

Supreme Court of Louisiana

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NEWS RELEASE #046

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **21st day of October, 2022** are as follows:

PER CURIAM:

2021-CC-01753

JACOB AUGUSTINE AND BRANDI AUGUSTINE VS. SAFECO
INSURANCE COMPANY OF OREGON AND JAMES BROWN (Parish
of Orleans Civil)

**DISTRICT COURT JUDGMENT VACATED. REMANDED. SEE
PER CURIAM.**

Hughes, J., additionally concurs and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2021-CC-01753

JACOB AUGUSTINE AND BRANDI AUGUSTINE

VS.

SAFECO INSURANCE COMPANY OF OREGON AND JAMES BROWN

On Supervisory Writ to the Orleans Civil District Court, Parish of Orleans

PER CURIAM

At issue is whether the district court abused its discretion when it granted defendant's motion to compel an additional medical examination, but placed limitations on the examination. For the reasons that follow, we vacate the judgment of the district court and remand the case for further proceedings.

UNDERLYING FACTS AND PROCEDURAL HISTORY

Plaintiffs, Jacob and Brandi Augustine, filed suit against James Brown and his insurer, Safeco Insurance Company of Oregon (hereinafter collectively referred to as "defendants"), alleging injuries from an automobile accident. In particular, plaintiffs alleged both physical and mental injuries, including memory loss, anxiety, traumatic brain injury, sleep disorder, headaches, dizziness, lethargy, nausea, blurred vision, and irritability.

Defendants retained Dr. Kevin Greve, a board-certified neuropsychologist, to perform an additional medical examination of plaintiffs pursuant to La. Code Civ. P. art. 1464. While plaintiffs agreed to be evaluated, they requested certain restrictions be placed on the examination. The parties were ultimately unable to reach an agreement regarding any restrictions on Dr. Greve's examination. As a result, defendants filed a motion to compel.

Plaintiffs opposed the motion to compel and sought to restrict the examination, including limiting the scope of the examination to those tests previously performed by their treating physicians. In support, they argued they suffered from traumatic brain injuries and should not be subjected to an intense two-day neuropsychological evaluation, which they did not undergo with their own treating medical providers.

After a hearing, the district court granted defendants' motion to compel in part and denied it in part. Although the court compelled plaintiffs to submit to the examination, it limited the examination to those tests performed by plaintiffs' treating physicians, explaining it did not want the examination to be "just a fishing expedition. . . ."

Defendants sought supervisory review of the district court's ruling. The court of appeal denied writs "on the showing made."

Defendants then applied to this court. We granted certiorari to consider the correctness of the district court's ruling. *Augustine v. Safeco Insurance Company of Oregon*, 2021-1753 (La. 3/22/22), __ So.3d __.

DISCUSSION

This case is in the nature of a sequel to our recent opinion in *Hicks v. USAA General Indemnity*, 21-0840 (La. 3/25/22), 339 So.3d 1106. In *Hicks*, we discussed the requirements for establishing good cause for an additional medical examination under La. Code Civ. P. art. 1464 and recognized the district court's sound discretion in ordering an examination. We are now confronted with the question of whether a district court which has found good cause for ordering an additional medical examination may place restrictions on how that examination is conducted.

The authority for ordering an additional medical examination is found in La. Code Civ. P. art. 1464, which provides, in pertinent part:

A. When the mental or physical condition 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 an additional medical opinion regarding physical or mental examination by a physician or to produce for examination the person in his custody or legal control, except as provided by law. In addition, the court may order the party to submit to an additional medical opinion regarding an examination by a vocational rehabilitation expert or a licensed clinical psychologist who is not a physician, provided the party has given notice of intention to use such an expert. 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.** [emphasis added].

In our civil law system, we begin as we must with the language of the article. *See* La. Civ. Code art. 9. In applying this article, we begin, as we did in *Hicks*, from the proposition that a “basic premise of our system of justice is that both sides to a dispute stand on equal footing in gathering evidence and preparing for trial.” *Hicks*, 339 So.3d at 1112. *Hicks* recognized the importance of the additional medical examination in furthering this pursuit of justice, explaining “the availability of a medical examination under article 1464 is vital, as it may be one party’s only opportunity to independently ascertain the existence and extent of the other party’s claimed injuries.” *Id.*

Hicks made it clear that the decision as to whether the moving party has affirmatively established the “in controversy” and “good cause” requirements of La. Code Civ. P. art. 1464 “ultimately lies in the sound discretion of the trial court.” *Id.* at 1114. By ordering the examination in this case, the district court obviously found defendants demonstrated plaintiffs’ mental and physical conditions were in controversy and showed good cause for the additional neuropsychological examination. Plaintiffs do not challenge the district court’s decision in this regard, and we find the district court was clearly within its discretion to order the examination.

However, having granted the motion to compel the examination, the district court went on to place restrictions on the examination by limiting it to those tests previously performed by plaintiffs' treating physicians. Defendants assert these restrictions will prevent the trial from being conducted on a level playing field because plaintiffs will be able to present evidence favorable to them while defendants will be prevented from conducting full testing which may lead to evidence which will refute plaintiffs' position. Conversely, plaintiffs submit La. Code Civ. P. art. 1464 gives the district court broad powers to protect them against unreasonable examinations in light of their physical conditions.

