheer or another neuropsychologist as their expert witness. These facts, in combination, demonstrate that good cause does not exist to compel an evaluation by Postal.

Accordingly, the trial judge's purported rationale for allowing the exam in this case, namely that it was "leveling the playing field by permitting fulsome discovery and equal access to the evidence for both parties" misstates the evidence. The facts here do not show a prejudicial disparity between the parties with respect to discovery, but conversely, demonstrate that they possess identical information on which they can develop their cases.

The Defendant Failed to Comply with the Notice Requirement of Rule 35

Integrally related to the showing of good cause is the additional provision required by Rule 35 that the party seeking an examination "specify the time, place,

manner, conditions, and scope of the examination and the person or persons by whom it is to be made." Mass. R. Civ. P. 35(a). Here, the defendant failed to comply with this requirement either in its initial correspondence pursuant to Rule 9C dated March 11, 2020 requesting that the plaintiffs voluntarily produce Ashe for an examination by Postal, or in its subsequent Motion for Examination. In light of Ashe's fragile medical condition and consequential conservatorship, such information was critical in order for the trial court to assess properly whether good cause existed for a Rule 35 examination.

It is also noteworthy that the defendant's request for an examination was made well past the expiration of the discovery deadline. Courts that have analyzed the issue of whether a Rule 35 examination can be had outside the discovery deadline have held that " 'good cause' requires the movant to demonstrate that it has been diligent in attempting to meet deadlines and that it has a good explanation for its delay." 49A Massachusetts Practice, Lauriat, McChesney, Gordon, Rainer *Discovery*, §9:3 (May 2020). In this case, the defendant has not been diligent with respect to meeting the discovery deadline and has not offered a good explanation for its delayed request for a Rule 35 examination. The initial discovery deadline expired on January 2, 2018. The parties agreed to extend the deadline twice, most recently to December 15, 2019. The defendant has known since 2017 that Ashe suffered a traumatic brain injury in his fall and has had ample opportunity to

review Dr. Sheer's 2017 and 2018 evaluations of Ashe. However, the defendant chose to wait until April 2020 to serve this motion and has set forth no good reason for its failure to bring the motion within the extensive discovery period. The defendant's untimely request further underscores its lack of good cause for a Rule 35 examination.

CONCLUSION

For the reasons set forth above, the plaintiffs respectfully request that this Court:

a. Reverse the trial court's decision to allow a Rule 35 examination of the plaintiffs' conservatee by Postal; and

b. Grant such other relief as is just and equitable.

August 5, 2021

Respectfully submitted,

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ADDENDUM TABLE OF CONTENTS

PAGE

Appealed Order

Statutes

Rules

Unpublished Decisions Cited in the Brief

Secondary Authority

Notify

08/20

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT CIVIL
CA NO: 1784CV0689A

CAROLE A. ASHE AND JESSICA MARIE ASHE AS CO-CONSERVATORS OF THOMAS M. ASHE
Plaintiffs,

v.

SHAWMUT WOODWORKING & SUPPLY, INC. AND LANCO SCAFFOLDING, INC.
Defendants,

and

SHAWMUT WOODWORKING & SUPPLY, INC. D/B/A SHAWMUT DESIGN AND CONSTRUCTION
Third-Party Plaintiff,

HAVEN RESTORATION, INC. and AM PM SAFETY, LLC
Third-Party Defendants.

THE DEFENDANT'S, SHAWMUT WOODWORKING & SUPPLY D/B/A SHAWMUT DESIGN AND CONSTRUCTION, MOTION FOR EXAMINATION OF THE PLAINTIFFS' CONSERVATEE, THOMAS ASHE

The Defendant, Shawmut Woodworking & Supply d/b/a Shawmut Design and Construction ("Shawmut" or "Defendant"), hereby requests that the Court issue an order requiring the Plaintiff's Conservatee, Thomas Ashe ("Plaintiff" or "Ashe") to submit to neuropsychological testing by Dr. Karen Postal, Ph.D. (Curriculum Vitae attached hereto as "Appendix A"). Dr. Postal is a Board Certified Clinical Neuropsychologist and part-time instructor in psychiatry and

TYPED VERSION OF THE PERTINENT HANDWRITTEN ORDER BEING APPEALED

"7/4/21 After a hearing on Zoom and consideration of the parties' written submissions. This motion is Allowed consistent with the Court's comments during the hearing.

Brieger, J.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION NO. 1784CV00689

CAROL A. ASHE and JESSICA MARIE ASHE as Co-Conservators of THOMAS M. ASHE
Plaintiffs

v.

SHAWMUT WOODWORKING & SUPPLY, INC., LANCO SCAFFOLDING, INC., and AM PM SAFETY, LLC,
Defendants

and

LANCO SCAFFOLDING, INC.,
Defendant/Third-Party Plaintiff

v.

HAVEN RESTORATION, INC.,
Third-Party Defendant

and

SHAWMUT WOODWORKING & SUPPLY, INC. d/b/a SHAWMUT DESIGN AND CONSTRUCTION
Third-Party Plaintiff

v.

HAVEN RESTORATION, INC. and AM PM SAFETY, LLC
Third-Party Defendants

PLAINTIFFS' NOTICE OF APPEAL

The Plaintiffs, Carole A. Ashe and Jessica M. Ashe, Co-Conservators of Thomas M. Ashe ("Plaintiffs"), hereby give Notice that they Appeal from the March 4, 2021 Order of the

Suffolk Superior Court allowing the Defendant Shawmut Woodworking & Supply's Motion to Compel Plaintiffs' Conservatee Thomas M. Ashe to submit to a neuropsychological examination by Karen Postal Ph.D., a neuropsychologist. This appeal is taken and notice given pursuant to the April 15, 2021 Order of the Single Justice of the Appeals Court, (Sullivan, J.), granting leave for Interlocutory Appeal.

Dated: April 21, 2021

Respectfully submitted,
The Plaintiffs,
Carole A. Ashe and Jessica M. Ashe,
Co-Conservators of Thomas M. Ashe,
By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon all counsel of record to this action on April 21, 2021, by email, as follows:

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ALM GL ch. 94C, § 1

Current through Chapter 21 of the 2021 Legislative Session of the 192nd General Court.

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE XV REGULATION OF TRADE (Chs. 93 - 110H) > TITLE XV REGULATION OF TRADE (Chs. 93 — 110H) > Chapter 94C Controlled Substances Act (§§ 1 — 49)

§ 1. Definitions.

As used in this chapter, the following words shall, unless the context clearly requires otherwise, have the following meanings:

"Administer", the direct application of a controlled substance whether by injection, inhalation, ingestion, or any other means to the body of a patient or research subject by—

(a) A practitioner, or

(b) a nurse at the direction of a practitioner in the course of his professional practice, or

(c) a registered pharmacist acting in accordance with regulations promulgated by the department, in consultation with the board of registration in pharmacy and the department of mental health, governing pharmacist administration of medications for treatment of mental health and substance use disorder and at the direction of a prescribing practitioner in the course of the practitioner's professional practice; or

(d) an ultimate user or research subject at the direction of a practitioner in the course of the practitioner's professional practice.

"Agent", an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser; except that such term does not include a common or contract carrier, public warehouseman, or employee of the carrier or warehouseman, when acting in the usual and lawful course of the carrier's or warehouseman's business.

"Bureau", the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, or its successor agency.

"Class", the lists of controlled substances for the purpose of determining the severity of criminal offenses under this chapter.

"Commissioner", the commissioner of public health.

"Controlled substance", a drug, substance, controlled substance analogue or immediate precursor in any schedule or class referred to in this chapter.

"Controlled substance analogue", (i) a drug or substance with a chemical structure substantially similar to the chemical structure of a controlled substance in Class A, B, C, D or E, listed in section 31 and which has a stimulant, depressant or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant

or hallucinogenic effect on the central nervous system of a controlled substance in Class A, B, C, D or E, listed in said section 31; or (ii) a drug or substance with a chemical structure substantially similar to the chemical structure of a controlled substance in Class A, B, C, D or E, listed in said section 31 and with respect to a particular person, which such person represents or intends to have a stimulant, depressant or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant or hallucinogenic effect on the central nervous system of a controlled substance in Class A, B, C, D or E, listed in said section 31; provided, however, that "controlled substance analogue" shall not include: (1) a controlled substance; (2) any substance for which there is an approved new drug application; (3) with respect to a particular person, any substance for which there is an exception in effect for investigational use for that person, under section 8, to the extent conduct with respect to the substance is pursuant to such exemption; or (4) any substance not intended for human consumption before such an exemption takes effect with respect to that substance; provided, however, that for the purposes of this chapter, a "controlled substance analogue" shall be treated as the Class A, B, C, D or E substance of which it is a controlled substance analogue.

"Counterfeit substance", a substance which is represented to be a particular controlled drug or substance, but which is in fact not that drug or substance.

"Deliver", to transfer, whether by actual or constructive transfer, a controlled substance from one person to another, whether or not there is an agency relationship.

"Department", the department of public health.

"Depressant or stimulant substance",

(a) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid; or any derivative of barbituric acid which the United States Secretary of Health, Education, and Welfare has by regulation designated as habit forming; or

(b) a drug which contains any quantity of amphetamine or any of its optical isomers; any salt of amphetamine or any salt of an optical isomer of amphetamine; or any substance which the United States Attorney General has by regulation designated as habit forming because of its stimulant effect on the central nervous system; or

(c) lysergic acid diethylamide; or

(d) any drug except marihuana which contains any quantity of a substance which the United States Attorney General has by regulation designated as having a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

"Dispense", to deliver a controlled substance to an ultimate user or research subject or to the agent of an ultimate user or research subject by a practitioner or pursuant to the order of a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary for such delivery.

"Distribute", to deliver other than by administering or dispensing a controlled substance.

"Drug",

(a) substances recognized as drugs in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;

(b) substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or animals;

(c) substances, other than food, intended to affect the structure, or any function of the body of man and animals; or

(d) substances intended for use as a component of any article specified in clauses (a), (b) or (c), exclusive of devices or their components, parts or accessories.

"Drug paraphernalia", all equipment, products, devices and materials of any kind which are primarily intended or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of this chapter. It includes, but is not limited to:

(1) kits used, primarily intended for use or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(2) kits used, primarily intended for use or designed for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances;

(3) isomerization devices used, primarily intended for use or designed for use in increasing the potency of any species of plant which is a controlled substance;

(4) testing equipment used, primarily intended for use or designed for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances;

(5) scales and balances used, primarily intended for use or designed for use in weighing or measuring controlled substances;

(6) diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, primarily intended for use or designed for use in cutting controlled substances;

(7) separation gins and sifters used, primarily intended for use or designed for use in removing twigs and seeds from or in otherwise cleaning or refining marihuana;

(8) blenders, bowls, containers, spoons and mixing devices used, primarily intended for use or designed for use in compounding controlled substances;

(9) capsules, balloons, envelopes and other containers used, primarily intended for use or designed for use in packaging small quantities of controlled substances;

(10) containers and other objects used, primarily intended for use or designed for use in storing or concealing controlled substances;

(11) [Stricken.]

(12) objects used, primarily intended for use or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish or hashish oil into the human body, such as:

(a) metal, wooden, acrylic, glass, stone, plastic or ceramic pipes, which pipes may or may not have screens, permanent screens, hashish heads or punctured metal bowls;

(b) water pipes;

(c) carburetion tubes and devices;

(d) smoking and carburetion masks;

(e) roach clips; meaning objects used to hold burning material, such as a marihuana cigarette that has become too small or too short to be held in the hand;

(f) miniature cocaine spoons and cocaine vials;

(g) chamber pipes;

(h) carburetor pipes;

(i) electric pipes;

(j) air-driven pipes;

(k) chillums;

(l) bongs;

(m) ice pipes or chillers;

(n) wired cigarette papers;

(o) cocaine freebase kits.

In determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(a) the proximity of the object, in time and space, to a direct violation of this chapter;

(b) the proximity of the object to controlled substances;

(c) the existence of any residue of controlled substances on the object;

(d) instructions, oral or written, provided with the object concerning its use;

(e) descriptive materials accompanying the object which explain or depict its use;

(f) national and local advertising concerning its use;

(g) the manner in which the object is displayed for sale;

(h) whether the owner, or anyone in control of the object, is a supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(i) direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

(j) the existence and scope of legitimate uses for the object in the community;

(k) expert testimony concerning its use.

For purposes of this definition, the phrase "primarily intended for use" shall mean the likely use which may be ascribed to an item by a reasonable person. For purposes of this definition, the phrase "designed for use" shall mean the use a reasonable person would ascribe to an item based on the design and features of said item.

"Electronic prescription", a lawful order from a practitioner for a drug or device for a specific patient that is generated on an electronic prescribing system that meets federal requirements for electronic prescriptions for controlled substances, and is transmitted electronically to a pharmacy designated by the patient without alteration of the prescription information, except that third-party intermediaries may act as conduits to route the prescription from the prescriber to the pharmacist; provided however, that electronic prescription shall not include an order for medication, which is dispensed for immediate administration to the ultimate user; and provided further, that the electronic prescription shall be received by the pharmacy on an electronic system that meets federal requirements for electronic prescriptions. For the purposes of this chapter, a prescription generated on an electronic system that is printed out or transmitted via facsimile is not considered an electronic prescription.

"Extended-release long-acting opioid in a non-abuse deterrent form", a drug that is: (i) subject to the United States Food and Drug Administration's extended release and long-acting opioid analgesics risk evaluation and mitigation strategy; (ii) an opioid approved for medical use that does not meet the requirements for listing as a drug with abuse deterrent properties pursuant to *section 13 of chapter 17*; and (iii) identified by the drug formulary commission pursuant to said *section 13 of said chapter 17* as posing a heightened level of public health risk.

"Immediate precursor", a substance which the commissioner has found to be and by rule designates as being a principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture.

"Isomer", the optical isomer, except that wherever appropriate it shall mean the optical, position or geometric isomer.

"Manufacture", the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, including any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging, or labeling of a controlled substance:

(a) by a practitioner as an incident to his administering a controlled substance in the course of his professional practice, or

(b) by a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale, or

(c) by a pharmacist in the course of his professional practice.

"Marihuana", all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; and resin extracted from any part of the plant; and every compound, manufacture, salt,

derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, industrial hemp as defined in *section 116 of chapter 128*, fiber produced from the stalks, oil, or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil, or cake or the sterilized seed of the plant which is incapable of germination.

"Medication order", an order for medication entered on a patient's medical record maintained at a hospital, other health care facility or ambulatory health care setting registered under this chapter that is dispensed only for immediate administration at the facility to the ultimate user by an individual who administers such medication under this chapter.

"Narcotic drug", any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(a) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate;

(b) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (a), but not including the isoquinoline alkaloids of opium;

(c) Opium poppy and poppy straw;

(d) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

"Nuclear pharmacy", a facility under the direction or supervision of a registered pharmacist which is authorized by the board of registration in pharmacy to dispense radiopharmaceutical drugs.

"Nurse", a nurse registered or licensed pursuant to the provisions of section seventy-four or seventy-four A of chapter one hundred and twelve, a graduate nurse as specified in section eighty–one of said chapter one hundred and twelve or a student nurse enrolled in a school approved by the board of registration in nursing.

"Nurse anesthetist", a nurse with advanced training authorized to practice by the board of registration in nursing as a nurse anesthetist in an advanced practice nursing role as provided in *section 80B of chapter 112*.

