CONDITIONALLY GRANT and Opinion Filed June 24, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00284-CV

IN RE REDBIRD TRAILS APARTMENTS, BRIDGEWAY CAPITAL, LLC, AND NCM MANAGEMENT, LTD., Relators

Original Proceeding from the County Court at Law No. 1
Dallas County, Texas
Trial Court Cause No. CC-17-00945-A

MEMORANDUM OPINION

Before Justices Myers, Partida-Kipness, and Evans
Opinion by Justice Evans

In this original proceeding, relators Redbird Trails Apartments, Bridgeway Capital, LLC, and NCM Management, Ltd., defendants below, seek mandamus relief from two trial court orders involving independent medical examinations they requested on two minor plaintiffs in the underlying personal injury action. *See* TEX. R. CIV. P. 204.1 (addressing procedure to compel party to submit to mental or physical exam). We stayed the trial court's March 2, 2020 medical examination order and requested a response from real party in interest, TiCourtney McMullen, individually and as next friend for her two minor children.

In a single issue, relators contend the trial court abused its discretion in ruling on their motion to compel independent medical examinations of the children by sua sponte disqualifying relators' expert, by selecting a doctor recommended by real party to perform the exams, and by imposing other requirements with respect to the exams. After reviewing the petition, real party's response, relators' reply, and the mandamus record, we agree the trial court abused its discretion and conditionally grant the writ.

BACKGROUND

Real party filed the lawsuit from which this original proceeding arises, alleging personal injuries to herself and her two minor children as a result of exposure to carbon monoxide released into their apartment in May 2015 during a boiler repair performed at their complex.[1] In March 2019, after learning that in support of their claims the children had been examined by multiple retained medical experts, including a neurologist, relators filed a motion to compel medical examinations of the children pursuant to rule 204.1 of the Texas Rules of Civil Procedure.

At a hearing on an emergency motion to revoke a rule 11 agreement, real party asserted the motion to compel rule 204.1 exams was untimely. The parties subsequently attempted to reach an agreement regarding the exams. When no

[1] The children were age three years and age nine months at the time of the incident.

agreement could be reached, a hearing was held on the motion in June 2019 at which time real party objected to the manner and scope of the exams. Notably, real party did not dispute relators' general entitlement to the exams.

The trial court did not rule on the motion following the hearing and instead requested additional information regarding the nature of the exam to be performed on the children. Relators filed a supplement to their motion attaching, among other things, their designated neurologist David B. Rosenfield, M.D.'s affidavit, curriculum vitae, and report. In addition, relators submitted a revised proposed order, specifying the time, place, terms, conditions, and scope of the exams.

In November 2019, at a second hearing on the motion, relators argued they were entitled to have Dr. Rosenfield perform the exam as set forth in his declaration without any special conditions. Real party objected to allowing Dr. Rosenfield to question real party about the children's medical history without an attorney present.[2] Ultimately, the trial court signed an order on February 21, 2020, that, in relevant part, (1) sua sponte concluded relators' designated neurologist Dr. Rosenfield was unqualified to perform the exams because he did not purport to be qualified in pediatric neurology, pediatric medicine, or pediatric treatment, (2) required each party to submit the names of three neurologists from which the trial judge would

[2] Counsel for real party also stated he was not "really sure what the point of [Dr. Rosenfield's] intention to perform a brief assessment of language and memory" was and would leave that condition of the requested exam to the discretion of the trial court. Otherwise, real party did not object to the manner in which Dr. Rosenfield intended to conduct the examinations.

select the examining physician, (3) permitted only the real party or a caregiver to be present at the exams and prohibited the examining physician from asking the person who accompanies the children to the exam any questions about the children's medical history, (4) sua sponte allowed the exams to be videotaped, and (5) limited the exam for each child to forty-five minutes.

Although relators filed a motion to reconsider the February 21 order, the trial court largely overruled the motion when it signed its March 2, 2020 order (1) appointing a neurologist submitted by real party to conduct the rule 204.1 exams, (2) setting forth the scope of the examination, (3) precluding any communication between the examining physician and the person accompanying the children except for purposes of identification "and exchanging normal pleasantries and introductions," (4) allowing the exams to be videotaped, and (5) requiring relators to bear the entire cost of the exam and real party's associated travel expenses and costs. Relators filed this petition for writ of mandamus.

