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SJC-13152

CAROLE A. ASHE, coconservator,¹ & another² vs. SHAWMUT WOODWORKING & SUPPLY, INC., & another³; HAVEN RESTORATION, INC.,
third-party defendant.

Suffolk. December 8, 2021. - April 15, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker,
& Wendlandt, JJ.

Psychologist. Rules of Civil Procedure. Words, "Physician."

Civil action commenced in the Superior Court Department on March 6, 2017.

A pretrial motion to compel a neuropsychological examination was heard by Heidi E. Brieger, J.

A proceeding for interlocutory review was heard in the Appeals Court by Mary T. Sullivan, J. The Supreme Judicial Court granted an application for direct appellate review.

Marsha V. Kazarosian (Shawn P. O'Rourke, Walter A. Costello, Jr., & Marc A. Moccia also present) for the plaintiffs.

Mark B. Lavoie for Shawmut Woodworking & Supply, Inc.

¹ Of Thomas M. Ashe.

² Jessica M. Ashe, as coconservator of Thomas M. Ashe.

³ Lanco Scaffolding, Inc.

Matthew C. Welnicki, for Lanco Scaffolding, Inc., was present but did not argue.

Lee Dawn Daniel, Thomas R. Murphy, Kevin J. Powers, & Paul R. Johnson, for Massachusetts Academy of Trial Attorneys, amicus curiae, submitted a brief.

Kyle E. Bjornlund & Grant D. King, for Massachusetts Defense Lawyers Association, amicus curiae, submitted a brief.

BUDD, C.J. A court may order a party whose mental or physical condition is at issue to "submit to a physical or mental examination by a physician . . . for good cause shown." Mass. R. Civ. P. 35 (a), 365 Mass. 793 (1974). Here, in connection with an appeal of such an order in a negligence suit, we are asked whether a neuropsychologist falls within the definition of "physician" under rule 35. We conclude that the answer is yes and affirm the motion judge's decision to allow the motion for examination.⁴

Facts and prior proceedings. Thomas M. Ashe suffered serious and permanent injuries as a result of a work-related accident that the defendants allegedly caused. Ashe's coconservators, the plaintiffs in the litigation, sued multiple parties for negligence, including Shawmut Design & Construction, Inc. (Shawmut), the general contractor for the worksite.

During discovery, the plaintiffs produced records demonstrating Ashe's physical and cognitive deficiencies based

⁴ We acknowledge the amicus briefs submitted by the Massachusetts Academy of Trial Attorneys and the Massachusetts Defense Lawyers Association.

on an examination conducted by Jeffery B. Sheer, Ph.D., a board-certified clinical neuropsychologist.⁵ Shawmut sought to have Ashe examined by its expert, Karen Postal, Ph.D., also a board-certified clinical neuropsychologist, because, after a review of the records, Postal disagreed with Sheer's conclusions regarding Ashe's deficits.

When the plaintiffs declined to make Ashe available, Shawmut filed a motion pursuant to rule 35 seeking a court order requiring Ashe to submit to a neuropsychological examination. The plaintiffs opposed the motion, arguing that rule 35, which applies to examinations performed by a "physician," precluded examination by Postal. After a hearing, the motion judge granted the order for examination, and the plaintiffs appealed. We allowed the plaintiffs' application for direct appellate review.

Discussion. The plaintiffs argue that the judge's order was improper because Postal is not a physician within the plain meaning of that term as it appears in rule 35, and because

⁵ Clinical neuropsychology is a specialty practice of psychology that uses unique methods and assessments in conjunction with knowledge about the relationship between the brain and behavior to evaluate, diagnose, and treat individuals with known or suspected neurological disease or injury. P.M. Kaufmann, Admissibility of Expert Opinions based on Neuropsychological Evidence 70 (2011).

Shawmut did not establish good cause for the examination.⁶ For the reasons that follow, we disagree.

1. The meaning of "physician" as it appears in rule 35.

Although the plaintiffs contend that the definition of "physician" does not include neuropsychologists, we are not convinced that the term is meant to be read as narrowly as the plaintiffs suggest. Because "physician" is not defined in rule 35, we may look to its "usual and accepted meaning[], provided that [it is] consistent with" the purpose of the rule, as is customary when construing statutes. Seideman v. Newton, 452 Mass. 472, 477-478 (2008). The dictionary definition of "physician" is a "person skilled in the art of healing" or "a doctor of medicine." Webster's Third New International Dictionary 1707 (2002). Thus, we must determine which definition of "physician" is most appropriate in the context of rule 35. See Ortiz v. Examworks, Inc., 470 Mass. 784, 788 (2015). In Ortiz, we similarly considered the meaning of "physician" as it appears in G. L. c. 90, § 34M, the Commonwealth's no-fault automobile insurance "personal injury

⁶ The plaintiffs also contend that Shawmut failed to comply with the rule 35 notice requirement. However, many of the details comprising the rule 35 notice, including the date and time of the examination, inevitably require collaboration between the parties (and perhaps the judge). As of this date, the plaintiffs have been opposed to any such examination, and thus have been unwilling to discuss conditions under which one might take place.

protection" (PIP) statute. There, too, we interpreted the term broadly in line with the PIP statute's purpose to "provide an inexpensive and uncomplicated procedure for obtaining compensation for injuries sustained in automobile accidents." Id., quoting Dominguez v. Liberty Mut. Ins. Co., 429 Mass. 112, 115 (1999).

