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Ordering Physical Examination of Personal Injury Plaintiffs

ORDERING PHYSICAL EXAMINATION OF PERSONAL INJURY PLAINTIFFS

In a damage suit for personal injuries the physical or mental condition of the plaintiff is frequently in dispute. To enable the court and the defendant to evaluate the claim the plaintiff asserts, it may be essential to have the plaintiff examined by a court-appointed physician. In some instances the plaintiff will voluntarily submit to the examination but, if he refuses, the question arises as to whether the court has the power to order him to submit to the physical examination.[1]

The court's power to order a physical examination of the plaintiff was recently considered by Oklahoma in *Witte v. Fullerton*.[2] The defendant in a personal injury suit filed a "Motion for Physical Examination" in which he requested the court to order the plaintiff to submit to a physical examination by a doctor appointed by the court. The defendant contended that he could not determine the truth of the plaintiff's claim of injury without such an examination. However, the trial court, relying on previous decisions of the Supreme Court of Oklahoma overruled the motion. The defendant took exception to this ruling and appealed to the Supreme Court. After reviewing its prior holdings, denying the power of trial courts to order physical examinations and weighing current legal thought on the question, the court abandoned its prior stand. The court stated that "in all cases tried subsequent to the issuance of the mandate in this case, the trial court upon timely request therefor, shall have the discretionary power to require the plaintiff in a personal injury action to submit to a physical examination."[3] The court expressly overruled its earlier decision announced in *City of Kingfisher v. Altizer*.[4]

The decision in *Witte v. Fullerton*[5] aligns the Oklahoma courts with a majority of jurisdictions[6] which hold that the courts have in-

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[1]Field & Kaplan, Civil Procedure 49 (1953).

[2]376 P.2d 244 (Okla. 1962).

[3]Id. at 248.

[4]13 Okla. 121, 74 Pac. 107 (1903).

[5]Supra note 2.

[6]Alabama G. So. Ry. v. Hill, 90 Ala. 71, 8 So. 90 (1890); Johnston v. Southern Pac. Co., 150 Cal. 535, 89 Pac. 348 (1907); Western Glass Mfg. Co. v. Schoeninger, 42 Colo. 357, 94 Pac. 342 (1908); Cook v. Miller, 103 Conn. 267, 130 Atl. 571 (1925); People ex rel. Noren v. Dempsey, 10 Ill. 2d 288, 139 N.E.2d 780 (1957); Shroeder v. Chicago, R.I. & Pac. R.R., 47 Iowa 375 (1877); Jerobek v. Safeway Cab, Transfer & Storage Co., 146 Kan. 859, 73 P.2d 1097 (1937); Illinois Cent. R.R. v. Beeler, 142 Ky. 772, 135 S.W. 305 (1911); Brown v. Hutzler Bros. Co., 152 Md. 39,

herent power to order the plaintiff in a personal injury action to submit to a physical examination. A few jurisdictions cling to the old view refusing to recognize any such inherent right in the courts.[7] Although later changing to the majority view, the United States Supreme Court, in an early decision on the question of the examination order, found the minority position a sound one.[8] This Court like other courts adhering to the minority view, considered the ordered examination a trespass to the person. The Court stated:

> "The inviolability of the person, is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass . . ."[9]

The thought that the physical examination amounts to a trespass is forcefully countered by the theory of implied consent advanced by a majority of courts.[10] According to the majority, a plaintiff who seeks justice from the courts and places his physical condition in issue, "impliedly consents" to the doing of justice; and justice may necessitate the plaintiff's making relevant disclosures including disclosures arrived at through physical examination.[11] A plaintiff is permitted to have himself examined by as many friendly physicians as he pleases, calling them as expert witnesses at the trial as he sees fit. If the defendant is denied a similar right, the court may get a clouded picture of the merits of the plaintiff's case, and the defendant may be left at the mercy of the witnesses whom the plaintiff wishes to call.[12]