ANALYSIS

In their petition, relators contend the trial court abused its discretion in the following ways: (1) sua sponte finding Dr. Rosenfield was unqualified to examine the children; (2) ordering *each* party to submit the names of three other neurologists to the trial court; (3) appointing one of real party's neurologists to conduct the examinations; (4) ordering either real party or a caregiver to be present, but prohibiting the examiner from asking that person any questions pertaining to the

children's medical histories; and (5) ordering the examinations be videotaped.[3] Relators further contend they have no adequate appellate remedy for these trial court errors.

Mandamus is an extraordinary remedy granted only when the relator establishes an abuse of discretion by the trial court and an inadequate appellate remedy. *In re N. Cypress Med. Ctr. Operating Co.*, 559 S.W.3d 128, 130 (Tex. 2018) (orig. proceeding). The trial court abuses its discretion when its discovery orders exceed the parameters of what is permitted by the rules of procedure. *Id*. at 131.

A. Abuse of Discretion

Requests for a physical or mental examination of an adverse party are governed by rule 204.1 of the Texas Rules of Civil Procedure, which does not grant an automatic right to an examination. *See* TEX. R. CIV. P. 204.1. Under this rule, the court may order an examination only if (1) "good cause" is shown and (2) the mental or physical condition of the party the movant seeks to examine "is in controversy." *Id*.; *In re H.E.B. Grocery Co., L.P.*, 492 S.W.3d 300, 303 (Tex. 2016) (orig. proceeding) (per curiam). These two requirements are not met "by mere conclusory allegations of the pleadings—nor by mere relevance to the case." *In re*

[3] Although relators also complain about the trial court's February 21 order limiting the exams to forty-five minutes for each child, they note that the trial court's subsequent March 2 order provided that each exam was not to exceed sixty minutes, which is what relators requested.

Ten-Hagen Excavating, Inc., 435 S.W.3d 859, 867 (Tex. App.—Dallas 2014, orig. proceeding) (quoting *Coates v. Whittington*, 758 S.W.2d 749, 751 (Tex. 1988) (orig. proceeding)). Rather, the movant has "an affirmative burden" to establish the rule 204.1 requirements. *In re Sanchez*, 571 S.W.3d 833, 835 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding).

The "good cause" and "in controversy" requirements are necessarily related. *In re H.E.B.*, 492 S.W.3d at 304. As the Supreme Court has noted in construing the substantially similar federal rule,[4] there must be greater showing of need to obtain a physical or mental examination than to obtain other sorts of discovery. *Schlagenhauf v. Holder*, 379 U.S. 104, 118–19 (1964). But a negligence plaintiff asserting a mental or physical injury "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.* at 119. The Texas Supreme Court has held, if "a plaintiff intends to use expert medical testimony to prove his or her alleged . . . condition, that condition is placed in controversy and the defendant would have good cause for an examination under rule [204]." *In re H.E.B.*, 492 S.W.3d at 304.

[4] The Texas Supreme Court has concluded that because the Texas rule governing mental and physical examinations was originally derived from rule 35 of the Federal Rules of Civil Procedure, federal courts' construction of rule 35 is helpful to an analysis of the Texas rule. *In re H.E.B.*, 492 S.W.3d at 304 (citing *Coates*, 758 S.W.2d at 751).

Relators contend that, as in *In re H.E.B.*, they have established good cause for the children to be examined by Dr. Rosenfield, their designated and qualified expert.[5] Although not an absolute right, a moving party is generally entitled to an examination by a physician of his choosing. Unless the patient involved has a valid objection to the movant's selection of an examiner, the examination should be conducted by a physician designated by the movant. *Sherwood Lane Assocs. v. O'Neill*, 782 S.W.2d 942, 946 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding) (Dunn, J., concurring) (citing *Emp'rs Mut. Cas. Co. v. Street*, 707 S.W.2d 277, 279 (Tex. App.—Fort Worth 1986, orig. proceeding) (op. on rehearing) (citing *Liechty v. Terrill Trucking Co.*, 53 F.R.D. 590, 591 (E.D. Tenn. 1971), to support proposition that "defendant has no absolute right to the choice of his own physician"; rather, if plaintiff has any objection to being examined by defendant's doctor, trial court should designate some physician indifferent between the parties).

