Mississippi College Law Review

Volume 23
Issue 1 *Vol. 23 Iss. 1*

Article 5

2004

Mississippi's Adoption of Rule 35 Independent Medical Examinations: A Whole New Can of Worms

Pieter Teeuwissen

Custom Citation
23 Miss. C. L. Rev. 41 (2003-2004)

MISSISSIPPI'S ADOPTION OF RULE 35 INDEPENDENT MEDICAL EXAMINATIONS: A WHOLE NEW CAN OF WORMS

*Pieter Teeuwissen**

I. INTRODUCTION

You are sitting in a cold, sterile examining room. Yet another doctor is going to examine you for the same condition, and this involves more questions, more tests, and more probes. You are wondering: why so many doctors, why so many tests? You are nervous, as you always are when seeing the doctor. Only this visit is a little more uncomfortable because you do not know this doctor and you did not choose this examination. You do not know what will happen in the examination or how long it will take. And to make the situation worse, you are not allowed to have any family members with you. You are all alone with a stranger who is receiving payment from an adverse party to examine you and contest your medical status.

Mississippi has now joined most other states and the federal courts by enacting a rule providing for the independent medical examination (IME) of a plaintiff.[1] While this rule is new to Mississippi, issues surrounding IME's have been addressed by numerous other jurisdictions. A review of other jurisdictions gives both guidance and pause with respect to issues that Mississippi litigators will encounter. This article will briefly detail the history of the IME in Mississippi, the enactment of the new Rule 35, and the future issues our courts will probably address. While this article is speculative by nature, what is certain is that Rule 35 will complicate litigation.

II. HISTORY AND ENACTMENT OF RULE 35

Rule 35 was enacted pursuant to the Mississippi Supreme Court's authority to promulgate various rules of civil procedure, which "emanates from . . . the separation of powers and vesting of judicial powers in the courts."[2] That court found its authority in section 144 of the Mississippi Constitution.[3]

Despite having rule-making authority, the Mississippi Supreme Court did not adopt the IME rule when the Mississippi Rules of Civil Procedure were originally enacted in 1984. The omission of an IME rule was especially pronounced since the Mississippi Rules of Civil Procedure were explicitly modeled after the Federal Rules of Civil Procedure.

The omission was addressed in *Swan v. I.P., Inc.*[4] Nancy Swan was a Long Beach Junior High School teacher who alleged physical injuries as a result of exposure to fumes and spray of polyurethane roofing materials.[5] During discov-

* J.D., University of Minnesota. Managing Partner, Danks & Teeuwissen, Jackson, Mississippi.

1. *See* MISS. R. CIV. P. 35.

2. Newell v. State, 308 So. 2d 71, 76 (Miss. 1975).

3. *Id.* at 76. Section 144 simply states that "[t]he judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution."

4. Swan v. I.P. Inc., 613 So. 2d 846 (Miss. 1993).

5. *Id.* at 847-48.

ery, the defendants wanted Swan to submit to an IME by an expert neurologist designated by the defendants.[6] The trial court refused to order an IME.[7] With two main opinions, the Mississippi Supreme Court was wildly divided.[8] The majority held that the omission of Rule 35 precluded a trial court from ordering an examination under any circumstances since "the subject of Rule 35 is beyond the scope of the legislation pursuant to which the Mississippi rules were adopted."[9]

In a harbinger of things to come, Chief Justice Hawkins dissented (joined by then-Justice Pittman).[10] He took issue with the majority's absolute holding that "no trial court *ever* has any authority to order a personal injury plaintiff to undergo any kind of medical examination by a qualified physician."[11] This was simply "the wrong answer."[12] Notwithstanding the perceived conflict, the Mississippi Supreme Court would not address the IME issue again for nearly ten years.

III. MISSISSIPPI RULE OF CIVIL PROCEDURE 35

The year 2002 was a well-publicized year in the fight over so-called "tort reform," with Mississippi seeing a flood of special interest advertisements and an expensive and exhaustive special session of the Legislature to address the problem. The *Mississippi College Law Review* even dedicated a symposium to the topic.[13] It seems that the state supreme court, perhaps sensing that it had an opportunity to balance the increasingly bipolar sides, passed a number of revisions to the Mississippi Rules of Civil Procedure. Among these revisions was the January 16, 2003 enactment of a new Rule 35—and not just the blank that held the place for years.