Neuropsychologists conduct assessments to "evaluate, diagnose, and treat individuals with known or suspected neurological disease and/or injury." P.M. Kaufmann, Admissibility of Expert Opinions Based on Neuropsychological Evidence 70 (2011). Thus, although not a medical doctor,⁷ a neuropsychologist is a "person skilled in the art of healing" and is, indeed, a "physician" pursuant to that definition of the

⁷ We note that similar to medical doctors, neuropsychologists in the Commonwealth must be certified by a board of registration after meeting certain moral, ethical, training, and academic requirements to receive a license. See G. L. c. 112, §§ 119, 120 (outlining prerequisites for licensure, including receiving doctoral degree in psychology; completing two years of supervised work, teaching, or research; and achieving passing result for board-designated examination). In addition, the American Board of Clinical Neuropsychology, the board certification body for clinical neuropsychology, requires completion of a minimum of two years in a formal postdoctoral residency program dedicated in part to clinical neuropsychology and additional examinations before a candidate can be certified as a clinical neuropsychologist. American Board of Clinical Neuropsychology, Becoming Certified, Procedures for Obtaining Board Certification in Clinical Neuropsychology, <https://theabcn.org/becoming-certified> [<https://perma.cc/98UL-WFNB>].

word.⁸ Webster's Third New International Dictionary 1707. See Commonwealth v. Scott, 464 Mass. 355, 358 (2013) (term with multiple meanings may have only one within context of statute).

Further, in considering the meaning of "physician" as it is used in rule 35, we are reminded that it is incumbent on us to interpret our rules of civil procedure in a "manner which will accomplish their obvious purpose and objective." Giacobbe v. First Coolidge Corp., 367 Mass. 309, 315 (1975). The Massachusetts Rules of Civil Procedure are patterned on the Federal Rules of Civil Procedure and, like the latter, they are meant to be "construed . . . to secure the just, speedy, and inexpensive determination of every action." Mass. R. Civ. P. 1, as amended, 474 Mass. 1402 (2016). See Rollins Env'tl. Servs., Inc. v. Superior Court, 368 Mass. 174, 179-180 (1975) (we construe Massachusetts Rules of Civil Procedure in line with Federal rules "absent compelling reasons to the contrary or significant differences in content").

⁸ The plaintiffs also note that G. L. c. 112, § 8A, provides that "[n]o person may, directly or indirectly, use the title 'physician' . . . 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 [§] 2." However, G. L. c. 112, § 2, deals with the prerequisite qualifications for individuals seeking registration as a physician before the Commonwealth's board of registration in medicine. It does not implicate the question whether the term as it is used in a discovery rule includes examinations by neuropsychologists. See Ortiz, 470 Mass. at 792.

The purpose of rule 35 in particular is to provide a defendant with an equal opportunity to evaluate any injuries the defendant is alleged to have caused. See, e.g., Looney v. National R.R. Passenger Corp., 142 F.R.D. 264, 265 (D. Mass. 1992) ("purpose of Rule 35, Fed. R. Civ. P., [seen] as providing a level playing field as between the parties"). Here, after the defendants received a report of Ashe's condition from the plaintiffs' neuropsychologist, it seems obvious that the defendants may invoke rule 35 to give them an opportunity to have their own neuropsychologist examine Ashe so as to "level [the] playing field." Id. We thus conclude that neuropsychologists are physicians for the purposes of rule 35.

2. Good cause. The plaintiffs additionally argue that Shawmut failed to demonstrate good cause for the rule 35 examination. However, during the hearing on the motion, Shawmut's counsel explained that the conclusions that the plaintiffs' neuropsychologist reached may have been skewed by a failure to consider Ashe's visual impairment. Shawmut thus sought to have its own neuropsychologist examine Ashe to provide a "level playing field" on which to evaluate the conclusions reached by the plaintiffs' expert. The judge aptly noted that as Ashe's cognitive deficits are the central issue in the case, she could not "imagine a better cause." We agree.

Conclusion. We conclude that the judge did not abuse her discretion by allowing Shawmut's motion for an order requiring Ashe to submit to an examination by Postal. See Doe v. Senechal, 431 Mass. 78, 84, cert. denied, 531 U.S. 825 (2000) (discovery rulings reviewed for abuse of discretion).⁹ The order allowing Shawmut's rule 35 motion is affirmed.

So ordered.

⁹ We ask this court's standing advisory committee on the rules of civil procedure to consider whether an amendment or other guidance to rule 35 is in order consistent with this opinion.