Serious Injuries - When the Doctor Must Testify

RULE 35 & MEDICAL EXAMINATIONS

Neb. Disc. R. 35, like *F.R. Civ. P.* 35, permits discovery through a medical examination of a party under carefully defined circumstances. The Rule, seldom the subject of appellate litigation, may be dominated by more myths and misperceptions than other discovery tools. Rule 35 does not provide for independent medical examinations or independent medical examiners, and does not permit a defendant to require that a plaintiff submit to an examination in every personal injury case. These words do comprise Rule 35(a):

> 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 or her 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.

Rule 35 In Practice.

Inattention to Rule 35's requirements has permitted a practice to develop that differs from the protocol of the Rule. Generally, medical examination requests do not go to court. A defense lawyer typically phones the plaintiff's counsel and says, I would like to have your client, Jane Doe, examined by Dr. _____, my independent medical examiner. I have scheduled it for this date. Will you get her there? The plaintiff's lawyer typically responds, I will tell her to be there unless she has a scheduling problem. Neither side typically uses Rule 35.

Yet, a medical examination is permissible only when the mental or physical condition . . . of a party . . . is in controversy . . . .

Rule 35 *might* be available to a defendant in a personal injury case, but not *every* personal injury case involves a controversy about the plaintiff's mental or physical condition. A case involving a fractured forearm and a simple intersection collision may create no controversy about the physical condition of the plaintiff, although it may present a disagreement about the manner in which the AMA rating guidelines should be applied to ascertain the impairment rating assigned to an injury.

A plaintiff's physician might choose an open surgical procedure as a proper treatment method instead of a laparoscopy. A controversy about the treatment modality chosen by the physician might follow, but the controversy in such a case does not involve the *plaintiff's* condition. Instead, it focuses on the doctor's selected method of treatment, and does not justify a Rule 35 examination of the plaintiff.

Perhaps an impaired plaintiff received emergency room care, then follow up from a family physician who referred the patient to an orthopedic surgeon who, in turn, chose noninvasive treatment methods. The injured party has never been seen by, or referred to a neurologist, nor has she been diagnosed with neurological problems. Does Rule 35 permit the defendant to select a new medical specialty for the medical examination of the unwary plaintiff, thereby setting the stage for a distracting defense claim at trial that the plaintiff has never seen the right medical specialist? I doubt it.

Plaintiff's lawyers have been too lax at litigating the necessity for Rule 35 examinations. As a result, defendants have become lax, too, at understanding the good cause requirement imposed upon one seeking a medical examination under the Rule.

The Good Cause Requirement.

Unless good cause is proven by the requesting party, a plaintiff need not endure a hostile medical examination. In *Hall County ex. rel. Tejral v. Antonson*, 231 Neb. 764, 437 N.W.2d 813 (1989), a paternity petition was filed alleging that the defendant was the father of the relator's child. An order was issued by the trial court, compelling the defendant to submit to a Rule 35 examination. On appeal, the defendant contended that good cause was not established. The Supreme Court reasoned that pleadings alone *may* demonstrate that a physical or mental condition is in controversy, i.e., directly involved in the litigation as a material element of the cause of action or defense, and establish good cause. Generally, the Rule's requirements of in controversy and good cause are not satisfied by mere conclusory pleadings; instead they may be fulfilled by a movant's affirmative showing that the condition to be verified by the requested examination is actually controverted and good cause exists for *ordering the examination*.

Multiple factors must be proven to establish the requisite good cause for a court ordered mental or physical examination under Rule 35. The motion must specify, and good cause must be shown for these items.

1. Proof that a mental or physical condition is in controversy;

2. The necessity for an examination, as contrasted with a review of evidence;

3. The identity of the examiner, and the suitability of his/her credentials and ability to conduct a proper examination;

4. The time, place, manner, condition, and scope of the examination and the person or persons by whom it is to be made. The nature and extent of the examination must be justified.

One may not, for example, simply by making a request and showing that the plaintiff's organic brain tissue is at issue, readily get permission to drill a hole in the plaintiff’s head to extract a biopsy. Furthermore, a defendant is not entitled to choose examination by a neurologist for the sake of introducing neurology into the case, where there is no neurological medical issue present. Even x-rays have been referred absent a showing of a need for them.

The term good cause has been carefully considered and thoroughly defined in several contexts by Nebraska judiciary. For example, good cause must be shown to justify service of more than 50 interrogatories. In a criminal context, good cause must justify failure to bring a criminal defendant to trial within six (6) months.

In *DeBries v. Rix*, 203 Neb. 392, 279 N.W.2d 89 (1979), the issue was whether good cause existed to vacate or modify a judgment. Nebraska’s Supreme Court noted:

Webster's Third New International Dictionary defines good cause as a cause or reason sufficient in law; one that is based on equity or justice or that would motivate a reasonable man under all of the circumstances.

The meaning of good cause must be determined in light of all of the surrounding circumstances. Therefore . . . it is our opinion that good cause . . . means a logical reason or legal ground, based on fact or law . . . .

Good cause for a late offering of evidence that was not disclosed in a civil pretrial order is required.