"Nurse practitioner", a nurse with advanced training who is authorized to practice by the board of registration in nursing as a nurse practitioner, as provided for in section eighty B of chapter one hundred and twelve.

"Opiate", any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction–forming or addiction–sustaining liability. It does not include, unless specifically designated as controlled under section two, the dextrorotatory isomer of 3-methoxy-n-methyl-morphinan and its salts, dextromethorphan. It does include its racemic and levorotatory forms.

"Opium poppy", the plant of the species Papaver somniferum L., except its seeds.

"Oral prescription", an oral order for medication which is dispensed to or for an ultimate user, but not including an order for medication which is dispensed for immediate administration to the ultimate user by an individual who is authorized to administer such medication under this chapter.

"Outsourcing facility," an entity at 1 geographic location or address that: (i) is engaged in the compounding of sterile drug preparations; (ii) has registered with the federal Food and Drug Administration as an outsourcing facility pursuant to 21 U.S.C. section 353b; and (iii) has registered with the board of registration in pharmacy pursuant to *section 36E of chapter 112*.

"Person", individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.

"Pharmacist", any pharmacist registered in the commonwealth to dispense controlled substances, and including any other person authorized to dispense controlled substances under the supervision of a pharmacist registered in the commonwealth.

"Pharmacy", a facility under the direction or supervision of a registered pharmacist which is authorized to dispense controlled substances, including but not limited to "retail drug business" as defined below.

"Physician assistant", a person who is a graduate of an approved program for the training of physician assistants who is supervised by a registered physician in accordance with sections nine C to nine H, inclusive, of chapter one hundred and twelve.

"Poppy straw", all parts, except the seeds of the opium poppy, after mowing.

"Practitioner",

(a) A physician, dentist, veterinarian, podiatrist, scientific investigator, or other person registered to distribute, dispense, conduct research with respect to, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research in the commonwealth;

(b) A pharmacy, hospital, or other institution registered to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in the commonwealth.

(c) An optometrist authorized by *sections 66*, 66B and 66C of chapter 112 and registered pursuant to paragraph (h) of section 7 to utilize and prescribe therapeutic pharmaceutical agents in the course of professional practice in the commonwealth.

(d) A nurse practitioner registered pursuant to subsection (f) of *section 7* and authorized by *section 80E of chapter 112* to distribute, dispense, conduct research with respect to or use in teaching or chemical analysis a controlled substance in the course of professional practice or research in the commonwealth.

(e) A nurse anesthetist registered pursuant to subsection (f) of *section 7* and authorized by *section 80H of chapter 112* to distribute, dispense, conduct research with respect to or use in teaching or chemical analysis a controlled substance in the course of professional practice or research in the commonwealth.

(f) A psychiatric nurse mental health clinical specialist registered pursuant to subsection (f) of *section 7* and authorized by *section 80J of chapter 112* to distribute, dispense, conduct research with respect to or use in teaching or chemical analysis a controlled substance in the course of professional practice or research in the commonwealth.

"Prescription drug", any and all drugs upon which the manufacturer or distributor has, in compliance with federal law and regulations, placed the following: "Caution, Federal law prohibits dispensing without prescription".

"Production", includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

"Radiopharmaceutical drug", any drug which is radioactive as defined in the Federal Food, Drug and Cosmetic Act.

"Registrant", a person who is registered pursuant to any provision of this chapter.

"Registration", unless the context specifically indicates otherwise, such registration as is required and permitted only pursuant to the provisions of this chapter.

"Registration number", such registration number or numbers, either federal or state, that are required with respect to practitioners by appropriate administrative agencies.

"Retail drug business", a store for the transaction of "drug business" as defined in section thirty–seven of chapter one hundred and twelve.

"Schedule", the list of controlled substances established by the commissioner pursuant to the provisions of section two for purposes of administration and regulation.

"State", when applied to a part of the United States other than Massachusetts includes any state, district, commonwealth, territory, insular possession thereof, and any area subject to the legal authority of the United States of America.

"Tetrahydrocannabinol", tetrahydrocannabinol or preparations containing tetrahydrocannabinol excluding marihuana except when it has been established that the concentration of delta–9 tetrahydrocannabinol in said marihuana exceeds two and one–half per cent.

"Ultimate user", a person who lawfully possesses a controlled substance for his own use or for the use of a member of his household or for the use of a patient in a facility licensed by the department or for administering to an animal owned by him or by a member of his household.

"Written prescription", a lawful order from a practitioner for a drug or device for a specific patient that is communicated directly to a pharmacist in a licensed pharmacy; provided, however, that "written prescription" shall not include an order for medication which is dispensed for immediate administration to the ultimate user by an individual who is authorized to administer such medication under this chapter.

History

1971, 1071, § 1; 1972, 806, §§ 1–6; 1973, 1190, §§ 1–6; 1981, 669, § 1; 1983, 565, §§ 1, 2; 1986, 97, §§ 1, 2; *1997, 55, § 1*; *1998, 50*; *1998, 104, § 1*; *2006, 172, §§ 1, 2*; *2010, 191, § 1*; *2014, 165, § 130*; *2015,*

46, § 80, effective July 1, 2015; *2016, 52, § 19*, effective March 14, 2016; *2016, 283, § 10*, effective October 6, 2016; *2017, 55, § 14*, effective July 28, 2017; *2018, 208, § 26*, effective January 1, 2020; *2020, 260, §§4*–8, effective January 1, 2021.

End of Document

§ 222. Interscholastic Athletic Head Injury Safety Training Program.

(a) The department shall direct the division of violence and injury prevention to develop an interscholastic athletic head injury safety training program in which all public schools and any school subject to the Massachusetts Interscholastic Athletic Association rules shall participate. Participation in the program shall be required annually of coaches, trainers and parent volunteers for any extracurricular athletic activity; physicians and nurses who are employed by a school or school district or who volunteer to assist with an extracurricular athletic activity; school athletic directors; directors responsible for a school marching band; and a parent or legal guardian of a child who participates in an extracurricular athletic activity.

In developing the program, the division may use any of the materials readily available from the Centers for Disease Control and Prevention. The program shall include, but not be limited to: (1) current training in recognizing the symptoms of potentially catastrophic head injuries, concussions and injuries related to second impact syndrome; and (2) providing students that participate in any extracurricular athletic activity, including membership in a marching band, the following information annually: a summary of department rules and regulations relative to safety regulations for students participation in extracurricular athletic activities, including the medical protocol for post-concussion participation or participation in an extracurricular athletic activity; written information related to the recognition of symptoms of head injuries, the biology and the short-term and long-term consequences of a concussion.

The bureau of substance addiction services shall provide educational materials on the dangers of opiate use and misuse to those persons participating in the annual head injury safety program required by this section. The educational materials shall also be distributed in written form to all students participating in an extracurricular athletic activity prior to the commencement of their athletic seasons.

(b) The department shall develop forms on which students shall be instructed to provide information relative to any sports head injury history at the start of each sports season. These forms shall require the signature of both the student and the parent or legal guardian thereof. Once complete, the forms shall be forwarded to all coaches prior to allowing any student to participate in an extracurricular athletic activity so as to provide coaches with up-to-date information relative to an athlete's head injury history and to enable coaches to identify students who are at greater risk for repeated head injuries.

(c) If a student participating in an extracurricular athletic activity becomes unconscious during a practice or competition, the student shall not return to the practice or competition during which the student became unconscious or participate in any extracurricular athletic activity until the student provides written authorization for such participation, from a licensed physician, licensed neuropsychologist, certified athletic trainer or other appropriately trained or licensed health care professional as determined by the department of public health, to the school's athletic director.

If a student suffers a concussion as diagnosed by a medical professional, or is suspected to have suffered a concussion while participating in an extracurricular athletic activity, the student shall not return to the practice or competition during which the student suffered, or is suspected to have suffered, a concussion and shall not participate in any extracurricular athletic activity until the student provides written authorization for such participation, from a licensed physician, licensed neuropsychologist, certified athletic trainer or other appropriately trained or licensed health care professional as determined by the department of public health, to the school's athletic director.

(d) A coach, trainer or volunteer for an extracurricular athletic activity shall not encourage or permit a student participating in the activity to engage in any unreasonably dangerous athletic technique that unnecessarily endangers the health of a student, including using a helmet or any other sports equipment as a weapon.

(e) The superintendent of the school district or the director of a school shall maintain complete and accurate records of the district's or school's compliance with the requirements of this section. A school that fails to comply with this section, as determined by the department, shall be subject to penalties as determined by the department.

(f) Nothing in this section shall be construed to waive liability or immunity of a school district or its officers or employees. This section shall not create any liability for a course of legal action against a school district, its officers or employees.

(g) A person who volunteers to assist with an extracurricular athletic activity shall not be liable for civil damages arising out of any act or omission relating to the requirements of this section, unless such person is willfully or wantonly negligent in his act or omission.

(h) The division shall adopt regulations to carry out this section.

History

2010, 166, § 1; *2016, 52, § 33*, effective March 14, 2016; *2017, 47, § 47*, effective July 1, 2017.

End of Document

ALM GL ch. 112, § 8A

Current through Chapter 21 of the 2021 Legislative Session of the 192nd General Court.

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE XVI PUBLIC HEALTH (Chs. 111 - 114) > TITLE XVI PUBLIC HEALTH (Chs. 111 — 114) > Chapter 112 Registration of Certain Professions and Occupations (§§ 1 — 289)

§ 8A. Physicians — Use of Title "Physician."

No person may, directly or indirectly, use the title "physician" or display or use the term physician in any title, advertisement, listing of affiliations, communication with the public or in any other manner to indicate or imply in any way that such person offers to engage or engages in the practice of medicine or in the provision of health care services to patients within the commonwealth who is not registered by the board of registration in medicine as a physician under section 2. This section shall not apply to use of the term "chiropractic physician" by individuals licensed and practicing under sections 89 to 97, inclusive, or the use of the term "podiatric physician" by individuals licensed and practicing under sections 13 to 22, inclusive, or the use of the term "physician assistant" by individuals licensed and practicing under sections 9C to 9K, inclusive. A person who violates this section shall be punished by a fine of not less than $100 and not more than $1,000 or by imprisonment for not less than 30 days and not more than 1 year in the house of corrections, or by both such fine and imprisonment.

History

2002, 37.

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§ 163. Mental Health and Human Services Professionals — Definitions.

As used in sections one hundred and sixty–three to one hundred and seventy–two, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings:—

"Allied mental health and human services professional", a licensed marriage and family therapist, a licensed rehabilitation counselor, a licensed educational psychologist or a licensed mental health counselor.

"Licensed marriage and family therapist", a person licensed or eligible for licensure under section one hundred and sixty–five.

"Practice of marriage and family therapy", the rendering of professional services to individuals, family groups, couples or organizations, either public or private for compensation, monetary or otherwise. Said professional services shall include applying principles, methods and therapeutic techniques for the purpose of resolving emotional conflicts, modifying perceptions and behavior, enhancing communications and understanding among all family members and the prevention of family and individual crisis. Individual marriage and family therapists may also engage in psychotherapy of a nonmedical nature with appropriate referrals to psychiatric resources and research and teaching in the overall field of human development and interpersonal relationships.

"Licensed rehabilitation counselor", a person licensed or eligible for licensure under section one hundred and sixty–five.

"Practice of rehabilitation counseling", the rendering of professional services for compensation, monetary or otherwise. These professional services would include the application of principles, methods and techniques of the rehabilitation counseling profession such as client assessment, job analysis, vocational assessment, counseling and job development for the purpose of maximizing or restoring the capacities of physically or mentally handicapped individuals for self–sufficiency and independent living including vocational and social functioning and creating those conditions favorable to this goal. The practice of rehabilitation counseling involves the following objectives: assisting individuals in the coordination of appropriate services; counseling with individuals, families or groups; serving an advocacy role with communities or groups toward the provision or implementation of rehabilitation services; research and teaching in the field of rehabilitation counselor education.

"Licensed mental health counselor", a person licensed or eligible for licensure under section one hundred and sixty–five.

"Practice of mental health counseling", the rendering of professional services to individuals, families or groups for compensation, monetary or otherwise. These professional services include: applying the principles, methods and theories of counseling, human development, learning theory, group and family dynamics, the etiology of mental illness and dysfunctional behavior and psychotherapeutic techniques to define goals and develop treatment plans aimed toward the prevention, treatment and resolution of mental and emotional dysfunction and intra or interpersonal disorders in all persons irrespective of diagnosis. The practice of mental health counseling shall include, but not be limited to, diagnosis and treatment, counseling and psychotherapy, of a nonmedical nature of mental and emotional disorders and the psychoeducational techniques aimed at prevention of such disorders and consultations to individuals, couples, families, groups, organizations and communities.

Practice of mental health counseling in independent practice with individuals diagnosed with psychosis may be undertaken by a licensed mental health counselor: (a) who is licensed under section 165 on or after March 1, 1992; or (b) who was licensed prior to March 1, 1992 and who meets the certification criteria for independent practice with individuals diagnosed with psychosis as established by the board of registration of allied mental health and human services professions.

"Licensed educational psychologist", a person licensed or eligible for licensure under section one hundred and sixty–five of this chapter and who has been certified as a school psychologist by the Massachusetts department of education; provided, however, that an educational psychologist shall not perform in private practice any of the services for which he is licensed for any student in a school system by which such educational psychologist is employed and provided, further, that an educational psychologist who violates this provision shall have his license suspended for a period to be determined by the board pursuant to the provisions of section one hundred and sixty–nine.

"Practice of educational psychology", the rendering of professional services to individuals, groups, organizations or the public for compensation, monetary or otherwise.

Such professional services include: applying psychological principles, methods and procedures in the delivery of services to individuals, groups, families, educational institutions and staff and community agencies for the purpose of promoting mental health and facilitating learning. Such services may be preventative, developmental or remedial and include psychological and psychoeducational assessment, therapeutic intervention, program planning and evaluation, research, teaching in the field of educational psychology, consultation and referral to other psychiatric, psychological, medical and educational resources when necessary.

"Advertise", includes, but is not limited to, distributing or causing to be distributed any card, sign or device to any person; or the causing, permitting or allowing of any sign or marking on or in any building or structure, or in any newspaper or magazine or in any directory, or on radio or television, or by the use of any other means designed to secure public attention.

"Use a title or description of", means to hold oneself out to the public as having a particular status by means of statements on signs, mailboxes, address plates, stationery, announcement, calling cards or other instruments of professional identification.

"Board", the Massachusetts board of registration of allied mental health and human services professions.

"Recognized educational institution", any educational institution which grants a bachelor's, master's, or doctor's degree and which is recognized by the board, or by a nationally or regionally recognized educational or professional accrediting organization; provided, however, that such institution is also approved by the United States Department of Education.

"Approved Continuing Education", continuing education such as research and training programs, college and university courses, in–service training programs, seminars and conferences designed to maintain and enhance the skills of allied mental health and human services professionals and which are recognized by the board.

"Licensed applied behavior analyst", an individual who, by training, experience and examination, meets the requirements for licensing by the board and is duly licensed to engage in the practice of applied behavior analysis in the commonwealth.

"Licensed assistant applied behavior analyst", an individual who, by training, experience and examination, meets the requirements for licensing by the board and is duly licensed to engage in the practice of applied behavior analysis under the supervision of a licensed applied behavior analyst or a physician or psychologist qualified to practice applied behavior analysis if it is consistent with the accepted standards of their respective professions.