The purpose of allowing the pre-trial medical examination is to

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136 Atl. 30 (1927); Reid v. Middleton, 211 Miss. 324, 130 So. 2d 554 (1961); State ex rel. St. Louis Pub. Serv. Co. v. McMullan, 297 S.W.2d 431 (Mo. 1957); State ex rel. Parmenter v. Troup, 98 Neb. 333, 152 N.W. 748 (1915); Murphy v. Southern Pac. Co., 31 Nev. 120, 101 Pac. 322 (1909); Drake v. Bowles, 97 N.H. 471, 92 A.2d 161 (1952); Holton v. Janes, 25 N.M. 374, 183 Pac. 395 (1919); Heton v. J. P. Stevens Co., 254 N.C. 321, 118 S.E.2d 791 (1961); Brown v. Chicago M. & St. P. Ry, 12 N.D. 61, 95 N.W. 153 (1903); Steele v. True Temper Corp., 86 Ohio L. Abs. 276, 174 N.E.2d 298 (C.P. 1961); Carnine v. Tibbetts, 158 Ore. 21, 74 P.2d 974 (1937); Williams v. Chattanooga Iron Works, 131 Tenn. 683, 176 S.W. 1031 (1915); Lane v. Spokane Falls & No. Ry., 21 Wash. 119, 57 Pac. 367 (1899); O'Brien v. City of LaCrosse, 99 Wis. 421, 75 N.W. 81 (1898).

[7]Kennedy v. New Orleans Ry. & Light, 142 La. 879, 77 So. 777 (1918); Cornell v. Great No. R.R., 57 Mont. 177, 187 Pac. 902 (1920); Sharp v. Ogden Rapid Transit Co., 48 Utah 481, 160 Pac. 438 (1916).

[8]Union Pac. Ry. v. Botsford, 141 U.S. 250 (1890).

[9]Id. at 252.

[10]Supra note 6.

[11]Wanek v. City of Winona, 78 Minn. 98, 80 N.W. 851 (1899).

[12]Id. at 852.

enable the defendant to prepare an intelligent and informed defense[13] and, at the same time, clearly bring into focus the issues that the court must decide.[14] Also, the physical examination should aid the court in assessing damages and enlighten the defendant as to the extent and permanency of the plaintiff's injuries for the purpose of settlement or possibly for exposing exaggerated or fraudulent claims. The court's power to order a physical examination is an effective tool for ascertaining the authenticity of the plaintiff's claim. To deny a court this power may be to accept approximate justice when something better is available.[15] In dealing with the question of the physical examination order, the court in *Schroeder v. Chicago, R.I. & Pac. R.R.*[16] stated succinctly the proposition that "while the law is satisfied with approximate justice where exact justice cannot be attained, the courts should recognize no rules which stop at the first when the second is in reach."[17]

While under the majority view a physical examination can be ordered by the court, such is not an absolute right of the defendant.[18] The order is granted only when the court, in the exercise of its discretion, considers the examination necessary.[19] The court does not compel

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[13]St. Louis Bridge Co. v. Miller, 138 Ill. 465, 28 N.E. 1091 (1891); McGovern v. Hope, 63 N.J.L. 76, 42 Atl. 830 (Sup. Ct. 1899); Roskovics v. Ashtabula Water Works Co., 16 Ohio Op. 2d 297, 174 N.E.2d 295 (C.P. 1961).

[14]State ex rel. Carter v. Call, 64 Fla. 144, 59 So. 789 (1912); City of Valparaiso v. Kinney, 75 Ind. App. 660, 131 N.E. 237 (1921).

[15]Carnine v. Tibbetts, 158 Ore. 21, 74 P.2d 974 (1937).

[16]47 Iowa 375 (1877).

[17]Id. at 379.

[18]In Belt Elec. Line Co. v. Allen, 102 Ky. 551, 44 S.W. 89, 90, (1898), the court concluded:

"(1) that trial courts have the power to order surgical examinations by experts of the person of a plaintiff who is seeking to recover for personal injury;

"(2) that the defendant has no absolute right to have an order made to that end, but that a motion therefor is addressed to the sound discretion of the court;

"(3) that the exercise of that discretion will be reviewed on appeal, and corrected in case of abuse;

"(4) that the examination should be ordered and had under the direction and control of the court, whenever it fairly appears that the ends of justice require the disclosure or more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination, and that the examination may be made without danger to the plaintiff's life or health, and without infliction of serious pain;

"(5) that the refusal of a motion, when the circumstances present a reasonably clear case for examination under the rules stated, is such an abuse of the discretion lodged in the trial court as will demand a reversal of a judgment in plaintiff's favor."