Mississippi Rule of Civil Procedure 35(a) is relatively straight-forward as written and easily breaks down into several important elements. When a physical or mental condition is in controversy, the trial court may order a party to submit to an IME.[14] The trial court's order may be made only on motion for good cause shown.[15] The provisions applicable to motions generally control form.[16]

---

6. *Id.* at 858.

7. *Id.*

8. Chief Justice Hawkins wrote the first part of the court's opinion. He also concurred with Parts I and II-A, along with Justices Lee, Prather, Sullivan, Pittman, Banks, and McRae. Only Hawkins, Prather, Sullivan, Pittman, and Banks concurred with Part II-B, while Justice McRae concurred separately, joined by Justice Lee. Justice Sullivan wrote for the court beginning with Part II-C. Justices Sullivan, Lee, Prather, Banks, and McRae concurred in Part II-C. Chief Justice Hawkins also dissented from Part II-C in a separate written opinion that Justice Pittman joined. Justice Roberts and Smith were precluded from voting.

9. *Swan*, 613 So. 2d at 858 (examining the original comment to MISS. R. CIV. P. 35).

10. *Id.* at 859.

11. *Id.* at 860 (Hawkins, C.J., dissenting) (emphasis added).

12. *Id.* at 859 (Hawkins, C.J., dissenting).

13. *See* Jeffrey O'Connell, *A Proposed Remedy for Mississippi's Medical Malpractice Miseries*, 22 MISS. C. L. REV. 1 (2002); Neil Vidmar & Leigh Anne Brown, *Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy*, 22 MISS. C. L. REV. 9 (2002).

14. Miss. R. Civ. P. 35(a).

15. *Id.*

16. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1191 (2d ed. 1987).

Likewise, provisions of Mississippi Rule of Civil Procedure 26(c) governing protective orders should apply to Mississippi Rule of Civil Procedure 35.[17] The trial court's order for an IME must specify the time, place, manner, conditions and scope of the examination and the person who shall administer the examination.[18] The party requesting the examination shall bear all costs, and the examination shall not require unreasonable travel.[19]

Mississippi Rule 35(b) addresses the gathering of information during an IME and how this information is disseminated. Rule 35(b)(1) endeavors to have all parties share any information gathered from an IME, including the examiner's findings, test results, diagnoses and conclusions.[20] Subsection (b)(2) addresses waiver of the privilege and thus reconciles Rule 35 with Rule 503(f).[21] The only specific limitations placed on the applicability of Rule 35 are enunciated in subsection (6).[22]

Mississippi Rule 35 is modeled in general after Federal Rule 35. Besides the deletion of two superfluous commas in the Federal Rule, Mississippi's Rule 35 makes two notable changes to the Federal Rule. First, an addition provides that "[a] party or person may not be required to travel an unreasonable distance for an examination. The party requesting the examination shall pay the examiner and shall advance all necessary expenses to be incurred by the party or person in complying with the order."[23] This perhaps mitigates the sting of Rule 35. Second, there is a section entitled "Limited Applicability to Actions Under Title 93 of the Mississippi Code of 1972" stating that "[t]his rule does not apply to actions under Title 93 of the Mississippi Code of 1972, except in the discretion of the Chancery Judge."[24]

IV. ISSUES ARISING FROM RULE 35

While the Mississippi state courts lacked a proper Rule 35 for years, any litigator practicing in the federal courts of Mississippi was faced with the IME rule for decades, via Federal Rule 35. Over sixty years ago, a plaintiff who claimed to have lost sight in one eye was ordered to undergo an independent medical examination.[25] It was held to be within the sound judgment of the court to decide which physician should make the examination, as opposed to accepting the physician recommended by the defendant.[26] This conflict between the state and federal courts of Mississippi gave rise to the holding that a Rule 35 examination in federal court would waive the physician-patient privilege promulgated in

17. *Id.* at §§ 2035-44.
18. MISS. R. CIV. P. 35(a).
19. *Id.*
20. MISS. R. CIV. P. 35(b)(1).
21. MISS. R. CIV. P. 35(b)(2).
22. MISS. R. CIV. P. 35(c).
23. *Id.*
24. *Id.* Title 93 is the Domestic Code.
25. Leach v. Greif Bros. Cooperage Corp., 2 F.R.D. 444, 446 (S.D. Miss. 1942).
26. *Id.*

state statutes.[27] Regrettably, parties in federal court began pursuing various methods to exert influence over the supposedly independent examination.[28]

With the newness of Rule 35, our supreme court has not had an opportunity to address application of the rule or interpret the language of the rule. For example, how does counsel determine the scope of an examination? Can counsel videotape the IME? Can the plaintiff have someone present during the IME? What happens when counsel for the respective parties cannot agree who should perform the independent examination? These are but a few of the practical aspects of Rule 35 that our courts must address. Until Mississippi case law is established, we must look to other jurisdictions for guidance.