"Practice of applied behavior analysis", the design, implementation and evaluation of systematic instructional and environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvements in human behavior, including the direct observation and measurement of behavior and the environment, the empirical identification of functional relations between behavior and environmental factors, known as functional assessment and analysis, and the introduction of interventions based on scientific research and which utilize contextual factors, antecedent stimuli, positive reinforcement and other consequences to develop new behaviors, increase or decrease existing behaviors and elicit behaviors under specific environmental conditions that are delivered to individuals and groups of individuals; provided, however, that the "practice of applied behavior analysis" shall not include psychological testing, neuropsychology, diagnosis of mental health or developmental conditions, psychotherapy, cognitive therapy, sex therapy, psychoanalysis, psychopharmacological recommendations, hypnotherapy or academic teaching by college or university faculty.

History

1987, 521, § 2; 1989, 341, § 71; 1989, 720, §§ 4, 5; *2000, 319*; *2012, 418, § 6*.

End of Document

ALM GL ch. 176B, § 1

Current through Chapter 21 of the 2021 Legislative Session of the 192nd General Court.

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE XXII CORPORATIONS (Chs. 155 - 182) > TITLE XXII CORPORATIONS (Chs. 155 — 182) > Chapter 176B Medical Service Corporations (§§ 1 — 25)

§ 1. Definitions.

In this chapter the following words shall have the following meanings:

"Certified nurse midwife", a nurse midwife authorized to practice midwifery in the commonwealth by the board of registration in nursing pursuant to section eighty B of chapter one hundred and twelve.

"Commissioner", the commissioner of insurance.

"Covered dependent", a dependent for whose medical or chiropractic care provision is made in a subscription certificate issued by a medical service corporation to a subscriber.

"Dependent", the spouse, child or foster child of a subscriber, or an adult relative dependent upon the subscriber for his support.

"Medical service", the medical services ordinarily provided by registered physicians in accordance with accepted practices in the community where the services are rendered.

"Chiropractic service", the chiropractic services ordinarily provided by registered chiropractors in accordance with accepted practices in the community where the services are rendered.

"Visual service", the optometric services ordinarily provided by registered optometrists and physicians in accordance with accepted practices in the community where the services are rendered.

"Medical service corporation" a corporation organized as provided by this chapter for the purpose of establishing and operating a non–profit medical service plan.

"Nonparticipating provider", a registered physician under the provisions of chapter one hundred and twelve or other provider of health care services licensed under the laws of the commonwealth who is not party to an agreement in writing with a medical service corporation to perform medical services for subscribers and covered dependents who are covered under a preferred provider arrangement approved by the commissioner under chapter one hundred and seventy–six I.

"Nonprofit medical service plan", a plan operated by a medical service corporation under the provisions of this chapter, whereby the cost of medical and chiropractic services and other health services furnished to subscribers and covered dependents is paid by the corporation, to participating physicians, to participating chiropractors, to nonparticipating providers if the

subscriber is covered by a Preferred Provider Organization, and to such other physicians as are provided for herein, and to providers of other health services.

"Participating nurse midwife", a certified nurse midwife who agrees in writing with a medical service corporation to perform midwifery service for subscribers and covered dependents and to abide by the by–laws, rules and regulations of such corporation.

"Participating physician", a registered physician under the provisions of chapter one hundred and twelve who agrees in writing with a medical service corporation to perform medical service for subscribers and covered dependents and to abide by the by–laws, rules and regulations of such corporation.

"Participating chiropractor", a registered chiropractor under the provisions of chapter one hundred and twelve who agrees in writing with a medical service corporation to perform chiropractic service for subscribers and covered dependents and to abide by the by–laws, rules and regulations of such corporation.

"Participating optometrist", a registered optometrist who agrees in writing with a medical service corporation to perform visual service for subscribers and covered dependents and to abide by the by–laws, rules and regulation of such corporation.

"Primary care provider", a health care professional qualified to provide general medical care for common health care problems who; (1) supervises, coordinates, prescribes, or otherwise provides or proposes health care services; (2) initiates referrals for specialist care; and (3) maintains continuity of care within the scope of practice.

"Registered physician", a physician registered to practice medicine in the commonwealth as provided in section two of chapter one hundred and twelve.

"Registered chiropractor", a chiropractor registered to practice chiropractic in the commonwealth as provided in section eighty–nine of chapter one hundred and twelve.

"Subscriber", a person who has subscribed to a non–profit medical service plan and to whom a subscription certificate has been issued in accordance with the provisions of section six.

History

1941, 306; 1965, 442, § 1; 1968, 432, § 8; 1969, 880, § 1; 1971, 543, § 1; 1978, 574, § 1; 1979, 365, § 1; 1985, 683, §§ 2, 3; 1988, 23, §§ 55, 56; *2012, 224, § 166*.

End of Document

ALM GL ch. 233, § 79G

Current through Chapter 21 of the 2021 Legislative Session of the 192nd General Court.

Annotated Laws of Massachusetts > PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES (Chs. 211 - 262) > TITLE II ACTIONS AND PROCEEDINGS THEREIN (Chs. 223 - 236) > TITLE II ACTIONS AND PROCEEDINGS THEREIN (Chs. 223 — 236) > Chapter 233 Witnesses and Evidence (§§ 1 — 83)

§ 79G. Evidence of Medical and Hospital Services.

In any proceeding commenced in any court, commission or agency, an itemized bill and reports, including hospital medical records, relating to medical, dental, hospital services, prescriptions, or orthopedic appliances rendered to or prescribed for a person injured, or any report of any examination of said injured person, including, but not limited to hospital medical records subscribed and sworn to under the penalties of perjury by the physician, dentist, authorized agent of a hospital or health maintenance organization rendering such services or by the pharmacist or retailer of orthopedic appliances, shall be admissible as evidence of the fair and reasonable charge for such services or the necessity of such services or treatments, the diagnosis of said physician or dentist, the prognosis of such physician or dentist, the opinion of such physician or dentist as to proximate cause of the condition so diagnosed, the opinion of such physician or dentist as to disability or incapacity, if any, proximately resulting from the condition so diagnosed; provided, however, that written notice of the intention to offer such bill or report as such evidence, together with a copy thereof, has been given to the opposing party or parties, or to his or their attorneys, by mailing the same by certified mail, return receipt requested, not less than ten days before the introduction of same into evidence, and that an affidavit of such notice and the return receipt is filed with the clerk of the court, agency or commission forthwith after said receipt has been returned. Nothing contained in this section shall be construed to limit the right of any party to the action to summon, at his own expense, such physician, dentist, pharmacist, retailer of orthopedic appliances or agent of such hospital or health maintenance organization or the records of such hospital or health maintenance organization for the purpose of cross examination with respect to such bill, record and report or to rebut the contents thereof, or for any other purpose, nor to limit the right of any party to the action or proceeding to summon any other person to testify in respect to such bill, record or report or for any other purpose.

The words "physician" and "dentist" shall not include any person who is not licensed to practice as such under the laws of the jurisdiction within which such services were rendered, but shall include chiropodists, chiropractors, optometrists, osteopaths, physical therapists, podiatrists, psychologists and other medical personnel licensed to practice under the laws of the jurisdiction within which such services were rendered.

The word "hospital" shall mean any hospital required to keep records under section seventy of chapter one hundred and eleven, or which is in any way licensed or regulated by the laws of any

other state, or by the laws and regulations of the United States of America, including hospitals of the Veterans Administration or similar type institutions, whether incorporated or not.

The words "health maintenance organization" shall have the same meaning as defined in section one of chapter one hundred and seventy–six G.

History

1958, 323; 1974, 442; 1976, 489; 1982, 118; 1985, 323; 1987, 540; 1988, 130.

End of Document

ALM R. Civ. P. Rule 1

This document reflects rules changes received as of May 18th, 2021.

MA - Massachusetts Court Rules > Massachusetts Rules of Civil Procedure > I. Scope of Rules—One Form of Action

Rule 1. Scope of Rules

These rules govern the procedure before a single justice of the Supreme Judicial Court or of the Appeals Court, and in the following departments of the Trial Court: the Superior Court, the Housing Court, the Probate and Family Court in proceedings seeking equitable relief, the Juvenile Court in proceedings seeking equitable relief, in the Land Court, in the District Court and in the Boston Municipal Court, in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

As used in these rules the following terms shall be deemed to have the following meanings:

"Superior Court" shall mean the Superior Court Department of the Trial Court, or a session thereof for holding court.

"Housing Court" shall mean a division of the Housing Court Department of the Trial Court, or a session thereof for holding court.

"Probate Court" shall mean a division of the Probate and Family Court Department of the Trial Court, or a session thereof for holding court.

"Land Court" shall mean the Land Court Department of the Trial Court, or a session thereof for holding court.

"District Court" or "Municipal Court" shall mean a division of the District Court Department of the Trial Court, or a session thereof for holding court; except when the context means something to the contrary, said words shall include the Boston Municipal Court Department.

"Municipal Court of the City of Boston" or "Boston Municipal Court" shall mean a division of the Boston Municipal Court Department of the Trial Court, or a session thereof for holding court.

"Juvenile Court" shall mean the Juvenile Court Department of the Trial Court, or a session thereof for holding court.

History

Amended June 13, 1974, eff July 1, 1974; November 9, 1979, eff January 1, 1980; December 13, 1981, eff January 1, 1982; eff June 8, 1989; July 1, 1996; April 5, 2007, eff June 1, 2007; November 28, 2007, eff March 1, 2008; June 29, 2016, eff Aug 1, 2016.

End of Document

Rule 35. Physical and Mental Examination of Persons

(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 physician or to produce for examination the person in his 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 specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Examining Physician.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his 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 he 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 a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(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 he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition; but he does not otherwise waive his right to object at the trial to the introduction into evidence of the report or any part thereof.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

End of Document

Rule 11. Direct Appellate Review

(a) Application; When Filed; Grounds. An appeal within the concurrent appellate jurisdiction of the Appeals Court and Supreme Judicial Court shall be docketed in the Appeals Court before a party may apply to the Supreme Judicial Court for direct appellate review. Within 21 days after the docketing of an appeal in the Appeals Court, any party to the case (or 2 or more parties jointly) may apply in writing to the Supreme Judicial Court for direct appellate review, provided the questions presented by the appeal are (1) questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court; (2) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the Commonwealth; or (3) questions of such public interest that justice requires a final determination by the full Supreme Judicial Court.

(b) Contents of Application; Form. The application for direct appellate review shall contain, in the following order: (1) a request for direct appellate review; (2) a statement of prior proceedings in the case; (3) a short statement of facts relevant to the appeal; (4) a statement of the issues of law raised by the appeal, together with a statement indicating whether the issues were raised and properly preserved in the lower court; (5) a brief argument thereon (consisting of not more than either 10 pages of text in monospaced font or 2,000 words in proportional font, as defined in Rule 20(a)(4)(B)) including appropriate authorities, in support of the applicant's position on such issues; and (6) a statement of reasons why direct appellate review is appropriate. A copy of the docket entries shall be appended to the application. The applicant shall also append a copy of any written decision, memorandum, findings, rulings, or report of the lower court relevant to the appeal. The application shall comply with the requirements of Rule 20(a), and shall contain a certification of such compliance, including a statement of how compliance with the foregoing length limit was ascertained, as specified in Rule 16(k).

(c) Response; form. Within 14 days after the filing of the application, any other party to the case may, but need not, file and serve a response thereto (consisting of not more than either 10 pages of text in monospace font or 2,000 words in proportional font, as defined in Rule 20(a)(4)(B)) setting forth reasons why the application should or should not be granted. The response shall not restate matters described in Rule 11(b)(2) and (3) unless the party is dissatisfied with the statement thereof contained in the application. The response shall comply with the requirements of Rule 20(a), and shall contain a certification of such compliance, including a statement of how compliance with the foregoing length limit was ascertained, as specified in Rule 16(k). A response may be filed in a different form as permitted by the court.

(d) Filing; service. One copy of the application and of each response shall be filed in the office of the clerk of the full Supreme Judicial Court. Filing and service of the application and of any response shall comply with Rule 13.

(e) Effect of application upon appeal. The filing of an application for direct appellate review shall not extend the time for filing briefs or doing any other act required to be done under these rules.

(f) Vote of Direct Appellate Review; Certification. If any 2 justices of the Supreme Judicial Court vote for direct appellate review, or if a majority of the justices of the Appeals Court shall certify that direct appellate review is in the public interest, an order allowing the application (or transferring the appeal sua sponte) or the certificate, as the case may be, shall be transmitted to the clerk of the Appeals Court with notice to the lower court. The clerk of the Appeals Court shall forthwith transmit to the clerk of the full Supreme Judicial Court all documents filed in the case.

(g) Cases transferred for direct review; time for serving and filing briefs. In any appeal transferred to the full Supreme Judicial Court from the Appeals Court:

(1) If at the time of transfer all parties have served and filed briefs in the Appeals Court, no further briefs may be filed by the parties except that a reply brief may be served and filed on or before the last date allowable had the case not been transferred, or within 14 days after the date on which the appeal is docketed in the full Supreme Judicial Court, whichever is later.

(2) If at the time of transfer only the appellant's brief has been served and filed in the Appeals Court, the appellant may, but need not, serve and file an amended brief within 21 days after the date on which the appeal is docketed in the full Supreme Judicial Court. The appellee shall serve and file a brief within 30 days after service of any amended brief of the appellant, or within 50 days after the date on which the appeal is docketed in the full Supreme Judicial Court, whichever is later.

(3) Service and filing of a reply brief shall comply with Rule 19.

(4) If at the time of transfer to the full Supreme Judicial Court no party to the appeal has served or filed a brief, the appellant shall serve and file a brief within 21 days after the date on which the appeal is docketed in the full Supreme Judicial Court or within 40 days after the date on which the appeal was docketed in the Appeals Court, whichever is later.

History

Amended effective July 1, 1979; effective July 1, 1991; March 29, 1995, effective April 14, 1995; effective Jan 10, 1996, effective Jan 29, 1996; effective Jan 1, 1998; effective Sept 3, 2002; October 31, 2018, effective March 1, 2019.

End of Document

Rule 35. Physical and Mental Examinations

(a) Order for an Examination.

(1) *In General.* The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) *Motion and Notice; Contents of the Order.* The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report.

(1) *Request by the Party or Person Examined.* The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) *Contents.* The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) *Request by the Moving Party.* After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) *Waiver of Privilege.* By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

(5) *Failure to Deliver a Report.* The court on motion may order—on just terms—that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(6) *Scope.* This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

History

Amended March 30, 1970, eff. July 1, 1970; March 2, 1987, eff. Aug. 1, 1987; Nov. 18, 1988, *P. L. 100-690*, Title VII, § 7047(b), *102 Stat. 4401*; April 30, 1991, eff. Dec. 1, 1991; April 30, 2007, eff. Dec. 1, 2007.

