

Additional Medical Examination Legislation and Implementation and Lagniappe Discovery Issues

Louisiana Judicial College
Louisiana Association for Justice

Evidence and Procedure Seminar 2020

Judge Piper D. Griffin
Senator Jay Luneau
Robert E. Kleinpeter

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Burden of Proof

A party seeking the examination bears the burden of proof.

Vaughn v. Commercial Union Ins. Co. of N.Y., 263 So.2d 50, 54 (La. App. 4th Cir.1972) writ den., 266 So.2d 425 (La.1972).

Triggering an Order

The decision to grant or deny a motion for examination requires the trial court to determine whether the party requesting the motion has adequately demonstrated “good cause” and met the showing of a physical or mental condition “in controversy”.

Matherne v. Hannan, 545 So 2d 1094, 1096 (La. Ct. App. 4 Cir. 1989).

Trial Court's Discretion

A trial court has wide discretion to order a medical examination and set its guidelines.

Daigle v. City of Shreveport, App. 2 Cir. 2011, 78 So.3d 753, 46,429, 46,492 (La. App. 2 Cir. 10/5/11); *White v. State Farm Mut. Auto. Ins. Co.*, 680 So.2d 1 (La. Ct. App. 3d Cir. 1996); *Williamson v. Haynes Best Western of Alexandria*, 595 So.2d 1201 (La. Ct. App. 4th Cir. 1992).

Limitation of Trial Court's Discretion

A trial court does not have discretion to issue an order affecting the time that treatment or surgery may be performed.

Viator v. Sonnier, 355 So.2d 1091
(La. App. 3d Cir. 1978).

Denial of Medical Examination

A trial court may properly deny a request for examination if the motion seeking it does not meet the requirements of 1464. The motion should explain who will conduct the exam, which tests need to be performed, and why the exam is necessary.

Alugas v. Halbert, 378 So.2d 192 (La. Ct. App. 4th Cir. 1979);
Williamson v. Haynes Best Western of Alexandria, 595 So.2d 1201 (La. Ct. App. 4th Cir. 1992).

Sanctions

A party may be sanctioned under LSA-CCP art. 1471 only if the court has ordered a party to submit to a 1464 examination and the party fails to comply.

Cheatum v. Morris, 789 So.2d 660 (La. Ct. App. 4th Cir. 2001).

Subsequent Examinations

It is within the trial court's discretion whether to allow a party to have an additional examination.

Granger v. Montgomery Ward & Co., Inc., 408 So.2d 320 (La. Ct. App. 3d Cir. 1981); *Greco v. Paternostro*, 305 So.2d 761 (La. Ct. App. 4th Cir. 1974).

Federal Law is Persuasive Authority

Louisiana courts rely upon prior interpretation by the federal courts of the source federal rules as a persuasive guide to the intended meaning of a similar Louisiana procedural article.

Vaughn v. Commercial Union Ins. Co. of N.Y., 263 So.2d 50, 52 (La. App. 4th Cir. 1972), *writ denied*, 266 So.2d 425 (La. 1972).

Report

If requested, the examined party is entitled to a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses, and conclusions. This requirement applies to examinations made by agreement of the parties.

LSA-CCP art. 1465.

West's Louisiana Statutes Annotated
Louisiana Code of Civil Procedure (Refs & Annos)
Book II. Ordinary Proceedings
Title III. Production of Evidence
Chapter 3. Discovery (Refs & Annos)
Section 2. Depositions: General Dispositions

LSA-C.C.P. Art. 1464

Art. 1464. Order for an additional medical opinion for physical or mental examination of persons

Effective: June 23, 2017

[Currentness](#)

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.

B. Regardless of the number of defendants, a plaintiff shall not be ordered to submit to multiple examinations by multiple physicians within the same field of specialty for the same injury except for good cause shown.

C. A minor subject to examination under the provisions of this Article shall have the right to have a parent, tutor, or legal guardian present during the examination. If such person cannot be present, the court shall order the examination to be videotaped at the expense of the party being examined. The court shall consider the best interests of the minor and may impose conditions upon videotaping, including that it be done in a manner least harmful to the minor and without disclosure to the minor.

Credits

Acts 1976, No. 574, § 1. Amended by [Acts 1991, No. 324, § 1](#); [Acts 1997, No. 1056, § 1](#); [Acts 2017, No. 381, § 1](#), eff. June 23, 2017.

Editors' Notes

COMMENT--1997

The amendment expands the category of examiner to include a licensed clinical psychologist if the other party has given notice of an intent to use such an expert.

[Notes of Decisions \(93\)](#)

LSA-C.C.P. Art. 1464, LA C.C.P. Art. 1464
Current through the 2019 Regular Session.