What follows is an alphabetical review of other jurisdictions and how they have addressed who may accompany the plaintiff during an IME issue.

Alaska

The Alaska Rules of Civil Procedure do not directly address the issue of the presence of another individual accompanying the plaintiff during an IME.[29] However, in *Langfeldt-Haaland v. Saupe Enterprises*, the Alaska Supreme Court held an attorney's protection and advice may be needed in the context of an opposing party's medical examination and saw no good reason why the attorney should not be available.[30] The function of the attorney is limited to that of an observer.[31] Counsel may take notes and save his or her comments for making objections during the trial and/or cross-examination of the doctor.[32] The Alaska Supreme Court stated this very important legal point:

> First, there is a constitutional right to counsel in civil cases arising from the due process clause. We recognize that the right to counsel in civil cases is not co-extensive with the right to counsel in criminal prosecutions, but in the area of compelled examinations, we see no reason to draw a distinction. Second, counsel may observe shortcomings and improprieties in an examination which can be brought out during cross-examination at either a civil or criminal trial. Third, although observation may be the primary role of counsel in both criminal and civil cases, counsel may on occasion properly object to questions concerning privileged information. There are privileges which may be invaded in civil as well as criminal cases.[33]

---

27. Hardy v. Riser, 309 F. Supp. 1234, 1242 (N.D. Miss. 1970).

28. *See, e.g.*, Ewing v. Ayers Corp., 129 F.R.D. 137 (N.D. Miss. 1989). In *Ewing*, the attorneys for the plaintiffs and the defendants were both adjudged to have contacted a doctor impermissibly. *Id.* at 138-39.

29. *See* ALASKA R. CIV. P. 35.

30. 768 P.2d 1144, 1144-45 (Alaska 1989).

31. *Id.* at 1145.

32. *Id.*

33. *Id.* at 1146.

Arizona

In *Burton v. Industrial Commission of Arizona,* the issue of monitoring of the IME was addressed in the workers' compensation setting.[34] The Arizona Court of Appeals held that the examination could be tape recorded.[35] "Respondents assert that the use of a tape recorder turns the examination into a direct adversarial proceeding. We disagree. A tape recorder operates silently, asks no questions, and merely records any audible sounds."[36]

California

In *Sharff v. Superior Court,* the California Supreme Court held that a party compelled to submit to a physical examination is entitled to have an attorney present.[37] In *Gonzi v. Superior Court,* that same court held that either party is also entitled to request the presence of a court reporter.[38]

Delaware

In *Rochen v. Huang,* the Delaware Supreme Court held that a patient can have another health care professional of her choice present to observe the proceedings *or* have the examination electronically recorded.[39]

Florida

In *Cinino v. United States Security Insurance Co.,* the Florida appeals court reiterated that an injured party is entitled to have an attorney present or to videotape a mental or physical examination scheduled by or on behalf of an insurance company.[40]

Idaho

In *Hewson v. Asker's Thrift Shop,* the Idaho Supreme Court held that, in the workers' compensation setting, an employee's tape-recording of an examination did not rise to the level of an unreasonable obstruction of the examination.[41]

Indiana

In *Jacob v. Chaplin,* the Indiana Supreme Court held that any party to the litigation, as well as the examiner, may record all aspects of the examination.[42] "The specific question that appellants . present for review is whether a party

34. 801 P.2d 473, 474 (Ariz. Ct. App. 1990).
35. *Id.* at 476-77.
36. *Id.* at 477.
37. 282 P.2d 896, 897 (Cal. 1955).
38. 335 P.2d 97, 98-99 (Cal. 1959).
39. 558 A.2d 1108, 1110 (Del. 1988).
40. 715 So. 2d 1092, 1093 (Fla. Dist. Ct. App. 1998) (citing Toucet v. Big Ben Moving and Storage, 581 So. 2d 952 (Fla. 1991)).
41. 814 P.2d 424, 429 (Idaho 1991).
42. 639 N.E.2d 1010, 1012-13 (Ind. 1994).

who is subject to a court-ordered medical examination may tape record all conversations that the party has with the examining physician at the time of the examination."[43] The Court rejected the defendants' argument that taping would impede the *court-ordered* examiner's ability to conduct a fair and complete examination.[44] Specifically, the court stated:

> It is inherent in such an important meeting that both examinerand examinee be permitted to choose whether or not to make written notes of the verbal exchange. It follows from this conclusion that both should as well be permitted to choose whether or not, in lieu of the laborious process of making notes, to openly record the verbal exchange by electronic means. In permitting the examination ordered in this case to be recorded, the trial court properly exercised its discretion and recognized the justness of permitting recording to take place in an open manner, in the absence of some overriding reason to prohibit recording. We also fail to see any reason why electronic recording of the examination would in and of itself impede an examiner's ability to conduct a fair and complete examination.[45]

Louisiana

In *Robin v. Associated Indemnity Co.*, the Louisiana Supreme Court held that an injured litigant is not precluded from having a lawyer present at an examination by a physician selected by the adverse party.[46]

Minnesota

In *Wood v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, the Minnesota appeals court held that an attorney may be present during an examination unless there is some valid reason why he or she should not be allowed to be present.[47] The party objecting to the attorney being present has the burden of proof and must obtain a court order directing that the attorney not be present:

> The discovery rules are designed to be tools for the elicitation of the truth. To require routinely that attorneys be present during adverse medical examinations is to thrust the adversary process itself into the physician's examining room. The most competent and honorable physicians in the community would predictably be the most sensitive to such adversarial intrusions. The more partisan physicians might feel challenged to outwit the attorney. Thus, we fear that petitioner's suggested remedy would only

43. *Id.* at 1011.
44. *Id.* at 1013.
45. *Id.*
46. 297 So. 2d 427, 429 (La. 1973).
47. 353 N.W.2d 195, 197 (Minn. Ct. App. 1984).

> institutionalize the abuse, convert adverse medical examiners into advocates, and shift the forum of controversy from the courtroom to the physician's examination room. We leave the decision to allow an attorney's presence during adverse examination to the sound discretion of the trial court.[48]

New York

In *Reardon v. Port Authority*, the court held that an attorney is permitted to attend both physical and mental examinations as well as tape-record the proceedings.[49]

Oregon

In *Tri-Met Inc. v. Albrecht*, the court found that allowing the claimant's attorney to be present during the employer's medical examination did not constitute obstruction of the medical examination which would require suspension of workers' compensation benefits.[50]

Washington

In *Tietjen v. Department of Labor*, the court held that an attorney is allowed to attend both physical and psychiatric examinations.[51]

Wisconsin

In *Zabkowicz v. West Bend Co.*, the court held that an attorney's presence at the examination is allowed.[52] The court also denied the defendants' motion to prevent the plaintiff from tape-recording the defense's psychiatric examination of the plaintiff, stating:

> The defendants' expert is being engaged to advance the interests of the defendants; clearly, the doctor cannot be considered a neutral in the case. There are numerous advantages, unrelated to the emotional damage issue, which the defendants might unfairly derive from an unsupervised examination. In sum, I do not believe that the role of the defendants' expert in the truth-seeking process is sufficiently impartial to justify the license sought by the defendants. Accordingly, the plaintiffs, at their option, are entitled to have a third party (including counsel) or a recording device at the examination.[53]

---

48. *Id.* at 197-98.

49. 503 N.Y.S.2d 233, 235 (N.Y. Sup. Ct. 1986).

50. 777 P.2d 959, 960-61 (Or. 1989).

51. 534 P.2d 151, 154 (Wash. 1975).

52. 585 F. Supp. 635, 636 (E.D. Wis. 1984); *See also* Whanger v. Am. Family Mut. Ins. Co., 207 N.W.2d 74, 79 (Wis. 1973) (stating that the trial court can exercise its discretion in ordering the presence of counsel at an IME upon such terms as may be just).

53. Zabkowicz, 585 F.Supp. at 636.

It appears from the above cases that most jurisdictions allow some sort of observation or monitoring of the IME. Mississippi courts can expect to address this issue as practitioners seek to have a personal representative, doctor, nurse or counsel attend the examination with the plaintiff. Moreover, our courts will have to address whether the examination can be recorded, and if so, by what means. Will the court allow video only, video and audio, audio only, or stenographer? The issue of recording of the examination will prove crucial to prevent "swearing matches" as to what actually occurred during the IME and so that counsel can adequately prepare for effective and meaningful cross-examination of the examiner. Finally, considering the probable adverse nature of this independent examination, a lawyer will probably have an ethical duty to prepare a client for the examination.