End of Document

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1684CV02449 Coyman, Kevin et al vs. Turner Construction Co

- Case Type
  Torts
- Case Status
  Closed
- File Date
  08/08/2016
- DCM Track:
  F - Fast Track
- Initiating Action:
  Other Negligence - Personal Injury / Property Damage
- Status Date:
  05/03/2019
- Case Judge:
- Next Event:

All Information | Party | Event | Tickler | Docket | Disposition

Party Information

Coyman, Kevin
- Plaintiff

Alias

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More Party Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
12/22/2017	Endorsement on Motion for Rule 16 Conference (#13.0): ALLOWED In part. Deadlines will be revised as follows: Discovery completed by 2/28/18, Plaintiff's expert disclosures by 5/2/18, Defendant's expert disclosures by 7/1/18. Final pre trial conference 7/17/18. Daubert motions served by 10/1/18 and filed by 10/12/18. Defendant may seed additional time to complete expert disclosures. The issue can be raised at the Final trial conference (dated 12/20/17) notice sent 12/21/17 Judge: Kazanjian, Hon. Helene		Image
12/22/2017	Endorsement on Motion for Protective Order (Cross Motion) (#24.0): DENIED (dated 12/21/17) notice sent 12/21/17 Judge: Kazanjian, Hon. Helene		Image
12/22/2017	Endorsement on Motion to Compel the Production of Plaintiff's Social Media Profiles (#23.0): ALLOWED for the good and sufficient reasons stated herein (dated 12/21/17) notice sent 12/21/17 Judge: Kazanjian, Hon. Helene		Image
12/22/2017	Endorsement on Motion for Examination of the Plaintiff (Kevin Coyman) (#22.0): DENIED after hearing. Since Dr. Karen Postal is not a physician there is no basis under Rule 35 or otherwise for the court to order an examination (dated 12/21/17) notice sent 12/21/17 Judge: Kazanjian, Hon. Helene		Image
12/22/2017	Endorsement on Motion for Examination of the Plaintiff (Kevin Coyman) Without Video Recording (#21.0): DENIED After hearing the motion to conduct an examination under Rule 35 by Dr. D'Alton (Without Videotaping) is DENIED. The examination which plaintiff consents to shall be performed with a neutral (Video) other person (dated 12/21/17) notice sent Judge: Kazanjian, Hon. Helene		Image
12/22/2017	Endorsement on Motion for Examination of the Plaintiff (#20.0): DENIED without prejudice to renewing at a later date. The court is not satisfied that an additional examination by Dr. Mufson is either warranted or necessary. The plaintiff has already been examined by Dr. Albert Druktainis at the request of Liberty Mutual. Before subjecting the plaintiff to yet another psychiatric examination, the Defendant needs to attempt to obtain the results of that examination. It is also unclear whether this examination is necessary in light of the fact that the plaintiff will be examined by Dr. D'Alton, an neurologist. After Dr. D'Alton's examination is complete, and after Defendant obtains or attempts to obtain the results of Dr. Druktainis' evaluation. Defendant may renew this motion if it can establish that further evaluation is necessary (dated 12/21/17) notice sent 12/21/17 Judge: Kazanjian, Hon. Helene		Image
02/23/2018	Defendant Turner Construction Co's Motion for Letters Rogatory (with opposition)	26	Image
03/01/2018	The following form was generated: Notice to Appear Sent On: 03/01/2018 13:42:30		
03/12/2018	Plaintiff Kevin Coyman's Motion to Compel Production of Surveillance "Fact" Work Product (with opposition)	26	
03/12/2018	Plaintiff Kevin Coyman's Motion to Compel Non-Party Liberty Mutual to Respond to Plaintiff's Keeper of Records Subpoena for Surveillance (with opposition)	27	
03/20/2018	The following form was generated: Notice to Appear Sent On: 03/20/2018 07:36:13		
04/19/2018	Event Result: Judge: Ullmann, Hon. Robert L The following event: Hearing RE: Discovery Motion(s) scheduled for 04/19/2018 02:00 PM has been resulted as follows: Result: Held as Scheduled		
04/19/2018	Event Result: Judge: Ullmann, Hon. Robert L The following event: Hearing RE: Discovery Motion(s) scheduled for 04/19/2018 02:00 PM has been resulted as follows: Result: Held as Scheduled		

Skip to main content

1382CV01232 Craffey, Stephen A. et al vs. Embree Construction Group, Inc.

- Case Type
  Torts
- Case Status
  Open
- File Date
  08/20/2013
- DCM Track:
  F - Fast Track
- Initiating Action:
  Other Negligence - Personal Injury / Property Damage
- Status Date:
  08/20/2013
- Case Judge:
- Next Event:

All Information | Party | Subsequent Action/Subject | Event | Tickler | Docket | Disposition

Party Information

Craffey, Stephen A.
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More Party Information

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- Plaintiff

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Craffey ppa, Brooklyn
- Plaintiff

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More Party Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
10/14/2014	Plaintiff's opposition to defendants' motion to compel plaintiff to undergo a neurological evaluation ordered by Liberty Mutual for the third time in 18 months (rec'd 10/10/14)	36.3	
10/14/2014	Reply of the defendant/third party plaintiff, Embree Construction Group, Inc. to the plaintiff, Steve Craffey's oppositions to Embree's motion to compel the plaintiff to attend independent medical examinations pursuant to Rule 35 (rec'd 10/10/14)	36.4	
10/14/2014	Rule 9A affidavit of Tyler M. Franklin (rec'd 10/10/14)	36.5	
10/14/2014	Rule 9c certificate of compliance (rec'd 10/10/14)	36.6	
10/14/2014	Request for hearing filed (rec'd 10/10/14)	36.7	
10/15/2014	Motion (P#35.0) After review, a hearing on this Motion will be held at a Litigation Control Conference on 11/06/2014 at 2:00 P.M. (Douglas Wilkins, Associate Justice). Notices mailed 10/15/2014		
10/17/2014	Motion (P#36.0) This motion shall be heard on November 6, 2014 at 2:00 p.m. (Douglas Wilkins, Associate Justice). dated October 17, 2014 Notices mailed 10/17/2014		
10/21/2014	Notice sent to appear on November 6, 2014 @ 2:00 P.M. for a hearing on (p#35.0) Joint Motion to Extend deadlines to be heard at this hearing (P#36.0) Motion of the Defendant, Third Party plaintiff, Embree Construction Group Inc to compel the plaintiff, Steve Craffey to attend independent medical examinations pursuant to Rule 35 (P#36.2) Plaintiff's Opposition to Motion to Compel Plaintiff to undergo a neuropsychological exam (P#36.3) Plaintiff's Opposition to Defendant's Motion to Undergo a neurological evaluation ordered by - Liberty Mutual before Judge Wilkins	37	
10/27/2014	Stipulation of partial dismissal as to Third Party Complaint ONLY without prejudice and without costs(rec'd10/24/14)	38	
11/03/2014	Plaintiff's assented to motion to continue the litigation control conference scheduled 11/6/14 (fax)	39	
11/04/2014	Motion (P#39.0) Continued to December 2, 2014 at 3:30 P.M. (Douglas Wilkins, Associate Justice). dated November 4, 2014 Notices mailed 11/4/2014		
11/26/2014	Joint motion to amend caption	40	
12/04/2014	Motion (P#35.0) See Scheduling Order. (Douglas Wilkins, Associate Justice).dated December 2, 2014 Notices mailed 12/4/2014		
12/04/2014	Motion (P#40.0) ALLOWED by agreement. (Douglas Wilkins, Associate Justice) dated December 1, 2014 Notices mailed 12/4/2014		
12/05/2014	Pre-trial Scheduling ORDER:After a final pretrial conference on December 2,2014 and notwithstanding the tracking order, it is ORDERED that:All non-expert discovery shall be complete by March 31,2015;All expert disclosures shall be complete by April 30,2015(for the plaintiff)and May 30,2015 (for the defendant);Summary Judgment motions shall be served by May 30,2015;Summary Judgment responses shall be served by June 30,2015;Mediation, if any, shall occur by September 30,2015;By October 15,2015, the parties shall file a joint final pretrial memo;If they fail to do so, they shall appear in court at 2:00pm on that date. The parties shall appear for a final trial conference at 2:00pm on November 3,2015 in Courtroom 10, Norfolk Superior Court in anticipation of a trial on November 9,2015. The parties should understand that, now that this case has a trial date, any delay in meeting the above dates may not be acceptable as a ground for continuing the trial (Wilkins,J)(dated;12/2/14)ns	41	
12/09/2014	Pleading, Motion to compel production of medical records , returned to Tyler M Franklin Esq., for/or Embree Construction; A new motion package is being resubmitted		
12/10/2014	Motion (P#36.0) After hearing, ALLOWED as to Dr. Michele Masi, at a time and location agreeable to the plaintiff, with a neutral videographer present and provided that, to avoid prejudice to plaintiff, defendant agrees to the admissibility of the prior IME. Denied as to William Brenner, D.O. as he is not a physician and there is no good cause for two examiners to do the IME. See MRCP 35). (Douglas Wilkins, Associate Justice) dated December 9, 2014 Notices mailed 12/10/2014		

Skip to main content

0684CV03190 Gomes v Brian Taxi, Inc et al

- Case Type
- Torts
- Case Status
- Closed
- File Date
- 07/31/2006
- DCM Track:
- F - Fast Track
- Initiating Action:
- Motor Vehicle Negligence - Personal Injury / Property Damage
- Status Date:
- 07/03/2008
- Case Judge:
- Next Event:

All Information | Party | Event | Docket | Disposition

Party Information

Gomes, Lionel
- Plaintiff

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More Party Information

Brian Taxi, Inc
- Defendant

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- Attorney
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More Party Information

Frazier (As Amended), Jonathan
- Defendant

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Party Attorney
- Attorney
- Moran, Esq., John

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/19/2007	MOTION (P#23) If documents sought are not produced within twenty (20) days of notice of this order the deft Brian Taxi's answer shall be stricken and a default shall enter (Regina L. Quinlan, Justice), Notices mailed 4/18/2007 dated 4/17/07		
05/25/2007	Plaintiff Lionel Gomes's MOTION to strike the Answer of deft, Brian Taxi Inc. and for entry of default for failure to comply with ordered dated April 17, 2007 w/opposition	24	
06/20/2007	Defendant Brian Taxi, Inc's MOTION to continue the discovery deadline and Amend the tracking order w/o opposition	25	
06/22/2007	Opposition of Plaintiff to Defendant's Motion to Continue the Discovery Deadline and Amend the Tracking Order	26	
06/27/2007	MOTION (P#25) ALLOWED, w/o opposition, (Regina L. Quinlan, Justice) Notices mailed 6/25/2007 (entered 6/22/07)		
06/27/2007	Defendant Brian Taxi, Inc's MOTION to strike plaintiff's opposition to deft's Motion to continue the discovery deadline and Amend the tracking order w/o opposition	27	
07/11/2007	MOTION (P#27) Moot in light of Judge Quinlan's ALLOWANCE of Defendant's motion to continue (Margaret R Hinkle, Justice), (Dated 7/9/07) Notices mailed 7/10/2007		
07/19/2007	MOTION (P#24) DENIED except (i) deft to produce a copy of the executed leave (allegedly already produced) to plf within 24 hours., (ii) deft to provide an affidavit of Brian Parchu within 7 bdays as to why the driving logs from August 1 - 6 are unavailable, and (iii) plf may move within 7 days of receipt of the affidavit to reopen Mr. Parchu's deposition with regard to solely to the information in the affidavit. (Margaret R Hinkle, Justice) (entered 7/18/07) Notices mailed 7/18/2007		
07/27/2007	Affidavit of Brian Parker.	28	
09/10/2007	Defendant Arbella Mutual Ins Co's MOTION for leave Partial relief of stay of proceedings for limited purpose of filing opposition to plf's Motion for Partial Summary Judgment w/opposition	29	
09/13/2007	MOTION (P#29) ALLOWED (Margaret R Hinkle, Justice) Notices mailed 9/12/2007 (entered 9/11/07)		
09/13/2007	Plaintiff Lionel Gomes's MOTION for Partial Summary Judgment, pursuant to Mass.R.Civ.P. 56, as to Brian Taxi, Inc (w/opp)	30	
09/13/2007	Affidavit of compliance with Superior Court Rule 9A certified mail return receipt	31	
09/14/2007	Opposition of Defendant Arbella Protection Insurance Company (improperly named as Arbella Mutual Insurance Company) to the Plaintiff's motion for partial summary judgment	32	
10/11/2007	Defendant Arbella Mutual Ins Co's MOTION for Sanctions against plf.	33	
10/11/2007	Opposition to deft. Arbella Protection Insurance Co's Motin for Sanctions & Plaintiff's COUNTER MOTION for Sanctions against deft. filed by Lionel Gomes	34	
10/11/2007	Opposition to plaintiff's Counter Motioin for Sanctions filed by Arbella Mutual Ins Co	35	
12/19/2007	Defendant Brian Taxi, Inc's MOTION to continue the discovery deadline and amend the tracking order (w/opp)	36	
12/26/2007	MOTION (P#36) ALLOWED New Tracking Order Discovery 3/26/08; R 56 4/28/08; PTC 5/28/08 Plaintiff's opposition does not substantiate any prejudice to Plaintiff and ignores the fact the they have petitioned the Court for 2 separate endorsements to the complaint that were granted (Merita A Hopkins, Justice) (Dated 12/21/0) Notices mailed 12/27/2007		
04/01/2008	(Defendant Brian Taxi, Inc's MOTION for an Order to compel Rule 35 Examination of the Plaintiff, Lionel Gomes (w/opp))	37	
04/25/2008	(MOTION (P#37) As Dr. Hebben is not a physician, pursuant to MRCP 35 the motion is hereby DENIED (Linda E. Giles, Justice) Notices mailed 4/24/2008 dated 4/24/08)		
05/15/2008	Defendant Brian Taxi, Inc's MOTION for Protective Order, quashing Plaintiff's subpoena of non-party witness Nay Hebben, Ph.D (w/opp)	38	
05/21/2008	Joint pre-trial memorandum filed	39	

04.26

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5/3

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
DOCKET NO.: 2015-02645

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2017 APR 24 A 11:27
MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE

notice sent
05.03.17
CFSJ
SLLp
JmL
LDSBs
(MD)

SERGIO KINSALA,
Plaintiff,

v.

GEORGE B. CAVANAUGH and
PATRICIA N. CAVANAUGH.

Defendants.

DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION FOR NEUROPSYCHOLOGICAL EVALUATION

The Defendants, George and Patricia Cavanaugh, respectfully move this Honorable Court to reconsider its order denying Defendants' Motion for Neuropsychological Evaluation of the Plaintiff.

As reasons therefor, the Defendants, George and Patricia Cavanaugh state as follows:

1. Rule 35 of the Massachusetts Rules of Civil Procedure is patterned after Rule 35 of the Federal Rules of Civil Procedure.
2. In 1988, Rule 35 of the Federal Rules of Civil Procedure was amended to allow evaluations by licensed psychologists.
3. In 1991, Rule 35 of the Federal Rules of Civil Procedure was again amended, this time to permit examinations by physicians, psychologists, and other certified or licensed professionals, or other licensed professionals, who are qualified to provide testimony and opinions about the physical or mental condition that is at issue.
4. The amendments to Federal Rule 35 provide a level playing field between the parties by providing the defendant with a fair opportunity to evaluate fairly plaintiff's alleged injuries and disabilities.
5. Rule 35 of the Massachusetts Rules of Civil Procedure has not been amended to incorporate the amendments made to its Federal equivalent.

5/2/17 After review, Denied. The need to amend Federal Rule 35 ... suggest a need to amend Mass. R. Civ. P. 35, but does not alter the plain meaning of the Massachusetts Rule. ... the issue ... raised ... physician ... Defendants' remedy ... language of Rule 35 ...

WILKINS, J.

6. Notwithstanding the fact that there has been no formal amendment to Rule 35 of the Massachusetts Rules of Civil Procedure, some Justices of the Massachusetts Superior Court have permitted such examinations. *See Palmer v. Youth Opportunities Upheld, Inc.*, 2004 Mass. Super. Lexis 415. *See also, McNeil v. Leighton*, C.A. No. 1997CV-00049(NE Housing Ct.). In so doing, Courts have reasoned that a literal reading of Rule 35 would be contrary to the national trend and would unnecessarily restrict their ability to achieve fair and just results in civil matters. Other Justices of the Superior Court have strictly interpreted Rule 35 and denied requests for neuropsychological evaluations holding that the express language of the Rule permits examinations by medical doctors only. There is no consensus in the trial court on whether such examinations are permitted.