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Section 2. Depositions: General Dispositions

LSA-C.C.P. Art. 1465

Art. 1465. Report of examining physician

Currentness

A. If requested by the party against whom an order is made under Article 1464 or by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses, and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

B. By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

C. This Article applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This Article does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

Credits

Acts 1976, No. 574, § 1. Amended by [Acts 1993, No. 619, § 1](#).

[Notes of Decisions \(3\)](#)

LSA-C.C.P. Art. 1465, LA C.C.P. Art. 1465

Current through the 2019 Regular Session.

282 So.3d 209 (Mem)
Supreme Court of Louisiana.

Muhammad HAIDER and Blues Taxi Services, LLC

v.

Latisha MORRIS, Rasier, LLC, Progressive
Paloverde Insurance Company, and
James River Insurance Company

No. 2019-CC-01477

|

11/12/2019

Applying For Supervisory Writ, Parish of Orleans Civil,
Civil District Court Number(s) 2017-07413, Court of Appeal,
Fourth Circuit, Number(s) 2019-C-0555.

Opinion****1** Writ denied.

[Crichton, J.](#), would grant and assigns reasons.

[Genevose, J.](#), would grant and assigns reasons.

[CRICHTON, J.](#), would grant and assigns reasons:

I would grant and docket this matter to examine the significant and unresolved legal standard for “good cause” sufficient for a court to order an additional medical examination pursuant to [La. C.C.P. art. 1464\(A\)](#). Although the Court addressed this question in [Williams v. Smith, 576 So. 2d 448 \(La. 1991\)](#), the legislature subsequently amended [La. C.C.P. art. 1464\(A\)](#) to overrule the primary holding in [Williams](#), leaving the precedential value of that decision in doubt. *Cf. Mansion v. Cigna, 572 So. 2d 47 (La. 1991) (Mem)* (“Judgment of the court of appeal is amended to permit defendant to select an orthopedist of its choice other than Dr. James McDaniel.”); [Walls v. Mandeville Mental Health Center, 97-0496 \(La. 4/18/97\), 692 So. 2d 429 \(Mem\)](#) (“The trial judge is ordered to allow defendant's expert neuropsychologist to examine

plaintiff Susanne Walls for the purpose of determining what portion of her child's injuries may be attributed to injury and what portions may be attributed to environmental or genetic factors.”). I believe that if this Court does not provide appropriate guidelines for the legal analysis of “good cause” under [La. C.C.P. art. 1464\(A\)](#), deference to the district court in determinations thereof is unwarranted. Accordingly, I would grant and docket this matter to permit a full review of the issue presented.

[Genevose, J.](#), would grant and assigns the following reasons. In this taxicab/automobile accident case, plaintiff alleges injury to his lumbar and cervical spine. An orthopedist treated his injuries with epidural steroid injections. Defendant filed a motion to compel plaintiff to submit to an independent medical examination (IME) pursuant to [La. Code Civ.P. art. 1464](#) by a neurosurgeon, who likewise treats spinal injuries and administers said [epidural injections](#). Plaintiff opposed the motion and objected to an examination by a neurosurgeon; however, he stated he would be willing to submit to an additional medical examination by an orthopedist. The trial court denied defendant's motion, and, in a split decision, the court of appeal denied defendant's writ with Judge Dysart dissenting. I find Judge Dysart's dissent persuasive. Additionally, I note that neurosurgeons treat spinal injuries at least as frequently as orthopedists, and thus an independent examination by a neurosurgeon is eminently reasonable in this case.

Because defendant has clearly shown good cause pursuant to [La. Code Civ.P. art. 1464](#) for requiring plaintiff to undergo an IME by its designated neurosurgeon, I find the trial court abused its discretion in denying defendant's motion. I would, ***210** therefore, reverse the lower courts and grant defendant's motion to compel plaintiff to undergo an IME by the neurosurgeon.

All Citations

282 So.3d 209 (Mem), 2019-01477 (La. 11/12/19)

JOHN DOE

NUMBER: DIVISION:

VERSUS

100TH JUDICIAL DISTRICT COURT

ACME MUTUAL AUTOMOBILE
INSURANCE COMPANY,
DEFENDANT 1 and ABC INSURANCE
COMPANY

PARISH OF SALEM

STATE OF LOUISIANA

STIPULATED JUDGMENT AND ORDER

This matter comes before the Court pursuant to the agreement of the parties. Appearing herein are:

JOHN DOE, by and through his counsel of record:

Plaintiff Attorney
1111 Easy Street
Baton Rouge, LA 00000

ACME MUTUAL AUTOMOBILE INSURANCE COMPANY by and through
its counsel of record:

Defense Attorney 1
2222 Rainbow Drive
New Orleans, La 11111

ABC INSURANCE COMPANY by and through its counsel of record:

Defense Attorney 2
3333 Sunset Blvd.
Metairie, La 22222

WHEREUPON THE COURT, considering the pleadings, stipulation of the parties and the applicable law, rendered Judgment as follows:

IT IS ORDERED AND NOTICE IS HEREBY GIVEN that **JOHN DOE** shall appear and attend a DEFENSE MEDICAL EXAMINATION at the request of ALL defendants to be held in the Parish of Salem and performed by **DR. AL SMITH**, (“Defense medical examiner”) maintaining an office in the Parish of Salem under the following conditions:

1. GOOD CAUSE - The parties hereto acknowledge that PLAINTIFF’S voluntary presentation to the subject examination does not establish “Good Cause” as considered by La. CCP Art 1464, but rather for the limited purpose of the scheduled examination, the requirement of “Good Cause” is dispensed with;
2. That the defense medical examiner **DR. AL SMITH** is not to limit any verbal responses of Mr. DOE to multiple choices, or yes/no responses;
3. That the total time within which such medical examination shall be performed, starting from the moment Plaintiff arrives at the offices of the medical examiner, shall be a maximum of 70 minutes;
4. That the medical examination be confined to Plaintiff’s Orthopedic status;
5. That no extrinsic diagnostic testing (i.e., x-rays, etc.), other than a PHYSICAL EXAMINATION of the areas of the body complained of by Mr. DOE be performed without prior court approval, and only then upon Defendants’

payment of costs of medical expenses attendant to such testing;

6. Any and all forms to be completed by Mr. DOE prior to his examination will be provided to Plaintiff Attorney at least a week in advance to allow time for Mr. DOE to come to the office to complete the forms;
7. That the defense medical examiner **DR. AL SMITH** is to preserve and produce when he testifies all recordings (written or audio) made during the examination;
8. That the Plaintiff, Mr. DOE, shall be provided within twenty days after the examination with a detailed written report of the examining physician, setting out the findings and conclusions;
9. That the Plaintiff, Mr. DOE shall not to sign any “releases from liability” which **DR. AL SMITH** may purport to require him to sign prior to his medical examination. Not only is this inappropriate under the circumstances, but it is expressly prohibited by Louisiana Civil Code Article 2004 which provides [in pertinent part]:

“Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.”

Such an attempt to have Mr. DOE grant immunity for a potentially future negligent act is against the public policy of this State and he will not sign any such document;

10. Since Mr. DOE claims continuing disability, pain, and discomfort from his injuries and has followed his treating physician’s advice and limited his activities in a “common sense” fashion to avoid those movements which precipitate and/or aggravate his pain, we have advised Mr. DOE to continue to follow his treating physician’s directives and, accordingly, not to participate in any physical “calisthenics” which may cause injury—or re-injury—to the areas of his body which have been affected by the original trauma. These proscribed activities include, but are not limited to, functional capacity evaluations, “callisthenic”-type exercises, etc. Thus, should **DR. AL SMITH** intend to have Mr. DOE perform any such physical activities during the course of the examination, we should be advised in advance as to the nature of the proposed exercises and the reasons therefor, failing which, we will advise our client not to participate in any such physical activities;
11. The physical examination of Mr. DOE is to be limited to just that—his physical examination. As a result, Mr. DOE has been advised not to submit to “deposition-like” questions concerning the cause of the accident, the dynamics of the accident, etc. The pertinent facts surrounding the motor vehicle accident are contained in the original “Petition for Damages” filed herein and, should **DR. AL SMITH** need any such background, we suggest that he be afforded with a copy of that document prior to the examination;
12. Since Mr. DOE objects to being physically examined by a physician who is unknown to him, it will be necessary for **DR. AL SMITH** to agree that he be allowed to be accompanied by another person, a relative, or other persons, other medical personnel, throughout the examination. Our courts have recognized this is “good cause” under such circumstances for this reasonable request. *Robin v. Assoc. Indemnity Co.*, 260 So.2d 118 (La. App. 3 Cir. 1972).
13. The parties reserve any rights to compel or oppose any Motion filed under or secondary to La. CCP Art. 1464; and
14. The physical examination of Mr. DOE performed by DR. AL SMITH be videoed at the expense of plaintiff.

RENDERED, READ AND SIGNED this ____ day of _____, 2020, in the

Courthouse Chambers, Parish of Salem, Louisiana.

**HON. _____, DISTRICT JUDGE,
100TH JUDICIAL DISTRICT COURT**

Respectfully Submitted,

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