Absent objection or special circumstances, however, "fundamental fairness" dictates that a defendant's expert be allowed to examine the plaintiff. Otherwise, the defendant will be at a significant disadvantage in the "battle of the experts." *See, e.g.*, *In re Offshore Marine Contractors, Inc.*, 496 S.W.3d 796, 802–03 (Tex. App.—

[5] Real party does not dispute examinations of the children are relevant given the nature of the claims. Additionally, real party has not argued an absence of the reasonable nexus between the condition in controversy and examination sought. Real party alleges the children sustained neurological damage from carbon monoxide exposure and relators request Dr. Rosenfield, a certified neurologist, assess the children's neurological status. Thus, there is a reasonable nexus between the requested exam and the condition in controversy. Finally, relators have established the information they desire cannot be obtained by less intrusive means. We therefore conclude relators established the requirements of rule 204.1.

Houston [1st Dist.] 2016, orig. proceeding) (evenhandedness and fairness required testing by defendant's expert to allow for discovery of facts that might contradict plaintiff's expert's opinions when (1) plaintiff elected to put his neuropsychological condition in controversy through expert testimony, (2) the requested examination was not invasive, intrusive or uncomfortable, and (3) less intrusive means would not yield the desired information); *In re Transwestern Publ'g Co.*, 96 S.W.3d 501, 507–08 (Tex. App—Fort Worth 2002, orig. proceeding) (defendants needed to conduct own independent evaluation of plaintiff to make own analysis of nature of plaintiff's mental anguish and to effectively challenge plaintiff's expert's opinions); *Sherwood Lane*, 782 S.W.2d at 945 (failing to allow relators' psychiatrist to perform independent examination would severely limit relators' ability to contest claim for mental injury damages and put relators at severe disadvantage in "battle of experts").

Here, real party never objected to or challenged the qualifications of Dr. Rosenfield in the trial court.[6] Unless the patient involved has a valid objection to the movant's selection of an examiner, the examination should be conducted by a physician of the movant's choosing. *See Sherwood Lane*, 782 S.W.2d at 946; *Emp'rs Mut. Cas. Co.*, 707 S.W.2d at 279. Accordingly, we conclude that the trial court abused its discretion in sua sponte rejecting relators' examining physician.

[6] Real party also does not raise any concerns with respect to Dr. Rosenfield's qualifications in her response to this petition for writ of mandamus.

In reaching our conclusion, we necessarily reject real party's contention that *In re Ten Hagen* supports the trial court's actions of declaring the relators' examining doctor unqualified and appointing a doctor proposed by real party. In *In re Ten Hagen*, relator requested a physical examination of real party by Dr. John Sklar. 435 S.W.3d at 862. Real party objected to the examination, maintaining among other things, that Dr. Sklar was not qualified to conduct the requested examination because he was "a physiatrist, not an orthopedic surgeon or a hand specialist or nerve specialist, [and did not] possess the necessary qualifications to assess orthopedic issues." *Id*. at 871. After conducting a hearing on the motion, the trial court denied relator's request. *Id*. at 862. Relator then filed a petition for writ of mandamus in this Court arguing the trial court abused its discretion by denying the motion. *Id*. After concluding relator met the requirements for requesting the examination, this Court noted that (1) a trial court may not *deny* a motion for a rule 204 examination based on the lack of qualifications of the proposed examining doctor, (2) a movant does not have an absolute right to a physician of its own choosing, and (3) if a trial court finds the proposed examining physician to be unqualified, the remedy is to appoint a different physician of the trial court's choice. *Id*. at 871. *In re Ten Hagen* did not hold that a trial court is authorized to do so in the absence of an objection or some other compelling reason.

Relators also complain about the trial court's order requiring the exams to be videotaped and prohibiting Dr. Rosenfield from communicating with real party

about the children's medical history at the exams. Ordinarily, a moving party's expert should be allowed the "same opportunity" as the opposing party's expert to "fully develop and present [his or her] opinion, ensuring a fair trial." *In re H.E.B. Grocery*, 492 S.W.3d at 304–05. Real party did not provide proof of any special circumstance that required videotaping the examinations, and does not suggest any such evidence exists in her reply to the petition for writ of mandamus. The examinations performed by real party's experts were not videotaped. Thus, in the absence of proof of special circumstances or a particularized need for videotaping or having an attorney present at the opposing party's examination, one party should not be required to videotape the examination when the other party did not. *See In re Soc'y of Our Lady of Most Holy Trinity*, No. 13-19-00064-CV, 2019 WL 3297163, at *11 (Tex. App.—Corpus Christi–Edinburg July 23, 2019, orig. proceeding). Thus, it was an abuse of discretion for the trial court to sua sponte require the exams be videotaped.