7. When confronted with a challenge to the use of a *psychological* evaluation that a Probate Court ordered of a party pursuant to Rule 35 of the Massachusetts Rules of Domestic Relations Procedure, which is identical to Rule 35 of the Massachusetts Rules of Civil Procedure, the Supreme Judicial Court denied the appellant's request to vacate the order for such an evaluation on the grounds that it is not permitted under the Rule. *See Yannas v. Frondistou-Yannas,* 395 Mass. 704 (1985).

8. In this case, the Plaintiff Sergio Kinsala alleges a serious brain injury that he contends resulted in post concussive syndrome, cognitive impairment, cognitive deficits and memory loss.

9. Plaintiff has produced multiple reports with these diagnoses from a neuro-psychologist, copies of which were attached to the Rely submitted with the original motion.

10. Absent an opportunity to have Plaintiff evaluated by a neuro-psychologist, the Defendants will be deprived of all reasonable opportunity to evaluate and/or defend against Plaintiff's claims.

11. Principles of equity, justice and the Supreme Judicial Court's ruling in the *Yannas* case support the allowance of the motion for the neuro-psychological

evaluation by Karen Postal, a well-qualified and Board Certified Neuro-Psychologist.

Defendants, George B. Cavanaugh and
Patricia N. Cavanaugh
By their attorney

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Law Offices of Steven B. Stein
Two Financial Center
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(617) 772-2800
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the following was served upon the attorney of record for each party by mail.

Date: 4/6/17

Jeanette M. Lucey

Skip to main content

0673CV01420 Machado et al v Calais Motors, Ltd. et al

Case Type
Torts

Case Status
Closed

File Date
11/16/2006

DCM Track:
A - Average

Initiating Action:
Products Liability

Status Date:
11/16/2006

Case Judge:

Next Event:

All Information | Party | Subsequent Action/Subject | Event | Tickler | Docket | Disposition

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Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/04/2010	(P#27) ALLOWED by agreement. (Hopkins, J./jlv) Notices mailed 5/4/2010		
05/04/2010	Tracking deadlines amended; per allowance of P#27.		
06/07/2010	American Honda Motor Co., Inc.'s assented to motion for the issuance of a letter rogatory pursuant to G.L. c. 223A, Section 10, with incorporated memorandum of law for Ray Matthieu.; Affidavit of Compliance.	28	
06/08/2010	Motion (P#28) ALLOWED (Robert J. Kane, Justice) Notices mailed 6/9/2010		
06/08/2010	ORDER for the issuance of Letter Rogatory as to Ray Matthieu (Robert J. Kane, Justice)	29	
06/08/2010	Letter Rogatory issued as to Ray Matthieu (Robert J. Kane, Justice)	30	
07/23/2010	Notice sent to appear for pre-trial conference on 11/22/2010		
07/26/2010	Stipulation regarding protective order.	31	
07/30/2010	(P#31) ALLOWED and endorsed. (Frances A. McIntyre, Justice) Notices mailed 8/2/2010		
07/30/2010	Protective ORDER (Frances A. McIntyre, Justice)	32	
08/02/2010	The parties joint MOTION to Modify the Scheduling deadlines and to continue final pre-trial conference.	33	
08/06/2010	Motion (P#33) ALLOWED (Marc J. Santos, Clerk/Magistrate) Notices mailed 8/6/2010		
08/06/2010	Tracking deadlines amended; per allowance of P#33		
09/21/2010	Notice sent to appear for pre-trial conference on 11/22/2010 at New Bedford Superior Court.		
10/07/2010	Plaintiff Meagan Machado, Peter Machado's MOTION to amend complaint to add a count of breach of implied warranty against the defendant Calais Motors Ltd.; affidavit of compliance; document list; certificate of service.	34	
10/08/2010	The Parties Joint MOTION to Modify the Scheduling Deadlines and to Continue Final Pretrial Conference	35	
10/08/2010	Motion (P#34) ALLOWED (Thomas F. McGuire, Jr., Justice) Notices mailed 10/12/2010		
10/08/2010	Amended complaint	36	
10/12/2010	Motion (P#35) ALLOWED (Thomas F. McGuire, Jr., Justice) Notices mailed 10/8/2010		
10/12/2010	Tracking deadlines amended; per allowance of P#35		
02/01/2011	ANSWER by American Honda Motor Company, Inc. to COMPLAINT (claim of trial by jury reqsd)	37	
02/09/2011	American Honda Motor Company, Inc.'s MOTION for Leave to Take Depositions of the Plaintiffs' Expert Witnesses; Memorandum in Support; Plaintiffs' Opposition; Affidavit of Compliance with 9A; Affidavit of Compliance with 9C; Notice of Filing; List of Documents	38	
02/09/2011	(American Honda Motor Company, Inc.'s MOTION to Compel Plaintiff to Submit to an Examination Relative to Life Care/Vocational Rehabilitation) Claims; Memorandum in Support; Plaintiff's Opposition; Affidavit of Compliance with 9A; Affidavit of Compliance with 9C; Notice of Filing; List of Documents	39	
02/16/2011	Request to file brief reply to the Plaintiffs' opposition to Motion of American Honda to submit to an examination relative to life care/vocational rehabilitation claims.	40	
02/16/2011	Request (P#40) ALLOWED, A brief of up to 5 pages may be filed. (Richard T. Moses, J.) Notices mailed 2/22/2011		
02/16/2011	Notice sent to appear on 3/10/2011 for a hearing on #38 & #39		
02/17/2011	Request of Defendant for Leave to File a brief Reply to the Plaintiffs Opposition to Defendant's Motion for Leave to Take Depositions of Plaintiff's Experts	40.1	
02/25/2011	Notice sent to appear for pre-trial conference on 4/25/2011		
02/28/2011	Assented to MOTION of American Honda Motor Co., Inc. to Change the Hearing Date Regarding the Defendant's Motions to Compel	41	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
03/02/2011	Motion (P#41) is ALLOWED by agreement. (Valerie A. Brodeur, AC/M) Notices mailed 3/2/2011		
03/03/2011	Request (P#40.1) Allowed. (Thomas F. McGuire, Jr., Justice)		
03/24/2011	Reply to Plaintiffs' Opposition to American Honda Motor Co., Inc's Motion to Compel the plaintiff to submit to an examination relative to Life Care/Vocational Rehabilitation Claims; Certificate of Service.	42	
03/24/2011	Reply to Plaintiffs' Opposition concerning American Honda Motor Co, Inc's Motion for leave to take depositions of the plaintiffs' expert witnesses.	43	
03/30/2011	Assented To MOTION of the Defendant, American Honda Motor Company, Inc. to Extend Time for Filing Motions for Summary Judgment and/or Pursuant to Daubert	44	
04/04/2011	Motion (P#44) ALLOWED by assent. (Valerie A. Brodeur, Asst. C/M) Notices mailed 4/4/2011		
04/14/2011	Hearing on (P#38 & 39) Motion to take Deposition and Motion for Examination held, matter taken under advisement. (Renee P. Dupuis, Justice)		
04/26/2011	Joint pre-trial memorandum filed	45	
04/26/2011	Pre-trial ORDER held on 4/26/2011	46	
05/12/2011	Motion (P#38) motion for leave to depose experts is ALLOWED in part and Denied in part. After hearing and by agreement of the plaintiffs, the parties may depose one another's seat belt experts and also exchange file materials of the seat belt experts. The party taking the deposition shall be responsible for all fees and costs associated with preparation, travel and testimony at the deposition. The defendants request to depose all other experts is Denied. (Rene P. Dupuis, Justice) Notices mailed 5/18/2011		
05/12/2011	Motion (P#39) to compel plaintiff to submit to an examination(s) after hearing DENIED. (Renee P. Dupuis, Justice) Notices mailed 5/18/2011		
09/30/2011	Nisi dismissal; agreement or stipulation to be filed by 10/30/2011 (Renee P. Dupuis, Justice)	47	
10/27/2011	Plaintiffs' Assented To Motion To Extend Time to File Closing Papers for (30) days	48	
11/01/2011	Motion (P#48) ALLOWED by assent. (Valerie A. Brodeur, Assistant Clerk/Magistrate) Notices mailed 11/1/2011		
11/01/2011	Extended Nisi dismissal; agreement or stipulation to be filed by 12/1/2011 (D. Lloyd Macdonald, Justice)	49	
12/01/2011	Plaintiffs' assented to motion to extend time to file closing papers.	50	
12/07/2011	Motion (P#50) ALLOWED (Richard T. Moses, Justice) Notices mailed 12/7/2011		
01/06/2012	Stipulation of dismissal with prejudice, without costs	51	

Case Disposition

Disposition	Date	Case Judge
Disposed by Agreement / Settled	01/06/2012	

2004-J-0554, JOHN MELODY vs. M.B.T.A.

MA Appeals & Supreme - Suffolk (Appeals)

Suffolk (Appeals)

This case was retrieved on 04/13/2007

Header

Case Number: 2004-J-0554
Date Filed: 11/19/2004
Date Full Case Retrieved: 04/13/2007
Status: Closed 11/24/2004
Misc: (113) GLc 231, s 118, p 1; Civil

Summary

Judge(s): Berry, J.
Case Type: Civil
NOS Description: GLc 231, s 118, p 1

Participants

Litigants	Attorneys
John Melody Plaintiff/Petitioner	Linda Evans, Esquire Plaintiff/Petitioner Rodgers, Powers & Schwartz 18 Tremont Street, Suite 500 Boston, MA 02108 617-742-7010
M.B.T.A. Defendant/Respondent	Daniel S. Tarlow, Esquire Defendant/Respondent Prince, Lobel, Glovsky & Tye LLP 100 Cambridge Street Suite 2200 Boston, MA 02114 617-456-8000 Fax: 617-456-8100

Case Header

Lower Court: Suffolk Superior Court
Lower Ct Judge: Nonnie S. Burnes J.
Pet Role Below: Plaintiff
Lower Ct Number: SUCV2003-01244

Proceeding Entries

Date	Paper Number	Details
11/19/2004	#1	PETITION purs to GL c 231, s. 118 w/attach, filed by John Melody.
11/22/2004	#2	Copy of Defendant, Massachusetts Bay Transportation Authority's motion to compel vocational examination of Plaintiff filed in Suffolk Superior Court.
[illegible]	[illegible]	[illegible]

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44

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT DEPARTMENT

04 190

HAMPSHIRE ss.

SUPERIOR COURT
CIVIL ACTION
NO. 04-190

KARAN MORIN and ROBERT MORIN,

vs.

THE LANE CONSTRUCTION CORPORATION

vs.

ALL STATES ASPHALT, INC.

ORDER

Although Mass. R. Civ. P. provides for examination by a physician, while defendant's proposed examination would be by a rehabilitation counselor who is not a physician as the testimony of Dr. Thomas S. Kaye, cited with emphasis in the defendant's emergency motion, addressed Dr. Kaye's medical opinion of disability and his application of the "AMA Guidelines" (presumably the American Medical Association's Guides to Evaluation of Permanent Impairment) the application of which requires medical diagnosis and medical evaluation, which the defendant's proposed witness is not qualified to do; as the period for discovery has closed save as extended at the pre-trial conference for "supplementation of all experts;" as the proposed witness was not identified in the Joint Pre-Trial Memorandum, nor was the subject area of the witness's proposed testimony; as the said memorandum made specific references to the need to supplement the expert witness disclosures for the plaintiff to supplement their economic expert's report and their nursing expert's "Life Care Plan" for Karan

Morin; for the defendant to designate an economic expert and provide a report, dependent upon disclosure or supplementation of the plaintiff's economic expert's report, and to designate a liability expert and provide a report, and for the defendant All States Asphalt, Inc. to supplement disclosures already made by witnesses already identified; as the "emergency" characterization of the instant motion demonstrates that the identity or the area of expertise of the proposed witness were not addressed at the May 10, 2007 pre-trial conference; and as the defendant has failed to justify its failure to address the issue of raising a challenge to the degree of the plaintiff Karen Morin's disability prior to the final pre-trial conference, the case now having been pending for one month less than three years, (the Defendant's Emergency Motion for Leave to Conduct) (Vocational Rehabilitation Evaluation and Testing is DENIED).

C. Brian McDonald
Justice of the Superior Court

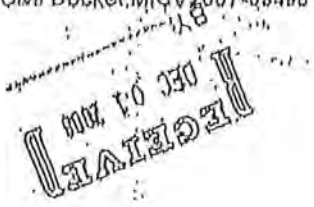
July 9, 2007

County of Middlesex
The Superior Court

Civil Docket MICV2007-03495

RE: Morrison et al v Wilson et al

TO: George F Leahy, Esquire
PO Box 15
West Boxford, MA 01885



CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 11/26/2008:

RE: Deft Harleysville's motion to order two medical examinations of plff Birgit Morrison; with supporting memorandum, affidavits of Drs Michael P Alexander and Nancy Hebben and plaintiff's opposition to motion

is as follows:

Motion (P#23) After hearing and review, the motion is Allowed in part and Denied in part. As to the IME examination by Dr. Michael Alexander, there is good cause for the examination and the defendant has specified the time, place, manner, conditions and scope of Dr. Alexander's examination. The motion is Allowed as to Dr. Alexander and the conditions requested by the Defendant and Denied as to the request for testing by Dr. Nancy Hebben the motion is Denied as Rule 35 is limited to a physician. I note that the plaintiff may well anticipate some opposition if she intends to introduce testing by her own expert. (Jane Haggerty, Justice). Notices mailed 11/26/2008

Dated at Lowell, Massachusetts this 26th day of November, 2008.

Michael A. Sullivan,
Clerk of the Courts

BY:

Michael Brennan
Assistant Clerk

Telephone: 978-453-0201

Copies mailed 11/26/2008

Disabled individuals who need handicap accommodations should contact the Administrative Office of the Superior Court at (617) 788-8130 ** [illegible]

18 Mass.L.Rptr. 301
Superior Court of Massachusetts.

James PALMER, III
v.
YOUTH OPPORTUNITIES UPHELD, INC. et al.

No. WOCV20012151A.
|
Oct. 5, 2004.

CORRECTED MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO COMPEL THE PLAINTIFF TO UNDERGO A MENTAL EXAMINATION PURSUANT TO MASS.R.CIV.P. 35(a)

AGNES, Justice.

1. Introduction

*1 This is a civil action in which the defendants, Youth Opportunities Upheld, Inc. (YOU, Inc.), Maurice Boisvert, Paul Kelleher, Michelle Hirst, Maria L. Doyle and Renee Soansaroli ("defendants") invoke Mass.R.Civ.P. 35 and seek an order to compel the plaintiff, James Palmer, III ("plaintiff") to submit to a "psychiatric examination by a physician, psychiatrist, psychologist or LICSW chosen by the defendant."[1]

[1] The text of Mass.R.Civ.P. Rule 35 is as follows: Physical and Mental Examination of Persons: 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 physician or to produce for examination the person in his 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 specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Mass.R.Civ.P. 35(a) (2004).