The good cause requirement for continuances have long required that an application must be in writing and supported by an affidavit which contains factual allegations demonstrating good cause or sufficient reason necessitating postponement of proceedings. In modification proceedings following entry of divorce decrees, good cause is demonstrated by a material change in circumstances.

The good cause burden cannot be met by a casual affidavit from a lawyer that a physical condition is in controversy. In some circumstances, perhaps the requirement can be met with evidence from the proposed medical examiner reciting that he/she has reviewed the relevant medical records and has identified a mental or physical condition which is in controversy. The affidavit should explain what controversy exists.

If there is a genuine dispute about the truthfulness of the affidavit, or the quality of the affiant's personal knowledge to make the affidavit, additional discovery, including depositions of the affiant, may be necessary before a court passes on the request for a Rule 35 examination.

Defendant Has No Absolute Right to Choice of Medical Examiner Under Rule 35

The Nebraska Supreme Court has apparently not yet addressed the need for an impartial medical examiner. However, the issue has come up many times in other jurisdictions. Courts in several other states have held that a defendant has no absolute right to the medical examiner of that party's choosing. A Defendant may be ordered to select another doctor if evidence exists that a doctor, designated by the Defendant to examine the Plaintiff, has a history of bias or hostility toward plaintiffs seeking damages for pain and suffering. *See Hagmeier v. Consolidated Rail Corporation*, 545 N.Y.S.2d 861 (A.D. 4 Dept. 1989). A well-documented history of advocacy against injured litigants constitutes sufficient good cause to disallow a Defendant designated medical examiner from examining an individual for the purpose of testifying in litigation. *White v. State Farm Mut. Auto Ins. Co.*, 680 So.2d 1 (La. App. 3 Cir. 1996).

In the case of *Helton v. J. P. Stevens Company,* 118 S.E.2d 791 (N.Car. 1961), the Supreme Court of North Carolina held:

It goes without saying the exclusive duty to make the selection rests with the court. Neither party should have advantage in the selection. When the examination is compulsory, there is obvious propriety in the selection of the expert by the court rather than by one or both of the parties. The court, in making the order and in designating the experts to execute it, is serving the interests of neither the defendant nor the plaintiff, but the ends of justice.

The Risks of Medical Examinations.

Protection from the independent medical examination process may be extremely important in some select circumstances. Rule 35(c) provides, that, following a medical examination, counsel for the party examined is entitled to the medical records of the examining physician, *provided* that, by making the request for records of the examination, the requesting party waives the physician/patient privilege with respect to his/her own medical records.

Plaintiff's counsel could find herself in a situation where she has allowed her plaintiff to be examined under Rule 35, has requested the records of the examination, and has, therefore, waived the physician/patient privilege of the plaintiff. Imagine the look on plaintiff's counsel's face if the medical records of the plaintiff's treating physician disclose the confession of a crime!

A Recent Rule 35 Challenge.

John Doe sustained an alleged personal injury when his vehicle was struck from the rear. His District Court filing pled personal injuries including closed head injuries, physical and mental anguish and suffering, and headaches. Doe has been treated by his family physician, an orthopedic surgeon, and upon referral by the orthopedic surgeon, he was seen briefly by a neurologist. After a short interview, the treating neurologist determined that the injury was more appropriate for consideration by a neuropsychologist who performed non-invasive neuropsychological testing. This testing disclosed the existence of a closed head injury.

Defense counsel requested that a Rule 35 medical examination be conducted by a neurologist well known to personal injury lawyers. Plaintiff's counsel refused to consent and a motion was filed along with an affidavit from the neurologist who recited he had reviewed the plaintiff's medical records. The neurologist acknowledged he is not competent to administer, interpret or evaluate neuropsycholocial tests, but he opined the plaintiff should be examined by a neurologist.

Plaintiff's lawyers contested the motion, claiming they should be permitted to conduct discovery about the truthfulness of the affidavit, and the objectivity of the proposed defense physician. The plaintiff's lawyers issued a subpoena duces tecum for the physician's appointment secretary, and requested his professional calendars to establish the amount of time devoted to medical examinations. They also issued a subpoena to the defense neurologist, commanding that he appear at the hearing on the defendant's motion for a Rule 35 examination.

The subpoenas got the attention of defense lawyers. They moved to quash the subpoenas, claiming they would (a) be burdensome to the physician, (b) invade the patient/physician privilege that the doctor claimed existed between himself and the patients he had independently examined previously, and (c) that the subpoena was harassive of the doctor. The trial court overruled the motions to quash the subpoenas, and commanded that the depositions of the records custodian and the physician proceed.

These judicial rulings produced an astounding reaction by defense counsel. Immediately after the court ruled, the defense lawyer withdrew the proposed neurologist witness as the examining physician, requested leave to delay trial, and advised the court that the defense would have to find another physician witness.

Conclusion

Plaintiff's lawyers can substantially assist their clients in personal injury cases by studying the requirements of Rule 35. Medical examinations should not be scheduled or permitted lightly, the credentials and objectivity of proposed physician examiners should be considered carefully, and the necessity, terms, scope and condition of the proposed examination should be challenged in court where appropriate.

Lawyers should not assume that defense lawyers are entitled to choose a doctor they like, require an injured plaintiff to travel, and give the defense a hired witness to controvert the plaintiff's claims at trial.

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