We likewise conclude the trial court abused its discretion in prohibiting Dr. Rosenfield from communicating with real party about the children's medical history at the exams. Although real party argues that allowing Dr. Rosenfield to communicate with the mother or caregiver is tantamount to a "back door means of questioning that would deprive mother of legal counsel," we do not agree. As previously stated, the Texas Supreme Court has concluded that in the absence of any special circumstance, a movant for a rule 204 examination should have the same

opportunity to fully develop and present his opinion as the opposing party's expert. *In re H.E.B. Grocery*, 492 S.W.3d at 304–05.

Dr. Rosenfield explained in his affidavit that the standard of care for obtaining a child's medical history is to obtain the information from adults with whom they interact. According to Dr. Rosenfield, this is so because a parent can provide a more valid medical history than the child, and in this case, the children's ages would complicate obtaining a valid medical history from them directly. Certainly, real party's experts had the opportunity to discuss the children's medical history with real party, and there is no reason why Dr. Rosenfield should not be given the same opportunity.

B. Adequate Remedy

Having concluded that the trial court abused its discretion, we now turn to whether relators have an adequate remedy on appeal for the trial court's errors. The test as to whether there is an adequate appellate remedy is practical and prudential, not subject to simple categories or bright-line rules, and requires the careful balancing of jurisprudential considerations. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding). The analysis includes consideration of the degree to which "important substantive and procedural rights" are subject to "impairment or loss." *Id*.

An order regarding a physical or mental examination under rule 204 may be subject to review by mandamus. The Texas Supreme Court has concluded that

mandamus is appropriate to correct the denial of an examination where the defense of the case "hinge[d] in large part on challenges to the nature, extent, and cause" of the plaintiff's injuries, those issues depended significantly on competing expert testimony, and the defense's expert required "the same opportunity" as the plaintiff's expert "to fully develop and present his opinion, ensuring a fair trial." *In re H.E.B.*, 492 S.W.3d at 304; *see also In re Ten Hagen*, 435 S.W.3d at 864 (because alleged injuries were not limited in extent or impact but included claims for future medical expenses and impairment, defense would be restricted unless examination allowed). Further, rulings regarding rule 204 examinations may be reviewed by mandamus when they violate the "fundamental fairness" doctrine or the "fair trial" standard. *See, e.g.*, *In re Advanced Powder Sols., Inc.*, 496 S.W.3d 838, 851 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding); *In re Ten Hagen*, 435 S.W.3d at 870.

In the underlying case, the defense hinges in large part on challenges to the nature, extent, and cause of the children's injuries, the issue of the children's injuries significantly depends on competing expert testimony, and the defense's expert should have "the same opportunity" as the plaintiff's expert "to fully develop and present his opinion, ensuring a fair trial." *See In re H.E.B.*, 492 S.W.3d at 303. Without such an opportunity, relators are placed at a severe disadvantage in the "battle of experts." We therefore conclude relators do not have an adequate appellate remedy and mandamus relief is appropriate for the trial court's abuses of discretion regarding the February 21 and March 2 examination orders.

CONCLUSION

We conditionally grant relators' petition for writ of mandamus. A writ will issue only in the event the trial court fails to (1) vacate its February 21, 2020 "Order Regarding Defendant Red Bird Trails Apartments' Rule 204.1 Medical Examination" and its March 2, 2020 "Order Granting Defendant Red Bird Trails Apartments' Motion for Rule 204.1 Medical Examination" selecting real party's recommended neurologist and (2) order the minor children submit to an examination by relators' neurologist David B. Rosenfield, M.D. in accordance with the (1) duration, (2) conditions, and (3) manner, scope, and areas of medical examination as set forth in relators' proposed form of order filed with the trial court on or about February 28, 2020.

/David Evans/
DAVID EVANS
JUSTICE

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