The facts pertinent to the resolution of the defendants' motion are not in dispute. This case involves allegations of sexual abuse of the plaintiff by third-party defendant Ronald L. Hewitt ("third-party defendant") when the plaintiff was a minor (date of birth: August 21, 1984). The alleged abuse occurred during a respite foster care stay with the third-party defendant on or about June 29, 2001. The allegations of negligence against the defendant YOU, Inc., its servants, agents and/or employees stem from YOU, Inc.'s alleged negligent approval of the third-party defendant and/or his household for respite care and/or the alleged negligent supervision of the third-party defendant.

The plaintiff claims that he has sustained emotional injuries as a result of being sexually assaulted by the third-party defendant. The plaintiff's alleged injuries include Bipolar Disorder with Psychotic Features, Post-Traumatic Stress Disorder, and suicidal ideation. The defendants have filed a motion to compel the plaintiff to submit to a "psychiatric examination by a physician, psychologist or LICSW (presumably, a reference to a "Licensed Independent Certified Social Worker") chosen by the defendants." In support of their motion, the defendants have attached portions of answers to interrogatories containing the identity of plaintiff's expert witnesses, and a general description of their anticipated testimony.

2. Discussion

A motion for an examination under Mass.R.Civ.P. 35(a) is not allowed as a matter of routine even though it is within the discretion of the court. This court recently had occasion to consider a motion for a physical examination under Mass.R.Civ.P. 35 in the context of a tort action in which the plaintiff alleged that she was injured as a result of the defendant's negligent operation of a motor vehicle, and that she suffered a herniated disk. Her treating physician reported that her medical records reflected a long history of pain syndromes, and that she suffers "intractable pain syndrome with symptoms of chronic fibromyalgia and occipital neuralgia, causing a severe headache." After discussing the applicable case law, state and federal, this court allowed the defendant to

conduct a physical examination under Mass.R.Civ.P. 35 by a licensed physician subject to the following conditions: "(1) the examination will consist of a physical examination (including the movement and manipulation of bodily parts) in the privacy of the doctor's office under conditions applicable to the care and treatment of any other patient; (2) the physician may inquire of the plaintiff about matters relating to his condition before and following the events that are the subject of this case and his treatment to date, but not about the events that led up to the incident or other questions relating to liability or comparative negligence; and (3) the physician is not permitted to conduct any diagnostic tests that involve an invasion of the plaintiff's bodily integrity such as a blood test or the placing of a scope inside the body, X-ray radiation, or offsite visits to another health care provider or medical establishment without prior approval of the court." *DaSilva v. Gagliardo*, 17 Mass. L. Rptr. 141, Worcester Superior Court No. 200202393 (December 30, 2003).

1. The "In Controversy" Requirement.

*2 In reviewing a Rule 35 motion, the court must determine whether the moving party has established that the other party's "physical or mental condition" is "in controversy." The seminal case is *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), interpreting the same language in the corresponding federal rule. The Supreme Court concluded that Federal Civil Procedure Rule 35 is not met by either conclusory allegations nor by a showing of simple relevance, *Schlagenhauf*, 379 U.S. at 118. The Supreme Court held that the "in controversy standard" imposes a stricter burden than that of mere relevance. *Id.* The Court in *Schlagenhauf* recognized that "there are situations where the pleadings alone are sufficient to meet the requirements." *Id.* at 119. When a plaintiff in a negligence action asserts mental or physical injury, [that plaintiff] places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury. *Id.*

General allegations of emotional distress, i.e. "garden variety emotional distress," do not satisfy the "in controversy" requirement, *Cody v. Marriott Corp.*, 179 F.R.D. 421, 422-23 (D.Mass.1984). However, the requirement is met where a plaintiff claims an ongoing specific mental or psychiatric injury or disorder. *Blount v. Wake Elec. Membership Corp.*, 162 F.R.D. 102, 107-08 (E.D.N.C.1993) (plaintiff's claim of personal injury placed both his physical and mental conditions in controversy). *Shepherd v. American Broad Cos., Inc.*, 151 F.R.D. 194, 212-13 (D.D.C.1993) (plaintiff's claim of Post-Traumatic Stress Disorder placed her mental condition at issue). The requirement is also usually met where the plaintiff intends to offer expert testimony supporting the claim of specific mental or physical injury. *Tomlin v. Holecek*, 150 F.R.D. 409, 411 (N.D.Ill.1994) (plaintiff's intention to call an expert witness). *Anson v. Fickel*, 110 F.R.D. 184, 186 (N.D.Ind.1986) (expert witness to be called by plaintiff).

In the case at bar, the plaintiff placed his mental condition directly in controversy by alleging in his pleadings that his current Bipolar Disorder, Post-Traumatic Stress Disorder, and suicidal ideation are the result of the alleged sexual assault for which the defendants are negligent, and thereby responsible. Moreover, the plaintiff placed his mental condition in controversy by answering interrogatories indicating that he intends to call an expert witness to testify to his mental condition. As such, the "in controversy" requirement has been met by both the plaintiff's pleadings and documentation from the discovery process.

2. "Good Cause Shown" Requirement.

Under Rule 35, a motion for mental examination is addressed to the court's sound discretion and depends upon a showing of good cause. *R.R.K. v. S.G.P.*, 400 Mass. 12, 19 (1987). In *Schlagenhauf, supra*, the Supreme Court recognized that the "good cause" requirement imposes a higher standard than the ordinary requirement of relevance on the movant and is *in addition to* the "in controversy" requirement. *Schlagenhauf*, 379 U.S. at 117-18 (emphasis added). The Court further stated that in determining whether "good cause" exists for ordering an examination that the "ability of the movant to obtain the desired information by other means is also relevant." *Id.* at 118-19.

*3 Courts have relied on this language to find that good cause for ordering an examination may be lacking if the party's mental or physical condition can be established by referring to prior examinations or other documentary evidence. *DeCrescenzo v. Maersk Container Serv. Co.*, 741 F.2d 17, 21 (2d Cir. 1984). In *DeCrescenzo*, a personal injury case, the trial court, upon remand, was charged with determining whether the prior physical examination of plaintiff was sufficient for the defendant's purposes, thereby obviating the need for an additional examination. *Id.* However, if the party to be examined has alleged an ongoing injury, a prior examination will probably not provide an adequate basis for the opposing party to evaluate the alleged condition. *Duncan v. Upjohn Co.*, 155 F.R.D. 23, 25 (D.Conn.1994). In *Upjohn*, even a voluminous production of medical records did not negate the defendant's good cause to conduct a mental examination of the plaintiff who was alleging ongoing mental harm. *Id.*

The movant "need not prove his case on the merits" nor is there a need for "an evidentiary hearing ... in all cases," but the movant "must produce sufficient information, by whatever means, so that the trial judge can fulfill his function" under the rule. *Schlagenhauf*, 379 U.S. at 119. Among the factors the courts may consider in evaluating whether good cause exists are: Whether the movant has exhausted all other means of discovery. *DeCrescenzo, supra*, 741 F.2d at 21.

Whether there are any other sources for this information or whether the examination will be the only source of evidence on the issue. *Id.*

Whether the movant already possesses such information. *Acosta v. Tenneco Oil Co.*, 913 F.2d 205, 209 (5th Cir.1990).

Whether the party to be examined will assert the condition at trial and present expert testimony of his/her own in support of the claim. *Tomlin, supra*, 150 F.R.D. at 411.

Whether the requested examination presents a risk of harm to the examinee. *Stinchcomb v. U.S.*, 132 F.R.D. 29 (E.D.Pa.1990).

The age and condition of the person to be examined. *Id.* at 30.

The fact that the party opposing the examination has provided reports of all prior examinations and medical reports does not preclude a Rule 35 examination where it is appropriate, for example, where the plaintiff's injuries are ongoing and a change in condition may have occurred. *Duncan*, 155 F.R.D. at 25.

In the case at bar, the plaintiff intends to assert his alleged mental condition at trial and present expert testimony to support his assertion. The plaintiff, though a minor at the time of the alleged sexual assault, is now an adult. Although there are other sources for the information, specifically from the plaintiff's own expert witnesses, the defendants should not necessarily be precluded from the opportunity to conduct their own examination based on the plaintiff's compliance with other discovery, such as interrogatories or requests for the production of documents.

*4 The burden to show good cause rests upon the movant, here the defendants. They have established that the plaintiff intends to make his physical and mental condition a special issue at trial, but no more. In the case at bar, the defendants have not made a sufficient showing of "good cause" to the degree necessary to order a Rule 35 examination. The defendants will need to supply the court with additional information as described above and in *Schlagenhauf*, in order for the good cause requirement to be reached.

3. Who may conduct the examination?

Under Rule 35, the examination must be conducted by a "physician." Mass.R.Civ.P. 35(a). The Rule does not define the term "physician," and thus it is not clear from the face of the rule whether examinations by any type of expert other than a physician are allowed. Lauriat, McChesney, Gordon, and Rainer, Discovery § 7.2, at 587 (49 Mass. Practice 2002). Smith and Zobel opine that it "should probably be limited to an individual licensed to practice medicine in Massachusetts." James W. Smith & Hiller B. Zobel, *Massachusetts Practice, Rules Practice, Rules 17-37* vol. 7 § 35.5, 386 (1st ed., West Pub. Co.1975)

[hereinafter Smith & Zobel, *Mass. Practice*]. Others assert that the rule should be interpreted more broadly. Lauriat, et al., Discovery, at § 7.2, at 587.

"Because the Massachusetts Rules of Civil Procedure are patterned after the Federal rules, we interpret our rules consistently with the construction given their Federal counterparts, absent compelling reasons to the contrary or significant differences in content." *Strom v. American Honda Motor Co.*, 423 Mass. 330, 335 (1996), quoting *Rollins Envtl. Servs., Inc. v. Superior Court*, 368 Mass. 174, 180 (1975) (internal quotations and citations omitted). This principle of construction applies fully when a Massachusetts Court is faced with the task of interpreting a Massachusetts rule that contains language identical to that of a federal rule after which it was patterned.[2] However, when the analogous federal rule has been amended, as in the case of Rule 35, this principle of construction does not necessarily have the same force. This is especially true if there is any indication that differences in language between a Massachusetts rule and the analogous federal rule reflect differences in policy or if the amended federal rule is in conflict with another rule, a statute, or any settled Massachusetts practice. See, e.g., *Robinson v. Prudential Ins. Co. of America*, 56 Mass.App.Ct. 244, 248-51 (2002) (court concludes that the term "medical examination," as it is used in G.L.c. 175, § 124, means an examination by a "physician" only as opposed to a nurse or nurse practitioner; "While we recognize that nurses and nurse practitioners now assume many of the duties of physicians, and at less cost, if the term "medical examination" in 124 is to be interpreted contrary to both its original meaning and its ordinary lexical definition, the change should be made by the Legislature"). Otherwise, amendments to an analogous federal rule should be regarded as persuasive evidence (though not binding authority) of how a comparable Massachusetts rule of procedure should be interpreted because of the desirability of national uniformity, particularly in a matter such as this, which is likely to involve litigants with contacts in many jurisdictions." *Strom v. American Honda Motor Co., Inc.*, 423 Mass. 330, 335 (1996). See also *Clean Harbors of Braintree, Inc. v. Board of Braintree*, 415 Mass. 876, 885 n. 8 (1993) ("We give our rules the construction given to the Federal Rules of Civil Procedure, absent compelling reasons to the contrary"); *Dinsdale v. Commonwealth*, 39 Mass.App.Ct. 926, 928 (1995) ("The Massachusetts Rules of Civil Procedure are construed in conformity with the Federal Rules of Civil Procedure absent compelling reasons to the contrary").

2 For example, in *Van Christo Advertising, Inc. v. MIA-COM/LCS*, 426 Mass. 410, 414 (1998), the Court noted that "[t]he Massachusetts Rules of Civil Procedure, adopted in 1974, were patterned on the Federal Rules of Civil Procedure, *Giacobbe v. First Coolidge Corp.*, 367 Mass. 309, 315 (1975), and the text of our rule 11(a) continues to be virtually identical to the text of its Federal analog prior to the latter's amendment in 1983. In construing our rules, we follow the construction given to the Federal rules "absent compelling reasons to the contrary or significant differences in content." *Rollins Envtl. Servs., Inc. v. Superior Court*, 368 Mass. 174, 179-80 (1975). We see no reason to depart from this principle of construction here and, in applying our rule 11(a), we shall rely on the construction given to the pre-1983 version of Fed.R.Civ.P. 11."

*5 To interpret Mass.R.Civ.P. 35(a) as limited to physical or mental examinations by a "physician" would not only be contrary to developing trends in the national law of civil procedure, but would impose restrictions on the court's discretion and perhaps expenses on the parties that are unnecessary to achieve the policy goals of the rule. It is important to consider that the Massachusetts Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." Mass.R.Civ.P. 1 (2004). Rule 35 is a "rule of practice." *O'Connor v. City Manager of Medford*, 7 Mass.App. 615, 617 (1979). Thus, it should be interpreted to secure the just, speedy, and inexpensive determination of the action. *Gilmore v. Gilmore*, 369 Mass. 598, 602 (1976). This interpretive principle suggests the wisdom of interpreting Mass.R.Civ.P. 35 in a manner that is consistent with the current federal rule.[3]

3 Of course, there may be sound reasons in any specific case why a court should order that a Rule 35(a) examination should be conducted by a physician as opposed to another licensed professional.

Until 1988, the federal rule was identical to the Massachusetts rule in limiting the examination to

physicians. In 1988, Fed.R.Civ.P. 35(a) was amended to read that a court could order a party to submit to a "physical examination by a physician, or mental examination by a physician or psychologist ..." The federal rule was amended again in 1991. The current version of Fed.R.Civ.P. 35(a) now provides that a court may order a party to submit to "a physical or mental examination by a suitably licensed or certified examiner ..." The Advisory Committee Note to this 1991 amendment to the federal rule provides that "[t]he rule was revised in 1988 by Congressional enactment to authorize mental examinations by licensed clinical psychologists. This revision extends that amendment to include other certified or licensed professionals such as dentists, or occupational therapists who are not physicians or clinical psychologists, but who may be well qualified to give valuable testimony about the physical or mental condition that is the subject of dispute."

Rule 35(a) is designed, in part, "to level the playing field" between the parties when one party chooses to place its physical or mental condition in issue in a special way. See *Ragge v. MCA/Universal*, 165 F.R.D. 605 (C.D.Cal.1995). As a discovery procedure, Rule 35(a) should be interpreted liberally to effectuate its purpose. *Lahr v. Fulbright & Jaworski, LLP*, 164 F.R.D. 196 (N.D.Texas), aff'd, 164 F.R.D. 204 (1996).

In this case, the plaintiff has not pointed out any Massachusetts authority that suggests it would be inappropriate to broaden the scope of the persons who may conduct Rule 35(a) examinations beyond physicians. Thus, in keeping with the design of Fed.R.Civ.P. 35(a), an examination of a party ordered by the court under Mass.R.Civ.P. 35(a) may be conducted by a physician or any suitably licensed or certified examiner.

4. Other procedural requirements.

Under Mass.R.Civ.P. 35(a), the movant is required to request the order only by way of a motion, upon notice to the person to be examined, and to all parties, and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. Mass.R.Civ.P. 35(a) (2004). In the case at bar, the movant has failed to make the requisite specifications to the plaintiff-the potential examinee-and to all other parties, in order to satisfy the notice requirement. These specifications need to include time, place, manner, condition, scope, and the credentials and qualifications of the proposed examiner(s). In the absence of compliance with these two procedural requirements, the court is unable to properly exercise its discretion under the rule. As such, the motion is not in compliance with the requirements of the Mass.R.Civ.P. 35(a).