[19]Cook v. Miller, 103 Conn. 267, 130 Atl. 571 (1925); Southern Grocery Stores v. Cain, 54 Ga. App. 48, 187 S.E. 250 (1936); Lake Erie & W.R.R. v. Griswold, 72 Ind. App. 265, 125 N.E. 783 (1920); Fritchman v. Chitwood Battery Co., 134 Kan.

the plaintiff, as by contempt proceedings, to submit to the examination;[20] the plaintiff is merely offered the alternative of reasonable examination or of having his suit dismissed.[21] In deciding whether to grant the examination order the court will weigh the extent of the information likely to be obtained or elucidated by the examination.[22] In addition to the above criterion, and even more important, the court will decide whether the examination can be made without serious pain being inflicted upon the plaintiff[23] and whether it can be made without endangering his life or health.[24]

The examination order is now within the power of the federal courts, being provided for in Rule 35 of the Federal Rules of Civil Procedure,[25] and in some states authorized by statute.[26] In a recent Virginia decision interpretating Rule 3:23(d) of the Rules of the Supreme Court of Appeals of Virginia, the court said that the purpose of the rule providing for medical examination was not to create a final arbiter of medical disputes or to provide a new method of settling conflicts between medical witnesses. The court stated that the rule was designed to preserve to the defendant the right to have an injured

727, 8 P.2d 368 (1932); Brown v. Hutzler Bros. Co., 152 Md. 39, 136 Atl. 30 (1927); Atkinson v. United Ry., 286 Mo. 634, 228 S.W. 483 (1921); Ziskovsky v. Miller, 120 Neb. 255, 231 N.W. 809 (1930); Flythe v. Eastern Carolina Coach Co., 195 N.C. 777, 143 S.E. 865 (1928); Brenne v. Hecox, 129 Ore. 210, 277 Pac. 99 (1929); Schroth v. Philadelphia Rapid Transit Co., 280 Pa. 36, 124 Atl. 279 (1924).

[20]Williams v. Chattanooga Iron Works, 131 Tenn. 683, 176 S.W. 1031 (1915).

[21]Compare Bailey v. Fisher, 11 La. App. 187, 123 So. 166 (1929). Louisiana has not adopted the majority position but applies a variation of the majority rule. In the Bailey case the court stated that in a personal injury action where the plaintiff declines before trial to permit defendant's physicians to make a physical examination of the plaintiff, the plaintiff will not be allowed to present his medical testimony as to the extent of his injuries.

[22]In Roskovics v. Ashtabula Water Works Co., 16 Ohio Op. 2d 297, 174 N.E.2d 295 (C.P. 1961)) the court explained that while the granting of the motion for physical examination is discretionary, the trial court should guard against going beyond the necessities of the case.

[23]Carnine v. Tibbetts, 158 Ore. 2, 74 P.2d 974 (1937).

[24]O'Brien v. City of LaCrosse, 99 Wis. 421, 75 N.W. 81 (1898).

[25]Fed. R. Civ. P. 35. But see Sibbach v. Wilson & Co., 312 U.S. 1 (1941) which holds that Rule 35 is limited by Rule 37 (b) (2) (iv.), which exempts from punishment, as for contempt, the refusal to obey an order that a party submit to a physical or mental examination. Remedies for a party's refusal to submit to a physical examination are outlined in Rule 37 (b) (2) (i) (ii) (iii).

[26]Reed v. Marley, 230 Ark. 135, 321 S.W.2d 193 (1959); Harabedian v. Superior Ct., 195 Cal. App. 2d 26, 15 Cal. Rptr. 420 (Dist. Ct. App. 1961); Pepsi-Cola Bottling Co. v. Modesta, 107 So. 2d 43 (Fla. Dist. Ct. App. 1958); Virginia Linen Serv., Inc. v. Allen, 198 Va. 700, 96 S.E.2d 86 (1957).