In *Hicks*, we recognized the "active role" of the district court in controlling the parameters of the examination, stating:

Notably, the plain language of article 1464 anticipates that the trial court take an active role, requiring the trial court to "specify the time, place, manner, conditions, and scope of the examination." These parameters provide limitations on any examination. In other words, even when a moving party establishes good cause for an examination by demonstrating a reasonable nexus between the requested examination and the condition in controversy, the moving party does not necessarily establish good cause for **any** examination. It remains the trial court's role to balance the competing interests and rights of the parties, considering both "sanctity of the body" and the implication of one party's privacy rights against considerations of fairness for the moving party in the adversarial process.

Id. [footnote omitted; emphasis in original].

This language, derived from the language of the article, clearly dispels any notion that the district court's finding of good cause for ordering examination divests the court of any control over the parameters of the examination. Rather, the district court retains the role of "balancing considerations of the sanctity of the body and the right to privacy with considerations of fairness in the judicial quest for truth." *Williams v. Smith*, 576 So. 2d 448, 451 (La. 1991).

Nonetheless, La. Code Civ. P. art. 1464 does not provide much guidance as to how the district court should achieve this balance. While the court is clearly given broad discretion to control the scope of the examination, any decision which places undue restrictions on the health care provider's ability to perform the examination could frustrate the other party's ability to obtain relevant evidence.

In beginning our inquiry, we note the jurisprudence has long recognized that “[i]t must be presumed that doctors will conduct their physical examinations properly.” *Simon v. Castille*, 174 So.2d 660, 665 (La. App. 3 Cir.), *writ denied*, 247 La. 1088, 176 So.2d 145, *cert. denied*, 382 U.S. 932 (1965). To rebut this presumption, the courts have required the party seeking to place conditions on the examination to make a showing of special circumstances. *Id.*; *see also Dao v. Thibodeaux*, 21-153 (La. App. 5 Cir. 5/11/21), ___ So.3d ___; *Henry v. Barlow*, 2006-283 (La. App. 3 Cir. 8/9/06), 937 So.2d 895, 897, *writ denied*, 2006-2592 (La. 1/12/07), 948 So.2d 153; *Walker v. Marcev*, 427 So.2d 678, 681 (La. App. 4th Cir.), *writ denied*, 433 So.2d 182 (La. 1983).

These decisions are consistent with the holdings of the federal courts which have interpreted the analogous provisions of Rule 35 of the Federal Rules of Civil Procedure. *See, e.g., Abdulwali v. Washington Metro Area Transit Auth.*, 193 F.R.D. 10, 15 (D.D.C. 2000) (“plaintiff has offered no compelling reason to intrude upon the examining doctor’s discretion regarding the scope, means and timing of her psychiatric examination; nor has she shown that any of the components of the psychiatric examination as described by Dr. Berger are unduly intrusive or overbroad”); *Lahr v. Fulbright & Jaworski, L.L.P.*, 164 F.R.D. 196, 202 (N.D. Tex. 1995), *aff’d*, 164 F.R.D. 204 (N.D. Tex. 1996) (“[f]or the court to intervene and limit the type of examination an expert has indicated is necessary in order to analyze plaintiff’s claims would subvert the truth finding function inherent in Rule 35 examinations”).

Reduced to its essentials, plaintiffs' request to place restrictions on the examination is analogous to a motion for a protective order under La. Code Civ. P. art. 1426.¹ In such cases, it is well settled that the burden rests upon the mover, that is the party who seeks to prevent or to limit the scope of the examination, to show good cause for such a protective order. *Chesson v. Hungerford*, 228 So.2d 332, 334 (La. App. 3rd Cir. 1969).

Combining these approaches, we have arrived at a practical framework for addressing the issue presented in this case while applying the law as written by the legislature. We start from the proposition that the initial burden of establishing good cause for seeking the additional medical examination rests with the moving party, which in this case is the defendants. Once the court finds this burden has been

¹ La. Code Civ. P. art. 1426 provides, in pertinent part:

A. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) That the discovery not be had.
- (2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place.
- (3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery.
- (4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.
- (5) That discovery be conducted with no one present except persons designated by the court.
- (6) That a deposition after being sealed be opened only by order of the court.
- (7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.
- (8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the courts.

satisfied and good cause exists for ordering an additional medical examination, the court should presume that the examination will be conducted in a reasonable manner. If the opposing party wishes to place restrictions on the examination, the burden shifts to that party to establish special circumstances justifying the imposition of restrictions on the examination. In meeting this burden, the party may not rely on mere allegations or speculation, but should produce competent evidence establishing a need for restrictions and the harm which may result if such restrictions are not imposed. *See, e.g., Newman v. San Joaquin Delta Cmty. Coll. Dist.*, 272 F.R.D. 505, 512 (E.D. Cal. 2011)(rejecting the plaintiff’s request to limit an examination because “the court has not been presented with evidence that certain tests will be dangerous or harmful”; rather, the plaintiff merely argued she should not be subjected to “unnecessary” or duplicative tests that might be “burdensome” to her).

Because we have now clarified the application of the law, we find it appropriate to vacate the district court’s ruling insofar as it placed restrictions on the examination. We will remand the case to the district court to conduct a new hearing consistent with the principles we have enunciated.

DECREE

For the reasons assigned, the judgment of the district court imposing limitations on the examination of plaintiffs by Dr. Kevin Greve is vacated and set aside. The case is remanded to the district court for further proceedings consistent with this opinion.

SUPREME COURT OF LOUISIANA

No. 2021-CC-01753

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VS.

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On Supervisory Writ to the Orleans Civil District Court, Parish of Orleans Civil

Hughes, J., concurring.

I agree with the clarity provided by the opinion although I believe the trial judge has already made the appropriate calculation in this case.