5. Order.

*6 The importance of a Rule 35 examination cannot be overstated in those cases where a party has placed his or her mental or physical condition at issue. It is a powerful and valuable discovery tool. This examination may be the only real opportunity for a party to ascertain the nature, extent or even existence of the alleged injuries. An examination may provide insight to the defendant as to whether to proceed to trial or to settle.

For the above reasons, the defendants' motion to compel the plaintiff to undergo a mental examination pursuant to Mass.R.Civ.P. 35(a) is *DENIED WITHOUT PREJUDICE*. The defendant may renew the motion to compel a mental examination in accordance with this opinion.

All Citations

Not Reported in N.E.2d, 18 Mass.L.Rptr. 301, 18 Mass.L.Rptr. 339, 2004 WL 2341571

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Commonwealth of Massachusetts
County of Norfolk
The Superior Court

Civil Docket NOCV2005-00640

RE: Patterson Individually et al v Hallamore Corporation et al

TO: Andrew M Abraham, Esquire
Baker&Abraham PC
30 Rowes Wharf
Boston, MA 02110

CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 09/06/2007:

RE: Defendant Brockton Rental Service Inc.'s MOTION to compel Plaintiff to submit to vocational rehabilitation exam and testing or, in the alternative, to preclude Plaintiffs from introducing testimony at trail by Plaintiffs' Vocational expert William Burke, Ph. D. (Rec'd 8/16/2007)

is as follows:

MOTION (P#37.0) DENIED (Charles M. Grabau, Associate Justice) dated 9/5/07. Notices mailed 9/6/2007

Dated at Dedham, Massachusetts, this 6th day of September, 2007.

Walter F. Timilty,
Clerk of the Courts

BY:

Assistant Clerk

Telephone: (781) 326-1600

Copies mailed 09/06/2007

47

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, ss SUPERIOR COURT
CIV. NO. 16-0208

SON TREME, HEATHER TREME, Individually,
and as Mother and Next Friend of BELLE TREME
Plaintiffs

v

MICHAEL SHEA, WAL-MART TRANSPORTATION, LLC
and CVS PHARMACY, INC.
Defendants

ORDER ON DEFENDANTS MICHAEL SHEA AND WAL-MART TRANSPORATION, LLC'S MOTION TO COMPEL A RULE 35 EXAMINATION

In this litigation the plaintiffs asserts that on November 12, 2014, Son Treme was injured in a traffic accident where a tractor trailer operated by Shea, an employee of Walmart, collided with Mr. Treme's motor vehicle. After treatment in a medical emergence department, he obtained two prescriptions, one of which was for Percocet. However, in filling the prescription, the pharmacist at CVS, in error, gave the plaintiff Prozac. He is claiming serious and permanent injuries as a result of this sequential negligence.

A. Request for a Rule 35 Examination

Specifically, the plaintiff is claiming a traumatic brain injury, PTSD and seizures. He asserts that he has significant cognitive and emotional damage, including memory loss, trouble reading, trouble with speech and related issues.

The defendants are seeking to have Mr. Treme evaluated by Douglas P. Gibson, Psy.D. M.P. H., a clinical neuropsychologist. Dr. Gibson seeks to undertake a forensic examination that consists of an oral interview and the administration of the appropriate standardized neuropsychological tests. The examination will take one day, 9:00 a.m. to 5:00 p.m.

The plaintiffs object to this examination for two reasons. First, Mr. Treme already has participated in an examination by a psychiatrist, including cognitive testing for the

defendant and this examination is unnecessary. Second, the plaintiffs assert that an examination under Rule 35 must be done by a physician.

Regarding a second examination, the plaintiffs indicate that a second evaluation of the plaintiff is unnecessary and would potentially have deleterious effect on Mr. Treme. They also assert that a neuropsychological evaluation was previously done in 2015 in the regular course of treatment. Finally, the plaintiffs will not have a neuropsychological expert testify on Mr. Treme's behalf.

Unfortunately, I was given very little information regarding the results of the examination by the defendants' psychiatrist and why a second evaluation is now necessary. Typically, a defendant is given one examination and only under the most unusual situations would a second examination be permitted. Given that the defendants did not mention the first examination, I do not fully understand the need for a second evaluation.

More importantly, case law favors the plaintiffs regarding the need to have a physician to conduct the examination. The Single Justice decision of Justice Berry in 2004 adheres to the language in the Rule that "a physician" means a medical doctor and not a psychologist. See *Meldoy v. MBTA*, Appeals Court 04-J-5534 (2004). This ruling has been consistently, although not universally, applied in the Superior Court. I accept the precedent that reads Rule 35 strictly.

The defendants' motion for a Rule 35 examination is DENIED.

SO ORDERED

Associate Justice, Superior Court

5/25/20
Date

6 Mass. Prac. Rules Practice § 35.5 (2d ed.)

Massachusetts Practice Series TM October 2019 Update

Rules Practice

James W. Smith[a0], Hiller B. Zobel[a1], Pocket Part by James W. Smith, Hiller B. Zobel

Rules Of Civil Procedure

V. Depositions And Discovery

Rule 35. Physical and Mental Examination of Persons

Authors' Comments

§ 35.5 Conditions of examination

Rule 35 authorizes an examination only by "a physician". Although the rule nowhere defines the term, it should probably be limited to an individual licensed to practice medicine in Massachusetts, unless the examination is to take place elsewhere. The order should specify, unless the parties can agree, the place and time of the examination. If the person to be examined resides outside of Massachusetts, the court may consider ordering the examination to take place where the person lives, bearing in mind the words of a great trial judge (and experienced trial lawyer) that an out-of-state physician "as a future witness would constitute a real handicap to the [examining party and that] it is an imposition on a Massachusetts physician, to which most will not voluntarily submit even if adequately compensated, to go to [another state] simply for an examination." [1]

The court may, either specifically or generally, authorize the examining physician to conduct tests, including psychological tests, and may, in its order, determine which if any individuals may be present during the examination. Routinely, courts allow a person undergoing examination to bring a supporting physician to the place of the examination. Less usually, an attorney may also attend. [2] Normally, a lawyer would neither add to the medical aspects of an examination nor effectively criticize it. But it is true that as part of an examination, a physician is entitled to elicit information concerning the patient's history. To ensure that such inquiry does not pass the delicate line between medical history and an analysis of liability, an attorney's presence may be helpful.

Rule 35 does not specifically limit the number of physical examinations. In an appropriate case, therefore, a court may order a battery of examinations by different specialists, if the circumstances demonstrate good cause. Similarly, after a party has obtained one physical examination, nothing in Rule 35 prevents the court from ordering a subsequent examination by a physician of the same specialty, so long as the application for the additional examination evidences the requisite good cause.

Footnotes

a0	Late Professor of Law, Boston College Law School.
a1	Associate Justice, Massachusetts Superior Court, Retired.
1	Warren v. Weber & Heidenthaler, Inc., 134 F.Supp. 524, 525 (D.Mass.1955), per Aldrich, J.
2	Green v. Dolan, 369 Mass. 959, 336 N.E.2d 908 (1975) (rescript) (attorney's presence prohibited).

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49A Mass. Prac., Discovery § 9:3

Massachusetts Practice Series TM | July 2021 Update

Discovery
Honorable Peter M. Lauriat[a0], S. Elaine McChesney[a1], William H. Gordon[a2], Andrew A. Rainer[a3]

Chapter 9. Physical and Mental Examinations of Persons

A. Commentary

§ 9:3. Physical and mental examination—Generally

In practice, mental and physical examinations are generally conducted as a result of stipulations between the parties.[1] Mass. R. Civ. P. 35 exists for those instances where the parties are unable to agree whether such an examination should occur or on the parameters of the examination.[2]

Rule 35 contemplates a three-step process: a motion, a showing of good cause, and an order of the court. Rule 35 permits an examination where the mental or physical condition of a party (or person in the custody or under the legal control of a party) is "in controversy";[3] however, permission must be given by order of a court, and only on motion "for good cause shown," with notice to the person to be examined and to all parties, and with specification of the time, place, manner, conditions and scope of the examination and the person or persons by whom the examination is to be made.[4]

A party is not entitled to an examination unless a dispute arises as to the physical or mental condition of another party or an individual controlled by that party, i.e., the "in controversy" requirement of Mass. R. Civ. P. 35. Ordinarily, where a plaintiff places his own condition directly in issue, such as in a personal injury action, the other party is entitled to request an examination under this rule. The same is also true where a party bases a defense on its own condition, such as an insanity defense,[5] a claim of incapacity or incompetency, or a defense that the defendant did not commit or was physically incapable of the act of which he is accused.[6] Where one party places another party's condition at issue, however, such as where one co-defendant alleges that another co-defendant caused an accident due to physical and mental impairment, the moving party has an affirmative burden to come forward with a showing that the condition is "in controversy" and that there is "good cause" to order an examination.[7] Rule 35 has also been applied to secure the taking of samples of bodily fluids or buccal swabs, such as in efforts to secure materials for DNA testing.[8] Generally speaking, courts will apply Rule 35's requirements that the specimen sought be clearly "relevant" to a "claim" in the case as balanced against the intrusion on the privacy of the person from whom the sample is taken.[9]

A party seeking to conduct a physical or mental examination must move for a court order. The rule states that "the court in which the action is pending *may* order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control."[10] Whether to grant such an order "is addressed to the court's sound discretion and depends upon a showing of good cause."[11] Rule 35 "requires discriminating application by the trial judge, who must decide … whether the party requesting a mental or physical examination has adequately demonstrated the existence of the Rule's requirements."[12]

The importance of a Rule 35 medical examination cannot be overstated in those cases where a party's physical or mental condition is truly at issue. This examination may be the only real opportunity a party has to ascertain the existence and true extent of the other party's claimed injuries. The Rule 35 examination is a valuable tool not only for trial preparation purposes but also

for evaluation of the case. It may provide the basis for a decision by a defendant whether to proceed to trial or whether to settle the case and, if so, for what amount. The threat of a Rule 35 medical examination may also be very powerful. Some claimants, when faced with a Rule 35 motion, will voluntarily dismiss or modify their claims in order to avoid such an examination.

Whether the request for an independent medical examination is deemed "fact discovery" or "expert discovery" depends on the facts and circumstances of the particular case, and counsel must take care that its request for such an examination be made within the applicable scheduling order deadlines.[13] Courts that treat Rule 35 examinations as discovery devices tend to look unfavorably on requests for IMEs outside the discovery deadlines.[14]

Some courts analyze this issue (whether a Rule 35 examination can be had outside the discovery deadlines) under the "good cause" prong of Rule 35, holding that "good cause" requires the movant to demonstrate that it has been diligent in attempting to meet deadlines and that it has a good explanation for its delay. If good cause is shown, the examination is allowed even though the discovery deadline has passed.[15] However, absent good cause, an examination request made outside the discovery deadline may be denied.[16] Rule 35 itself contains no deadline for when a request for an examination must be made, other than to state the action must be "pending."

In the federal courts, there is further inconsistency in how the courts deal with the Rule 26 expert disclosure deadline and the timing of a Rule 35 examination and report, with some courts treating the two rules as completely independent, and other courts applying the Rule 26 expert deadlines to the Rule 35 reports.[17] The problem is that if the examining party wishes to call the examining physician as a testifying expert at trial, then that expert's report, i.e., the Rule 35 report, must be produced by the Rule 26 deadline. Given the varying approaches to this issue, the prudent approach is to assume that a Rule 35 examination is subject to the Rule 26 deadline for expert designation unless the scheduling order is otherwise clear on the issue. In any case, where a Rule 35 examination may be a possibility, counsel is well advised to seek modification of any scheduling order at the outset of the case to address the issue, or to otherwise seek clarification from the court.

Footnotes

a0 Associate Justice, Massachusetts Superior Court.

a1 Of The Massachusetts Bar.

a2 Of The Massachusetts Bar.

a3 Of The Massachusetts Bar.

1 *See* § 9:27: Stipulation as to Examination by Physician.

2 A medical examination may also be ordered pursuant to a cooperation clause in an insurance contract, even in the absence of Rule 35 "good cause." Townsley v. GEICO Indem. Co., 2013 WL 3279274, *3-4 (W.D. Wash. June 22, 2013). Conversely, where the insurance contract provided only for physical examinations and not mental examinations, one court did not find that a mental examination of plaintiff was required under Rule 35 because the contract provided otherwise. *See* HSK v. UnumProvident Corp., 2013 WL 5310204, *2 (D. Md. Sept. 19, 2013) (granting summary judgment for plaintiff on contract interpretation issue, holding that plaintiff would not be denied benefits for failure to cooperate based on refusal to submit to a mental examination).

3 An in-depth discussion of the "in controversy" requirement is found at § 9:8 of this Chapter.

4 Mass. R. Civ. P. 35(a).
See Doe v. Senechal, 431 Mass. 78, 81, 725 N.E.2d 225, 228-229 (2000) (discussion of nature and scope of Mass. R. Civ. P. 35); Dasilva v. Gagliardo, 17 Mass. L. Rptr. 141, 2003 WL 23094879 (Mass. Super. Ct. 2003) (Agnes, J.) (discussion of standard, limitations, and procedure for Rule 35 examinations).
See also McDaniel v. Burlington Coat Factory of Florida, LLC, 2017 WL 951741, *1 (S.D. Fla. 2017) (defendant cannot unilaterally and without court order schedule a physical examination of another party).

5 Schlagenhauf v. Holder, 379 U.S. 104, 119, 85 S. Ct. 234, 243, 13 L. Ed. 2d 152, 9 Fed. R. Serv. 2d 35A.1, Case 1 (1964) (citing Richardson v. Richardson, 124 Colo. 240, 236 P.2d 121 (1951)).

6 *See generally* Doe v. Senechal, 431 Mass. 78, 84, 725 N.E.2d 225, 236 (2000) (defendant ordered to submit to Rule 35 paternity test where, in a civil action for assault and battery resulting in pregnancy of minor, defendant claimed he could not possibly be the father of the child).

7 *See* Schlagenhauf v. Holder, 379 U.S. 104, 119, 85 S. Ct. 234, 243, 13 L. Ed. 2d 152, 9 Fed. R. Serv. 2d 35A.1, Case 1 (1964). *See also* §§ 9:8, 9:9, *infra*. *See generally* Com. v. Poissant, 443 Mass. 558, 823 N.E.2d 350 (2005) (examination of sexually dangerous person pursuant to M.G.L. c. 123A, § 13(d)).

8 *See* D'Angelo v. Potter, 224 F.R.D. 300, 302-303 (D. Mass. 2004) (citing McGrath v. Nassau Health Care Corp., 209 F.R.D. 55 (E.D.N.Y. 2002)), for a comprehensive review of the law as to whether a litigant in a civil case can be compelled to provide a sample for DNA testing.

In Ashby v. Mortimer, 329 F.R.D. 650 (D. Idaho 2019), plaintiffs' daughter discovered through a notification from Ancestry.com that her DNA sample matched that of the defendant doctor and predicted a parent-child relationship between the two. The daughter had been conceived through artificial insemination, with her father's sperm supposedly mixed with that of an anonymous donor. The parents and the daughter then sued defendant doctor, who had performed the procedure, alleging that he had used his own sperm to inseminate the mother, without disclosure of same. The plaintiffs requested that the doctor submit to a DNA test (buccal cheek swab) to prove or disprove paternity. By denying paternity, the doctor placed paternity in controversy, and the DNA test was ordered under Rule 35. Good cause was shown by the Ancestry.com report which was a reasonable basis for belief that defendant was the biological father, and there was no other way of proving the issue than through DNA testing.