Another issue that will lead to considerable litigation is just how "independent" the examiner really is. For example, the examiner is compensated by the party requesting the examination. Will the source of payment compromise the examiner's judgment? The quick answer is, arguably, yes. If not, why would the defendant need an examination independent of the examination paid for by the plaintiff? Similarly, what if the examiner derives a substantial portion of his or her income from the same referring party? Or, what if the examiner *only* performs examinations for plaintiffs or for defendants? All of these questions will become fodder for cross-examination by trial counsel, and the scope of counsel's permissible inquiry will come before our courts. Again, other states provide guidance on this issue.

What follows is an alphabetical review of other jurisdictions and how they have addressed the scope of counsel's permissible inquiry upon cross-examination of the examiner. Of course, the case law cited in this section is by no means exhaustive. Rather, it is provided to illustrate the approaches taken by other jurisdictions to an issue Mississippi litigators and courts will face.

Alabama

In *Otwell v. Bryant*, the Alabama Supreme Court held that "a sufficient degree of 'connection' [by the witness] with the liability insurance carrier" will allow proof of this relationship as a means of attacking credibility of the witness.[54]

Colorado

In *Bonser v. Shainholtz*, the Colorado Supreme Court held that commonality of insurance was admissible to demonstrate possible bias.[55] In *Bonser*, a dental malpractice case, evidence that the dentist and his expert witness were insured by the same insurance trust was admissible to show the witness's bias.[56]

54. 497 So. 2d 111, 114 (Ala. 1986).
55. 3 P.3d 422, 424 (Colo. 2000).
56. *Id.*

Ohio

Ede v. Atrium was a medical malpractice case in which the defendant and the defendant's expert were both insured by the same malpractice carrier.[57] The Ohio Supreme Court held that evidence of commonality of insurance interests is sufficiently probative of expert bias as to clearly outweigh any potential danger that introduction of evidence of insurance might cause.[58]

Oklahoma

In *Mills v. Grotheer*, the Oklahoma Supreme Court held that cross-examination regarding insurance was improper.[59] In this case there was an insufficient connection between the expert and the insurer to justify admission where the expert was merely a policyholder of the insurer.[60]

South Carolina

In *Yoho v. Thompson*, the South Carolina Supreme Court adopted the "substantial connection analysis" and reversed a trial court that refused to allow cross-examination regarding income derived from insurance companies.[61] The court held that the expert's connection to the defendant's insurer was sufficiently probative to outweigh the prejudice to the defendant resulting from the jury's knowledge that the defendant carries insurance.[62]

Virginia

In *Rohrbaugh v. Lombard*, plaintiff Rohrbaugh was injured in an automobile accident when he was struck from behind by Lombard.[63] At trial, counsel for Rohrbaugh impeached the doctor hired by Lombard's insurance company by questioning the doctor on the amount of income he received from insurance companies.[64] The Virginia Supreme Court held that this cross-examination was proper based on the "substantial connection test."[65] In other words, the doctor's substantial connection between his income and insurance companies outweighed the dangers of mentioning insurance before a jury.

The above cases are but some of the issues facing the Mississippi Bar with respect to Rule 35. In reviewing the use of independent medical examinations in other states, it becomes clear that the IME has fueled both litigation and costs because it is axiomatic that more conflict in litigation equals more costs to the

57. 642 N.E.2d 365, 366 (Ohio 1994).
58. *Id.* at 368.
59. 957 P.2d 540, 542-43 (Okla. 1998).
60. *Id.*
61. 548 S.E.2d 584, 586 (S.C. 2001).
62. *Id.*
63. 551 S.E.2d 349, 350-51 (Va. 2001).
64. *Id.*
65. *Id.* at 355-56.

parties. If an independent medical examination is not truly independent, then the conclusions will fuel additional litigation by bolstering a defendant that does not want to settle (much as a non-independent report may fuel a plaintiff's claim). Finally, at trial, the parties will now introduce more expert testimony–along with more claims of bias–to a jury already numbed by the lack of clarity at trials.

V. CONCLUSION

Mississippi Rule 35 is here and probably here to stay. The Bar could slay a good many trees arguing the wisdom of Rule 35, but this is pointless as the Supreme Court has exercised its inherent authority in passing the rule. Instead, members of the Bar should recognize potential issues arising from Rule 35 and begin crafting solutions. This is obviously a challenge since something as benign as an independent medical examination in the hands of overly zealous counsel could become the next battleground within the bigger war of tort reform. While a bit naïve and certainly optimistic, hopefully the Mississippi Bar and courts will learn from other jurisdictions which have faced the challenges of an IME rule and apply the rule to foster resolution of cases, not increase litigation.