9 *See* Sacramona v. Bridgestone/Firestone, Inc., 152 F.R.D. 428, 27 Fed. R. Serv. 3d 929 (D. Mass. 1993) (court denied request to compel a blood test to determine if a plaintiff had AIDS where only reason advanced by defendant for such test was to argue that future damages should be reduced if plaintiff had a shortened life expectancy; court found that relevance of the blood test to the cause of action was “too attenuated”).

Fed. R. Civ. P. 35 has also been employed to obtain an autopsy where the decedent's physical condition was at issue. *See* Jack v. Asbestos Corporation Ltd., 2017 WL 4838397, *2–3 (W.D. Wash. 2017) (autopsy of decedent ordered pursuant to Rule 35 where decedent was a plaintiff at time of death claiming injuries from asbestos exposure; holding that when Rule 35 is used to order an autopsy, the moving party must show that decedent's physical condition was in controversy and that an autopsy is the most medically reasonable method considering the reasonable medical alternatives).

10 *See* Mass. R. Civ. P. 35(a) (emphasis added).

See also McDaniel v. Burlington Coat Factory of Florida, LLC, 2017 WL 951741, *1 (S.D. Fla. 2017) (defendant cannot unilaterally and without court order schedule a physical examination of another party).

11 R.R.K. v. S.G.P., 400 Mass. 12, 19, 507 N.E.2d 736, 740 (1987).

12 Schlagenhauf v. Holder, 379 U.S. 104, 118, 85 S. Ct. 234, 243, 13 L. Ed. 2d 152, 9 Fed. R. Serv. 2d 35A.1, Case 1 (1964).

13 “The law in this area does not appear to be well settled. Whether IMEs are fact or expert witness discovery certainly could influence the outcome of this dispute. Perhaps IMEs are best described as hybrid, both fact and expert witness discovery, depending on which view one finds most persuasive.” Lopez v. City of Imperial, 2014 WL 232271, *2-3 (S.D. Cal. Jan. 21, 2014) (allowing defendants to conduct IME of plaintiff, giving defendants “the benefit of the doubt” due to the lack of clarity as to whether IMEs are fact or expert discovery, but stating that the court tends to agree that if the IME examiner will offer opinions and conclusions regarding the objective facts derived from examination, the IME and the IME report is expert discovery and the timing of such IME is dictated by the terms of the scheduling order regarding expert witness discovery).

In Rowland v. Paris Las Vegas, 2015 WL 4662032, *3 (S.D. Cal. Aug. 6, 2015), the court noted that “there is no uniform consensus among federal district courts as to whether Rule 35 should be read in conjunction with, or independently of, the expert witness disclosures of” Fed. R. Civ. P. 26, and surveyed the varying approaches taken by different federal courts. Where the proposed IME clearly falls within the realm of expert discovery, but defendants failed to move for a Rue 35 order until after the expert discovery deadline, the request was untimely. 2015 WL 4662032, *4. However, the court found good cause because

of "changed circumstances," e.g., new medical records, change in plaintiff's medical condition, and allowed the examination. 2015 WL 4662032, *4-5.

See generally, de La Cruz v. Wells, 2020 WL 1812023, *1-2 (S.D. Miss. 2020) (defendants would be allowed to supplement expert disclosures after deadline where court granted defendants' motion to take a Rule 35 examination out of time, plaintiff did not identify her treating neuropsychiatrist until the expert designation deadline, plaintiff identified no prejudice, and the supplemental report was disclosed four months prior to trial); Nazar v. Harbor Freight Tools USA Inc., 2020 WL 4730973, *3 (E.D. Wash. 2020) (recognizing split among district courts, court granted defendant's motion to extend the expert disclosure deadlines for good cause, to accommodate the Rule 35 examination); Alvarado v. Northwest Fire District, 2020 WL 2199240, *1-3 (D. Ariz. 2020) (recognizing the split in authority as to whether a Rule 35 examination must be made before the deadline for expert designations, court analyzed the issue under Rules 16 and 26 as a request to modify a scheduling order for good cause and, under that standard, allowed an extension to both parties to conduct Rule 35 examinations); Nguyen v. Regents of the University of California, 2018 WL 6112617, *5 n.3 (C.D. Cal. 2018) (noting split among courts as to the proper timing of a Rule 35 request and the interplay between Rule 35 and the Rule 26 expert disclosure deadlines, but deferring decision on the issue); Seyfang v. DreamHome Restoration, LLC, 2018 WL 1701970, *3–4 (D. Wyo. 2018) (discussing split among the federal courts in views as to the relationship between Rule 35 and Rule 26 and emphasizing need for courts to be flexible and fair where the federal rules do not provide guidance to practitioners); Lambert v. Liberty Mut. Fire Ins. Co., 2016 WL 3193252, *2 (D. Ariz. June 9, 2016) (generally, treating physicians are percipient witnesses who need not provide a detailed report under Rule 26(a)(2)(B) as long as his/her expert opinion is formed during the course of treatment, but if the treating physician is to testify as an expert, the expert must nonetheless be disclosed under Rule 26(a)(2)(C)).

14 *See, e.g.,* Gonzales v. Marshall University Board of Governors, 2019 WL 1560887 (S.D. W. Va. 2019) ("When the independent medical examination is performed for the purpose of providing, developing, or supplementing expert opinions, then courts tend to agree that the witness and report are subject to the Rule 26(a)(2) deadlines"; denying defendant's Rule 35 motion because it was brought well past the deadlines for filing expert reports and for serving discovery requests, and defendant offered no good cause for extending deadlines); Bryant v. State Farm Mutual Automobile Insurance Company, 2018 WL 3869981, *1 (M.D. La. 2018) ("As a discovery tool, Rule 35 examinations are subject to the court's discovery deadlines …," and defendant's motion for a Rule 35 examination was denied when filed after expiration of the discovery deadline); Stratford v. Brown, 2018 WL 4623656 (S.D. W. Va. 2018) (Rules 26 and 35 act in tandem when determining whether to permit a Rule 35 examination requiring subsequent disclosure of a related expert report; denying defendant's request for Rule 35 examination made after expiration of discovery and expert disclosure deadlines); Wormuth v. Lammersville Union School District, 2017 WL 3537257, *2 (E.D. Cal. 2017) (denying Rule 35 examination after close of discovery as set forth in scheduling order because "all discovery" includes Rule 35 motions, but noting division among courts as to whether Rule 35 examinations are governed by the Rule 26(a)(2) deadlines); Garayoa v. Miami-Dade County, 2017 WL 2880094, *4–5 (S.D. Fla. 2017) (Rule 26's expert deadlines and Rule 35 must be read in conjunction; court granted plaintiff's motion to compel documents to provide Rule 35 reports and related documents by the close of the fact discovery deadline so that plaintiff had the report in his possession in advance of the deadline for expert disclosures); In re Harper, 2016 WL 7031883, *2 (M.D. La. 2016) (denying motion for Rule 35 examination as untimely when filed five months after the close of discovery because "Rule 35 examinations are subject to the Court's discovery deadlines"); Doe v. Town of Hopkinton, 2016 WL 6905373, *1–2 (D. Mass. 2016) (Talwani, J.) (where defendants filed their Rule 35 motion for plaintiff's examination after receipt of plaintiff's expert report and a deposition of that expert, over four months after discovery closed, defendants' Rule 35 motion was untimely and defendants failed to show good cause; court did, however, extend the deadline for rebuttal expert disclosures and depositions); Evans v. Dart Transit Co., 2015 WL 3617764, *2-3 (N.D. Ind. June 9, 2015) ("Rule 35 examinations are a discovery device," and defendants' motion for an examination of the plaintiff was untimely where that request implicitly requested an extension of the discovery deadline and defendants could not demonstrate excusable neglect for their delay in requesting the examination, especially where no request for an extension was made prior to the issuance of the defendants' experts' reports); Goin v. USA, 2015 WL 1577771, *2 (S.D. Ill. Apr. 2, 2015) (Denying defendants' request for plaintiff's Rule 35 examination where, even though plaintiff had identified a new treatment associated

with the original injury, the discovery deadline had expired. Defendants were aware from the outset that plaintiff had claimed the injury at issue, but defendants failed to seek a Rule 35 examination and chose to rely solely on their expert; but defendants were allowed to depose plaintiff's doctor about the new treatment.).

15 *See, e.g.,* McCarty v. MVT Services, LLC, 2019 WL 1028534 (W.D. Tex. 2019) (allowing defendant's Rule 35 motion, even though brought after Rule 26(a)(2) expert disclosure deadlines had expired, where plaintiff had surgery after those deadlines expired; noting that both Rules 26(a)(3) and (e)(2) allow for supplementation where circumstances so warrant); Does 1-5 v. City of Chicago, 2019 WL 2076260 (N.D. Ill. 2019) (although defendant did not file its Rule 35 motion until the day fact discovery closed, the deadline for rebuttal expert disclosure had not yet lapsed and plaintiffs had only recently named an expert psychologist; therefore, good cause existed for allowing the examination even though disclosure deadline might technically have been missed); Narayan v. Compass Group USA, Inc., 2019 A.D. Cas. (BNA) 18341, 2019 WL 265109 (E.D. Cal. 2019) (allowing Rule 35 examination where defendant originally requested examination before expiration of the close of fact discovery but plaintiff refused to comply); McConathy v. Wal-Mart Louisiana, LLC, 2018 WL 5023344 (W.D. La. 2018) (allowing supplemental report by expert beyond disclosure deadline where, after plaintiff's examination, expert reviewed additional medical records containing statements contrary to statements made by plaintiff during her examination about pre-existing injury); Gibson v. Jensen, 2017 WL 2982952, *3 (D. Neb. 2017) (allowing Rule 35 examination where request was made prior to close of discovery but limiting examination to the expert opinions and theories previously advanced because the Rule 35 motion was made after expiration of the expert report deadline); Williams v. Gyrus ACMI, LP, 2016 WL 6892291, *1 (N.D. Cal. 2016) (expert discovery deadline would be extended upon defendants' request where defendants sought plaintiff's Rule 35 examination in a timely manner but plaintiff failed to cooperate before expiration of the expert discovery deadline); Dillon v. Auto-Owners Insurance Company, 2014 WL 4976315, *2 (D. Colo. Oct. 6, 2014) (citing cases); Denny v. Wingspan Portfolio Advisors, LLC, 118 Fair Empl. Prac. Cas. (BNA) 1133, 2013 WL 2434572, *2 (N.D. Tex. June 5, 2013) (overruling plaintiff's objection that defendant's request for mental examination was untimely given particular circumstances of case); Haymer v. Countrywide Bank, FSB, 2013 WL 657662, *3 (N.D. Ill. Feb. 22, 2013) (defendant's request for examination was timely, given that trial date was not yet established, examination could be accommodated, and request was filed within a reasonable time in light of the discovery schedule in the case); Large v. Regents of University of California, 2012 WL 3647485, *2 (E.D. Cal. Aug. 27, 2012) (good cause existed to extend discovery deadlines to allow mental examination of plaintiff because new diagnosis changed circumstances of case); Silva v. Mercado Food Enterprise, Inc., 2012 WL 174926, *5 (E.D. Cal. 2012) (noting court's power to alter scheduling deadlines, especially where scheduling order was ambiguous regarding when a request for a Rule 35 examination should be made, and the general principle is that Rule 35 is to be construed liberally in favor of discovery); Walti v. Toys R Us, 2011 WL 4715198 (N.D. Ill. 2011) (request was timely made after expert disclosures where need for examination was not clearly foreseeable before close of fact discovery); Minnard v. Rotech Healthcare Inc., 2008 WL 150513 (E.D. Cal. 2008) (request timely made after plaintiff's expert disclosures made apparent need for such examination).

16 *See, e.g.*, Gonzales v. Marshall University Board of Governors, 2019 WL 1560887 (S.D. W. Va. 2019) ("When the independent medical examination is performed for the purpose of providing, developing, or supplementing expert opinions, then courts tend to agree that the witness and report are subject to the Rule 26(a)(2) deadlines"; denying defendant's Rule 35 motion because it was brought well past the deadlines for filing expert reports and for serving discovery requests, and defendant offered no good cause for extending deadlines); Bryant v. State Farm Mutual Automobile Insurance Company, 2018 WL 3869981, *1 (M.D. La. 2018) ("As a discovery tool, Rule 35 examinations are subject to the court's discovery deadlines …," and defendant's motion for a Rule 35 examination was denied when filed after expiration of the discovery deadline); Stratford v. Brown, 2018 WL 4623656 (S.D. W. Va. 2018) (Rules 26 and 35 act in tandem when determining whether to permit a Rule 35 examination requiring subsequent disclosure of a related expert report; denying defendant's request for Rule 35 examination made after expiration of discovery and expert disclosure deadlines); Miksis v. Howard, 106 F.3d 754, 758, 46 Fed. R. Evid. Serv. 502, 36 Fed. R. Serv. 3d 1161 (7th Cir. 1997) (request for examination after close of fact discovery ruled untimely where plaintiff's medical condition, and need for expert testimony had been apparent from outset of case); Carter v. Hornbeck Offshore Transp., LLC, 2013 WL 6388638, *4 (E.D. La. Dec. 6, 2013) (examination denied where request

was not made until a month after the deadline for all pretrial motions expired and where the request was for a third examination of plaintiff); Magnuson v. Jackson, 2012 WL 2061919, *2 (N.D. Okla. June 5, 2012) (defendant's request for medical examination was untimely where made after deadlines for expert identification and reports had passed and defendant offered little to justify reopening expert discovery shortly before trial, and defendant further failed to conduct physical examination before close of general discovery deadline).

17 *See* Zumstein v. Boston Scientific Corp., 2014 WL 7236406, *3 (S.D. W. Va. Dec. 17, 2014) (surveying differences in federal courts in determining whether Rules 26 and 35 are intended to be read independently or in conjunction with each other—in which case Rule 35 reports are subject to Rule 26(a)(2)'s disclosure requirements—and concluding that when the independent medical examination is performed for the purpose of providing, developing, or supplementing expert opinions, courts tend to agree that the witness and the report are subject to the Rule 26(a)(2) deadlines). *See also* Diaz v. Con-Way Truckload, Inc., 279 F.R.D. 412 (S.D. Tex. 2012), for an excellent discussion of the widely varying positions of the federal courts on this topic.

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physician noun

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Definition of *physician*

1 : a person skilled in the art of healing

specifically : one educated, clinically experienced, and licensed to practice medicine as usually distinguished from surgery

CERTIFICATE OF COMPLIANCE WITH RULE 16K

I, Marsha Kazarosian, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but to limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. App. P. because it is produced in the monospaced font Times New Roman at size 14 characters per inch, and contains a total of 4,659 non-excludible words.

/S/ Marsha V. Kazarosian
Marsha V. Kazarosian

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2021, a true copy of the above document was served upon all counsel of record in the underlying matter either electronically through the efileMA system to all Registered User Counsel of Record, or by regular mail or email to all Non-Registered Counsel of Record on this date, to wit: Mark Lavoie, Esq. and Matthew Mastromauro, Esq., Hacking & Lavoie, LLC, Counsel for Defendant Shawmut Woodworking & Supply, Inc.; Michael J. Mazurczak, Esq. and Matthew Welnicki, Esq., Melick & Porter, LLP, Counsel for Lanco Scaffolding, Inc. and Kevin G. Kenneally, Esq., Janet R. Barringer, Esq., and William Gildea, Esq., Freeman Mathis & Gary, LLP, Counsel for Haven Restoration, Inc.

/S/ Marsha V. Kazarosian
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